AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 yearly review of modern awards

REPLY SUBMISSIONS:
ANNUALISED ARRANGEMENTS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

13 APRIL 2018

1. BACKGROUND

1.1 These reply submissions relate to the Annualised Arrangements common issue proceeding before a Full Bench of the Fair Work Commission (**Commission**) as part of the 4 yearly review of modern awards (AM2016/13) (**Proceeding**).

1.2 These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act* 2009.

2. REPLY TO SUBMISSIONS OF UNITED VOICE

Paragraph reference in UV Submissions[1]	**Subject matter**	**Extract/summary**	**ABI/NSWBC reply**
[7]-[16]	Minimum increment above the award classification rate	*"Nothing less than 25% should be the threshold and there is some merit in setting the threshold higher..".* *"We note that model clauses 1 and 3 do not envisage a percentage above base rates to be paid...We query whether there is any utility in such clauses which do not clearly state that the arrangement must be in excess of otherwise applicable minimum wages by a particular amount."*	As noted in paragraph 2.43 of our clients' further submissions dated 26 March 2018 (**ABI Submissions**), in circumstances where a reconciliation and repayment process already forms part of an Annualised Arrangement, the rationale behind payment of a minimum increment above the base rate of pay is rendered redundant. Apart from leading to the imposition of unnecessary multiple and overlapping administrative safeguards, this approach would provide employees with an effective windfall, which would be inappropriate having regard to the need to maintain a fair and relevant minimum safety net for both employees and employers. It is on this basis that our clients are firmly opposed to UV's submissions on this issue.

[1] 23 March 2018; corrigendum filed 3 April 2018

			While, as noted above, we consider any kind of minimum increment arrangement to be redundant (in circumstances where reconciliation /repayment mechanisms are in play in an Annualised Arrangement), setting the threshold for same at 25% or higher would be particularly problematic and would serve to severely undermine the utility and purpose of Annualised Arrangements for employers and employees.
[17]-[21]	Indexation	*"The link between award terms and conditions should be maintained by the indexation of the gross amount paid under an annualised wage arrangement with the annual minimum wage process."*	This proposal is unnecessary in circumstances where all of the Commission's proposed model clauses already contain a reconciliation/repayment mechanism. In circumstances where relevant award rates have increased as part of the annual minimum wage process, these would (if not taken into account at an earlier date) ultimately be picked up by way of an Annualised Arrangement reconciliation process. This is therefore sufficient to satisfy the requirement in s 139(1)(f)(iii).

[31]-[32]	Inspection	*"The model clauses should contain a provision stating that the employee has the right to inspect and copy such records in X2(c). This would be aligning salary arrangements with standard industrial practice."*	The *Fair Work Act 2009* (Cth) (**FW Act**) and associated regulations already provide an appropriate mechanism by which employees can access relevant employee records. Subject to our comments at paragraph 2.35 of the ABI Submissions, employers utilising Annualised Arrangements are also subject to particular record-keeping obligations associated with the use of these instruments. In these circumstances, it is unnecessary for Annualised Arrangements to impose any additional requirement, and the inclusion of such a provision would not satisfy the extremely narrow jurisdictional 'window' provided by s 142, in being "essential" for the purpose of making Annualised Arrangements operate in a practical way.
[35]	Part-time employment	*"In relation to the Hospitality Award and the Restaurant Award their part time employment provisions have recently been varied and made more flexible, salary arrangements for this category of employee should be avoided."*	With respect, this submission in no way engages with the question as to whether Annualised Arrangements are suitable for use in relation to part-time employment;[2] it is simply an assertion of the union's preference. The mere fact (or indeed, assertion) that particular award provisions have been made more flexible in a particular industry does not in any manner militate against the suitability of particular payment structures for part-time employees, in this case Annualised Arrangements.

[2] A matter that has been addressed by our clients in section 5 of the ABI Submissions

3. REPLY TO SUBMISSIONS OF THE HSU

Paragraph reference in HSU Submissions[3]	Subject matter	Extract/summary	ABI/NSWBC reply
[21]	Protections against coercion or duress	*"...the current provisions in clause X.1(a) in* [Model Clauses 3 and 4] *do not adequately ensure that employee agreement be obtained without coercion or duress..."*	Part 3-1 of the FW Act expressly prohibits (and imposes civil remedies in relation to) conduct that includes coercion (s 343) and undue influence or pressure (s 344). The HSU's submissions have not provided any cogent reason why Annualised Arrangements should duplicate these provisions, bearing in mind very narrow test imposed by s 142 and the requirements of s 139(1)(f).
[22]	Reconciliation	*"...it is exceedingly unfair for employees that an employer is only required to pay the shortfall for an underpayment – where an annualised wage arrangement works out to be less than what the employee would have otherwise received under the award – after 12 months... We submit that it would be more appropriate for an employer to have to make up the shortfall quarterly."*	As noted at paragraph 2.34 of the ABI Submissions, our clients consider that annual reconciliations satisfy the minimum requirements of s 139(1)(f)(iii), and strike a fair balance in this regard. A more frequent reconciliation than annually, and certainly one that occurs on a quarterly basis, would be not only unnecessary for the purposes of s 139(1)(f)(iii) (and inconsistent with the s 142 test), but in terms of the administrative difficulty imposed on employers and employees, would also serve to significantly (and potentially, fatally) undermine the potential benefits and purpose of Annualised Arrangements.

[3] 19 March 2018

			Furthermore it would not take into account seasonal fluctuations in work, which may average out only over a period of 12 months.
[23]	Notice of termination of an Annualised Arrangement	"[In Model Clauses 3 and 4] *12 months notice is required for an employee to terminate an annualised wage arrangement...it is fairer to the employee that they be required to provide only 3 months notice to terminate an annualised salary arrangement."*	As noted at paragraphs 2.11 to 2.26, our clients submit that termination and amendment of an Annualised Arrangement should remain a matter of contract (or mutual agreement) between the parties, and not be able to be unilaterally terminated by either party. The HSU's proposal that employees only be held to a 3 month termination provision would mean that the efficiencies and benefits derived from Annualised Arrangements would be substantially undercut, particularly as the use of such instruments would not guarantee wage stability and would create considerable administrative and logistical interruption. In addition, such arrangements would create very real problems in relation to the interaction between modern awards and common-law contracts, as articulated at paragraph 2.20 of the ABI Submissions.

4. REPLY TO SUBMISSIONS OF THE AMWU

Paragraph reference in AMWU Submissions[4]	**Subject matter**	**Extract/summary**	**ABI/NSWBC reply**
[29]; [32]-[33]	How Annualised Arrangements should be agreed	"*Annualised wage arrangements should always be by agreement*"	The AMWU's submissions are at odds with the Commission's conclusions at paragraph 129 of its decision dated 20 February 2018 with respect to employee agreement, in relation to which (and as noted in paragraph 2.8 of the ABI Submissions), our clients do not express any opposition. Our clients therefore oppose this submission, on the basis that it fails to satisfy the requirement in s 139(1)(f)(i) to have regard to patterns of work in occupation, industry or enterprise, most obviously in relation to whether employees work a reasonably stable pattern of hours. It is unclear why in these circumstances, and bearing in mind the safeguards that are required by s 139(1)(f)(iii), employers ought not be able to implement Annualised Arrangements without the additional hurdle of obtaining mutual agreement.

[4] 20 March 2018

[29];[34]-[48]	How Annualised Arrangements should be agreed	*"...where* [Annualised Arrangements] *are going to be introduced to more than 50% of the workforce they should require majority agreement."*	Our client strongly oppose this submission. Annualised Arrangements are intended to provide benefits to employers and *individual* employees. They are not to be conflated with industrial mechanisms such as enterprise agreements which (by design) affect and therefore require a majority consensus of the broader workforce. While some award provisions require majority employee consent, it is unclear why such a requirement would be relevant in these circumstances, particularly as the Annualised Arrangements only affect each employee individually. The AMWU's submissions have failed to identify why such a requirement would be necessary.
[29]; [49]-[50]	Protections against coercion or duress	*"Any model clause should also specify that the parties must have 'genuinely agreed' without coercion or duress."*	This is opposed on the same grounds as set out above in relation to paragraph 21 of the HSU's submissions.

5. REPLY TO SUBMISSIONS ON HYPOTHETICAL EMPLOYER NON-COMPLIANCE

5.1 A number of union parties, but most prominently the ACTU[5] and the AMWU,[6] have made submissions to these proceedings to the effect that historical employer non-compliance (alleged or otherwise) militates against the appropriateness of Annualised Arrangements in a general sense, on the basis of hypothetical future employer non-compliance with these provisions.

[5] Submissions dated 20 March 2018
[6] As per 4 above

5.2 While a number of union parties have made submissions to this effect, no evidence (probative or otherwise) is before the Commission:

(a) establishing a pattern of employer non-compliance with award obligations in relation to Annualised Arrangements specifically;

(b) that explains that, even if there was a degree of employer non-compliance with some award provisions, why that would lead to non-compliance with Annualised Arrangements. Indeed, the notion that Annualised Arrangements are intended to make award provisions administratively simpler to comply with should lead to higher levels of compliance; and

(c) as to why existing protections and enforcement mechanisms of the FW Act, coupled with the substantial additional powers now available to the Fair Work Ombudsman and significantly increased penalties under the FW Act, are not sufficient with regard to award compliance.

5.3 In addition, while the Commission is required to ensure that modern awards are, amongst other things, "*simple, easy to understand, stable and sustainable*", issues of compliance and enforcement ought not be conflated with the substantive requirements of the FW Act (including sections 138, 139 and 142).

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

13 April 2018