IN THE FAIR WORK COMMISSION

AM2016/13

4 yearly review of modern awards
Annualised Salaries

SUBMISSIONS OF THE ACTU IN REPLY

1. Our initial submissions in response to the decision of the Full Bench on 20 February 2018[1] ("the Decision") dealt only with issue 1 identified at paragraph [134] of the Decision, namely whether the terms of the provisions set out at paragraphs [130] – [133] of the Decision "are appropriate to be adopted as model annualised wage arrangement provisions". Consistent with that approach, our reply submission deals only with the submissions of other parties insofar as they touch on that issue, in particular the submissions of the Ai Group and Australian Business Industrial ('ABI').

2. As a preliminary and general observation, we note that there does not appear to be any desire among interested parties for a general proliferation of annualised salary provisions in modern awards. Whilst the reasons for this may differ among the parties, it is a view we share and one we consider is relevant to the Commission's consideration of a fair and *relevant* safety net.

3. Paragraphs [8] – [24] of the submissions of the Ai Group recount the evidently successful efforts of employer interests to lobby for changes to regulations under a previous Government, more than a decade ago. The detail of how such regulatory change came to pass is entirely irrelevant to the present proceedings. Further, the logic that underscores the inference that Ai Group seeks be drawn from that history - that it would be "unworkable" to record the starting and finishing times of workers who might be subject to annualised salary terms presently under consideration - is flawed. Plainly, the categories of workers who might be invited (or required) to enter into a annualised salary pursuant to an award clause - those

1 [2018] FWCFB 154

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with entitlements to additional payments based on the times at which they work - are the same workers for whom the existing requirement to record such information is mandatory under regulation 3.34. No reason is provided as to why a duplicate of the extant requirement to keep such records for a particular type of worker would become unworkable merely because they had agreed to or been imposed with an annualised salary. The Ai Group's reference to the circumstances of managerial and professional workers, who might "think" or check their e-mail when they are outside of the office is a distraction from the majority of the workforce whom are within the contemplation of the present proceedings.

4. Whatever the reasons for the current level of non-compliance with record keeping requirements (referred to in our earlier submission) may be, the compliance burden under the proposed model terms for regarding time records doesn't rise above the existing legislative determination of what an appropriate protective requirement is. Ai Group's protestations are best seen as consistent with the view expressed in our initial submission, whilst safeguards like those relating to the keeping of such records are necessary, the practical real world risk of non-compliance renders the pursuit of permissible annualised salary terms in more awards a pointless exercise.

5. At paragraphs [28]-[38], the Ai Group argue for a "broader" approach to the construction of the expression "appropriate safeguards to ensure that individual employees are not disadvantaged", as it appears in section 139(1)(f)(iii). We reject their construction. It is clear that the assessment required under section 139 is one of characterisation, rather than merit. The Commission needs to satisfy itself that a proposed annualised salary arrangement under consideration can be characterised in the way section 139(1)(f) requires, before it can then go on to apply the modern awards objective. Section 139(1)(f) in effect provides that "terms about" .. "annualised wage arrangements" "may" be included in awards, provided those terms meet certain requirements. Those requirements, read together, make plain that a key condition is that such terms ensure that individual employees are not disadvantaged. The "appropriate safeguards" referred to are the *mechanisms* by which this is to be ensured. The fact that the term itself must include such safeguards disposes of the argument advanced at paragraphs [56]-[60] of the Ai Group's submissions.

6. The "broader" conception of "disadvantage" contended for by the Ai Group at paragraphs [39] to [49] of their submissions pays no regard to the distinct contextual features of the provision, or more plainly the specific reference point against which disadvantage is to be assessed. The reference point is clearly "separate payment of wages and other monetary entitlements" that the annualised wage is "an alternative to". Any disadvantage relative to that standard renders the term unable to be included in an award. Ai Group's further contentions at paragraphs [50]-[55] concerning the attractiveness of a "review" rather than a "reconciliation" need to be interpreted in light of that restriction.

7. The more contestable element of section 139(1)(f), not referred to by Ai Group, is the notion that terms that are about annualised wage "arrangements" include terms that require employees to unwillingly submit to annualised wages. Dictionary definitions provide scant support for the notion that such requirements are properly described as "arrangements":

> "**arrange** *v.* **1.** put into a certain order, adjust, place attractively. **2** form plans, settle the details of; prepare; *arrange to be there, arrange a meeting*. **3** adapt (a musical composition) for voices or instruments other than for those which it was written. **arrangement** *n.,* **arranger** *n.*"[2]
>
> "**arrange** *v.t.,* -**ranged, -ranging. 1.** to place in proper, desired, or convenient order; adjust properly. **2.** to come to an agreement or understanding regarding. **3.** to prepare or plan. **-arrangement**, *n*"[3]

8. Certainly, other uses of the word "arrangement" in the *Fair Work Act* contemplate the concurrence of more than one party, rather than the unilateral imposition of conditions:

   (a) Individual flexibility arrangements at s. 144-145 and s. 203-204;
   (b) Accommodation arrangements in s. 521A
   (c) Transport arrangements in s. 521B
   (d) Flexible work arrangements in s. 65
   (e) Averaging arrangements under s.64

9. The Ai Group refers, at paragraphs [79]-[80] of their submissions, to the possibility that employers might be attracted to annualised salary provisions in Awards following the finalisation of the *Payment of Wages Common Issue*. Whilst we concur with the assessment at that level, we do not accept that it follows that a proliferation of annualised salary terms will be *necessary* if those proceedings impose tighter regulation on pay periods, accrual and time for payment.

2 Oxford Australian, 2nd Edition, OUP 1994
3 Macquarie, New Budget Edition, Macquarie Libriary 1997.

10. We reject the assertion at paragraph [85] of the Ai Group's submission and paragraph [2.41] of ABI's submission that multiple safeguards are inappropriate. The safeguards exist to meet a standard of ensuring an employee is not disadvantaged. The record keeping and re-conciliation requirements are necessary to meet that standard, as is the requirement for a record that sets out how the annualised salary has been devised to meet that no-disadvantage standard. It is untenable to suggest that the benefits to the employer of retaining and providing documentation detailing exactly how the annualised salary works are outweighed by the administrative work involved in doing so. Further, it is wrong in law to suggest (as ABI does at paragraph [2.35] of their submissions) that record keeping requirements need to pass through the test established in s. 142 of the Act, given that record keeping is itself forms part of a safeguard to meet the mandatory requirements of s. 139(1)(f)(iii). Safeguards are essential to the terms permissible under section 139(1)(f), not incidental to them.

11. Furthermore, in response to paragraphs [97]-[104] of the Ai Groups submission, it is entirely appropriate in our view to ensure that, if an annualised salary arrangement or employment terminates inside of a 12 month period, a reconciliation process follow. It is impossible to ensure that an employee has not been disadvantaged over an annual period that has become hypothetical owing to the termination of the arrangement or the employment. Any term must do what is required to be done to ensure there is no disadvantage.

12. ABI, at paragraphs [2.11]–[2.26] of their submissions resist the notion that annualised wage arrangements be terminable. Whist it is no doubt correct to observe that the termination of an annualised salary arrangement may occasion an inconvenience to an employer, this does not answer the requirement that employee not be disadvantaged. Leaving aside the prospect of termination of employment, the only other option an employee has is to wait 12 months for a reconciliation to occur in order to rectify their disadvantage. It cannot seriously be said that an annualised salary arrangement that had proven to disadvantage an employee over 12 months would be continued beyond that point. Nor can it be said to be fair that an arrangement that by design or implementation was clearly disadvantaging an

employee should be required to remain on foot for 12 months before the disadvantage is rectified – this in itself an impermissible disadvantage (and one evidently not anticipated by paragraph [2.40] of ABI's submission).

13. ABI's further assertion that "contractual and award based annualised arrangements are ordinarily entered into"[4] is nothing more than that. Even if it be accepted, it does not follow that insurmountable difficulties will arise in transitioning to new award requirements: contracts can be varied, and well drafted ones contain severability clauses to deal with issues that might otherwise fall to to be determined under principles of frustration or illegality.

14. In response to paragraphs [105] to [110] of the Ai Group's submission, we merely point out that the factual matrix that presents in any enforcement proceeding are beyond the control of the Commission. Whether or not documents exchanged at the point of engagement evince compliance with an annualised salary term in an award or a contractual set off mechanism (or neither) is a matter to be resolved in each instance. There is no warrant for the Commission taking any steps to regularise or endorse set off practices (whether effective or not) through the terms of awards. For our part, we would merely note that there is legal distinction between the setting off of a debt, and the incurring of that debt. In some circumstances, a finding that an "all in rate" is paid in satisfaction of all award entitlements may have more bearing on the orders made in proceedings for contraventions of award terms and regulation based record keeping requirements than it does on a finding of whether or not a contravention occurred.

15. Further to ABI's discussion of a potential employee "windfall" at paragraphs [2.43]-[2.47] of their submission, it is to be borne in mind that what the Commission is trying to ensure – and is required to ensure - is the avoidance of any disadvantage, rather than the avoidance of any advantage. That the Commission has conceived the "outer limits" restrictions based on pay period and roster cycles is entirely reasonable given that it is required to formulate terms that "have regard to the patterns of work in an occupation, industry or enterprise". It is not objectionable that employee be regarded as being disadvantaged by an annualised salary when they are disadvantaged in a given pay cycle or roster in a manner that it is significantly

4 At paragraph [2.20]

inconsistent with the assumptions upon which the annualised salary was designed. In any event, ABI's concerns in this regard ought to be assuaged by the Commission's explanation that the outer limit "..is not intended to reflect the average number of overtime and penalty rate hours upon which the annualised wage is calculated but rather a higher number of such hours representing the maximum that an employee can reasonable be asked to work in a given pay period without being entitled to an amount in excess of the annualised wage".[5]

ACTU

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5 Decision at [129](6)