IN THE FAIR WORK COMMISSION

Matter No.: AM2016/13 Annualised wage arrangements
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following further Submissions to the Fair Work Commission in response to the Submissions of the AiGroup 27 March 2018[1] and the ABI & BCNSW 26 March 2018.[2]

2. In particular, this submission addresses the following issues from the ABI & BCNSW Submission:

    a. The interaction with common law contracts that provide for annualised arrangements; and

    b. The need for safeguards beyond an annual reconciliation.

3. The following issues from the AiGroup submission are also addressed:

    a. The history of record-keeping requirements does not support removing the requirements to keep relevant start and finishing time records;

    b. Keeping records of starting and finishing times is necessary;

    c. Appropriate safeguards must ensure that employees are not disadvantaged;

    d. Annual reconciliation is necessary safeguard;

    e. Historical lengthy negotiations have less weight in the current environment; and

    f. "Annualised wage arrangement" should be the nomenclature used.

4. The AMWU continues to rely upon its 20 March 2018 submission,[3] which addresses other matters addressed in the AiGroup and ABI & BCNSW Submissions.

5. In relation to the evidence before the Commission about various arrangements, the AMWU notes that it has not engaged in the processes prior to the decision of the Commission 20 February 2018[4] because the indications from the Commission were that the process undertaken in this matter AM2016/13 Annualised wage arrangements would not necessarily lead to a standardised clause.[5] The 20 February 2018[6] decision did not give directions about further material or evidence.

6. If there is to be implementation of these model clauses into Awards which were not the subject of the hearing, the AMWU respectfully submits that they should be

[1] AiGroup Submission 27 March 2018
[2] ABI & BCNSW Submission 26 March 2018
[3] AMWU Submission 20 March 2018
[4] Annualised wage arrangements – 4 yearly review of modern awards [2018] FWCFB 154
[5] AMWU correspondence with the Commission 21 November 2016
[6] Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154 at paragraph [134] and [148]

dealt with on an award by award basis, with an opportunity provided to parties to present evidence about any assumed or accepted facts taken into account by the Commission about those Awards' industries or occupations.

Interaction with common law contracts that provide for annualised arrangements

7. ABI & BCNSW's submission raises some concerns about the interaction between Award Annualised wage arrangements and common law contractual annualised arrangements.[7] The issue is raised in the context of methods of terminating the annualised arrangement.

8. The AMWU submits that there should be no ambiguity about the interaction between the Award and common law contracts. The Award is a statutory minimum safety net instrument that must be complied with by parties entering into employment contracts. If there is any inconsistency between the contract of employment and the Award terms, where the contract terms are inferior to the Award, then the Award terms must prevail. Specifically, in relation to any contractual arrangement which purports to consolidate terms of the award into a singular rate, if there exists an annualised wage arrangement in the Award, then the contract term should be required to comply with the protections provided by the Award term.

9. If the contract of employment can provide for annualised arrangements that are not required to comply with the Award annualised wage arrangement terms, this would undermine the protections provided by those Award terms.

10. The ABI & BCNSW submission raises the prospect of an employee terminating an arrangement and reverting to an Award rate of pay from "above award" rates. This is not a realistic proposition. No employee is going to seek a pay cut. However, if the so called "above-award" rates, are actually an attempt to consolidate rates that work out to be less than what an employee would have received under the Award, an employee should be entitled to revert back to the Award rates.

11. If there are to be annualised arrangements, in order to protect the fair and relevant safety net of terms and conditions provided for by Awards, they should be made under a clear award term that provide safeguards to ensure that wages are paid on time as per the minimum requirements of the Award. As the Commission correctly pointed out, while it may be possible to "buy out" award entitlements under arrangements, the principles for which were stated in *Poletti v Ecob*,[8] these loose arrangements are more likely to result in non-compliance with requirements to pay entitlements within a specified time period.[9]

12. Without the safeguards proposed by the Commission, there may not be any formal mechanisms that would alert the employer if the amounts proposed in the contractual annualised arrangement, (to "buy out" certain entitlements), fell short,

[7] ABI & BCNSW Submission 26 March 2018 at paragraphs 2.22 – 2.26
[8] *Poletti v Ecob* (1989) 31 IR 321
[9] Annualised wage arrangements – 4 yearly review of modern awards [2018] FWCFB 154

resulting in potential breach of requirements to pay entitlements within a time frame.

The need for safeguards beyond an annual reconciliation

13. ABI & BCNSW "*do not specifically oppose annual (but do oppose more frequent) 'reconciliations' in relation to Annualised Arrangements in order to satisfy the minimum requirements of s.139(1)(f)(iii)*."[10]

14. However, ABI & BCNSW go on to say that the annual reconciliation renders further safeguards redundant. The submissions of ABI & BCNSW go specifically towards opposing the outer limit hour safeguard. The AMWU opposes these particular submissions of the ABI & BCNSW about additional safeguards beyond the annual reconciliation.

15. Further safeguards are important, in order to:

    a. remove the scope for underpayments; and

    b. avoid payments which do not satisfy the requirements to pay within a specific time period; and

    c. remove the ability for employer to use Award-reliant employees overtime wages as interest free loans.

16. The Commission acknowledged in the *Annual Wage Review Decision* 2016-2017 that some Award-reliant workers, working full time, will be living in poverty.[11] This is an important fact, which should be taken into account in this process.

17. The outer limit hour safeguards are important in limiting the scope for significant underpayments because the hours are beyond what was envisaged by the annualised arrangement. If these underpayments were left to the annual reconciliation, there would be a high probability that the employer would be non-compliant with requirements to pay for the performance of work within the necessary time frames.[12]

18. It is important to recognise that a system that allows underpayments, which are only uncovered through an annual reconciliation, will result in a system that in effect provides an employer with an interest free loan from an Award-reliant employee's overtime penalties. Employers can at worst knowingly underestimate the value of overtime to be included in an annualised arrangement, knowing that they can simply and legally address the underpayment at the annual reconciliation.

19. The Commission has also made an observation in its decision that the reconciliation "*creates the possibility of having to make good a potentially large monetary shortfall at the end of the year which would not be quantifiable until the*

[10] ABI & BCNSW Submission 26 March 2018 at paragraph 2.34
[11] Annual Wage Review Decision Statement 2016-2017 [2017] FWCFB 3501 at paragraph [11]
[12] s.323 of the Fair Work Act 2009 requires payment for the performance of work at least monthly. Award terms may also require more frequent payment of wages.

annual reconciliation exercise was carried out, and thus not be able to be budgeted for."[13] We understand this observation to mean the Commission is aware that the possible amounts of Award entitlements being underpaid to workers under an annualised wage arrangement have the potential to be so significant so as to cause cash flow distress to businesses.

20. If the amounts would cause such distress to businesses, the impact on Award-reliant workers would be much more significant. The negative impacts upon both employer and employee provides strong support for the necessary protections beyond the reconciliation and to support the effectiveness of the reconciliation. Measures such as the upfront disclosure of the assumptions about penalty and overtime that would otherwise be payable and the limitation on the number of overtime or penalty attracting hours are strongly supported by this observation. These measures should prevent employers from at best naively miscalculating annualised wage arrangements which result in large amounts of money being paid at the reconciliation or at worst intentionally using workers as an interest free loan facility.

The history of record-keeping requirements does not support removing the requirements to keep relevant start and finishing time records

21. The AMWU does not agree with the AiGroup position about record keeping for Modern Award annualised wage arrangements. Where a Modern Award annualised wage arrangement is in place, there should be an appropriate record of the hours worked, including the start and finish times.

22. In order for an employee to be able to prove that they are worse off under an annualised wage arrangement, or for an employer to prove that an employee isn't worse off, there would need to be an appropriate record kept. As discussed in the AMWU's earlier submission 20 March 2018, there is a very high incidence of wage theft and non-compliance across Australian workplaces,[14] which warrants appropriate safeguards, such as proper record keeping.

23. The AiGroup has canvassed history of the recording keeping requirements under the *Fair Work Regulations* 2009 and the *Workplace Relations Regulations* 2006.[15] They indicate that some changes were made because of the difficulty in complying for managers and professionals and because of an ambiguity about the whether hours were required to be worked by the employer.

24. This history which has been canvassed by the AiGroup, does not present an argument that Award reliant workers who are asked to work hours under an annualised wage arrangement, should not have those hours recorded by the employer.

25. All the history demonstrates is that employers were successful in lobbying the Government of the day, the Executive arm of Government to change the regulation

[13] Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154 at paragraph [119]
[14] AMWU Submission 20 March 2018 at paragraphs 9 - 21
[15] AiGroup Submission 27 March 2018 at paragrahs 8 to 20

to their benefit and because of reasons they gave without question, which the Executive can do without reference to the Parliament. Of course, there was no risk of the Regulation being disallowed by any house of the Parliament, because in 2006 the Coalition Government controlled both houses of Parliament.

26. The current regulations indicate that there should be a record kept of the number of overtime hours worked by the employee during each day[16] and set out the details of any loadings or penalties.[17] It is not apparent from the terms of the current regulations that s.139(1)(f) mechanism of providing an "alternative to the separate payment of wages and other monetary entitlements" would mean that those entitlements are extinguished in favour of an annualised wage arrangement. It is open for parties to assume that the Award entitlements remain but are paid in a consolidated form. The various options for interpretation which have at various times been adopted by this Commission and by parties on both sides, lend support to the proposition that it is not self-evident that the current regulations were intended to not apply in annualised wage arrangements.

27. In any event, there is nothing that prevents the Commission from determining that particular records should be kept by the employer in order to support a particular safety net Annualised wage arrangement that provides appropriate safeguards to work practically. The AMWU supports the Commission's observations about its powers to include such a provision under s.142 of the *Fair Work Act* 2009.[18]

28. It is also important to note that under a contractual annualised arrangement which "bought out" award entitlements, an employer would need to produce their own records to defend claims of underpayments, where an employee has kept their own time sheets. It is in the interest of an employer in mitigating the risk of litigation resulting in substantial payouts to keep their own time sheets.

Keeping records of starting and finishing times is necessary

29. Keeping records of starting and finishing times is not unworkable. The AiGroup claim that professionals, managers and other employees who work outside of the office or who may generate ideas outside of an office are unable to record their start and finishing times.

30. This argument is not supported by the fact that where an employer charges clients for time their workers worked on a project, they will have no problems recording the start and finishing times of workers on the project. In relation to health services, such as self-care support in particular, which are provided on-location, many programs are now funded on the basis of hours of support provided. The NDIS for example is funded on the basis of hours of support provided for some services with price guides released by the Government.[19]

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[16] Regulation 3.34 *Fair Work Regulations* 2009
[17] Regulation 3.33 *Fair Work Regulations* 2009
[18] Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154 at paragraph [129] sub-paragraph (7)
[19] NDIS Price Guide (accessed 12 April 2018) at page 31

31. The AiGroup say that workers performing work on smart phones and checking emails out of the office, means it is more difficult to record start and finishing times. Their argument is not supported by the reality that the existence of smart phones makes it easier to record starting and finishing times. Many "apps" have been developed which specifically assist in logging a range of activities from driving to walking. However, proprietary apps are not necessary for employees to create a "record" which could be an email of when they start and finish work. In short, smart phones make it increasingly easy to record start and finishing times, which may even include GPS data information.

32. Lastly, in any event, the use of Managers as an example, is not relevant to the Awards where the AMWU has an interest. Where employees are incorporating overtime penalties into an annualised wage arrangement, this means there was a requirement to record start and finishing times for the overtime prior to the annualised wage arrangement. Therefore, it is not unworkable to continue that requirement during the annualised wage arrangement to ensure the worker is not disadvantaged.

33. It is important to note that the employer still retains the benefit of a steady and predictable wage and cash flow in relation to the employee's wages. They also retain the benefit of avoiding the weekly calculation of overtime, and the subsequent manual changes to pay that this requires. Outsourcing an annual reconciliation (such as to their accountant) is also a much more efficient and likely possibility than a weekly calculation, particularly for small businesses.

34. The keeping of these records is necessary in order for the Commission to be satisfied that the term it develops satisfies s.139(1)(f)(iii), which requires "ensuring" "employees are not disadvantaged."

Appropriate safeguards must ensure that employees are not disadvantaged

35. The AiGroup claim that onerous safeguards will result in employers refusing to offer annualised wage arrangements.[20] They also make a range of assertions and claims about the impacts on business and employment levels. The claims echo past claims by AiGroup and other employer peak bodies about any regulation of business activities. There is no evidence provided by the AiGroup to support their claims about the impacts upon business.

36. Given the fact that some Award-reliant workers are living in poverty,[21] any annualised wage arrangement should not allow for any monetary reduction in what the workers would otherwise have been paid under the Award.

37. Government and the Commission and its predecessors have regulated business activity as they relate to workers and put in place requirements to ensure that businesses do not exploit workers.

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[20]

[21] Annual Wage Review Decision Statement 2016-2017 [2017] FWCFB 3501 at paragraph [11]

38. The legislative requirement is a strict requirement of including "appropriate safeguards to ensure that individual employees are not disadvantaged"[22] for annualised wage arrangements.

39. Creating proper records of starting and finishing times, so that the financial impact of an annualised wage arrangement can be determined is an appropriate safeguard, necessary to ensure an individual employee is not disadvantaged.

40. The AiGroup's arguments about so-called non-monetary advantages that might be gained by an employee gives an indication that their members do want to benefit financially by forcing Award reliant workers onto annualised wage arrangements.

41. The AiGroup's submissions at paragraph 36 and 37 appear to outline an intention by the AiGroup's members to enter into annualised wage arrangements which may result in disadvantage to employees, based on a purely mathematical calculation.

42. The AiGroup's position provides strong evidence that the Commission should provide very strong safeguards to protect against Award reliant workers having their entitlements taken away from them in return for non-monetary benefits.

43. Modern Awards should provide a minimum safety net floor, which should not be undermined by any individual arrangements.

Annual Reconciliation is a necessary safeguard

44. The AMWU supports an annual reconciliation being included as the appropriate safeguard to ensure that an employee is not disadvantaged. The AMWU opposes the AiGroup's submissions urging the Commission to prefer their "annual review" clause.

45. Firstly, it is interesting to note that in support of their clause being inserted into the *Health Professionals and Supported Services Award* 2010 the AiGroup submission 10 October 2016 said the following about the "annual review:"

> "The proposed clause also satisfies s.139(1)(iii). We have earlier explained the operation of clause 16.2, which is self-evidently designed to ensure that an individual employee in receipt of a salary pursuant to clause 16 is not disadvantaged." (emphasis added)

46. Now, the AiGroup submission 23 March 2018 argues that an annual review is different to an annual reconciliation and that the model term does not need to be an annual reconciliation. The AiGroup provides an example of a clause which they say does not require an annual reconciliation and instead only requires an annual review, which the AiGroup say is less onerous.[23]

47. The AiGroup's interpretation of the clause leaves little room for any meaningful employee entitlement to protection and appears to amount to nothing more than a

[22] s.139(f)(iii) *Fair Work Act* 2009
[23] AiGroup Submission 27 March 2018 at paragraphs 50 to 55

paper shuffling exercise. The clause would appear to have little work to do, under the AiGroup's interpretation. Yet, two year's earlier, in their submissions, they asserted the clause was "self-evidently designed to ensure that an individual employee in receipt of a salary pursuant to (the clause) is not disadvantaged." It's useful to note that the term chosen by the AiGroup as an example, the Contract Call Centres Award 2010 clause 8, was a result of consent positions, rather than by arbitration of the Commission.

48. The AMWU disputes that the AiGroup's interpretation of the obligations arising from the word "appropriate" in their example clause is correct. It would have been intended that the clause had work to do. In another example, the reference to the annual review ensuring compensation is "appropriate" in the context of the *Water Industry Award* 2010 annualised salaries arrangements (which was the result of arbitration), is intended to mean "not to disadvantage the employee." The full clause from the *Water Industry Award* 2010 is as follows:

> "**14.2.2 Annual salary not to disadvantage employees**
>
> (a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).
>
> (b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary."

49. The fact that the annual review is contained within the "not to disadvantage employees" clause, makes it very clear what the annual review is intended to be looking at. The annual review must ensure that there was no disadvantage. The only way that can occur is if there are clear records to accurately calculate the two situations to be compared (i.e. firstly, under the annualised arrangement and secondly, under the terms of the award). Its clear that the Commission in arbitrating this clause intended that "appropriate" means, "not to disadvantage the employee." The AiGroup appeared to want to leave the Commission with this impression in relation to their preferred clause when they made the submission that the annual review would "self-evidently" ensure "no disadvantage."

50. In any event, the Commission constituted as a Full Bench in the present matter acknowledged in the 20 February 2018 decision[24] that some "annual reviews" were "imprecise" in their requirements and therefore cannot satisfy s.139(1)(f)(iii).[25] The AMWU agrees with the Commission's observation that without clear steps and requirements an employer without industrial experience may not be able to achieve the objective of the review and may consider the review to be a paper shuffling exercise – as evidenced by the AiGroup's

[24] Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154
[25] Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154 at paragraph [121]

interpretation, (which one can assume is the advice the AiGroup provides to its members).

51. In order for the Commission to be satisfied that there is an appropriate safeguard to ensure that no individual employee is disadvantaged by the annualised wage arrangement, there must be an annual reconciliation which compares what the employee would have received under the award and what they received under the annualised wage arrangement. The use of the nomenclature "Annual reconciliation" makes it clearer for readers of the Award what the requirement is.

52. Without proper records of starting and finishing times and an annual reconciliation, it would be impossible to determine whether or not an annualised wage arrangement resulted in any wage theft by the employer or disadvantage to the employee – as required by the no disadvantage safeguard.

53. With wage theft and non-compliance at extraordinary levels, there can be no argument for creating a vague area within the safety net that can harbour and obfuscate examples of wage theft.

54. It is also relevant to note that ABI & BCNSW support an annual reconciliation and make submissions contrary to the AiGroup. We agree with the ABI & BCNSW observation about an annual reconciliation that "*the mere fact that there remains the prospect of non-compliance with an award obligation… cannot constitute a reason to dismiss such an obligation as an appropriate component of the fair and relevant safety net.*"[26]

The NES Safeguards are insufficient on their own

55. The AiGroup claim that the NES safeguards are relevant to considering what safeguards exist for an annualised wage arrangement. Specifically, AiGroup claims that the existence of the NES safeguards, "obviates the need for onerous safeguards to be included in award clauses."[27]

56. This assertion by the AiGroup ignores the range of entitlements which the annualised wage arrangements can include. The AMWU submits that appropriate safeguards must ensure all entitlements that may be included in an annualised wage arrangement are protected and ensure that an employee does not lose those Award entitlements as a result of entering into an annualised wage arrangement.

Historical lengthy negotiations have less weight in the current environment

57. The AiGroup submits that the Commission should place weight on clauses which arose out of lengthy negotiations and changes should not be made to them without cogent evidence.

58. In the current environment, safeguards must be improved, where:

[26] ABI & BCNSW Submission 26 March 2018 at paragraph 2.39
[27] AiGroup Submission 27 March 2018 at paragraph 60

a. wage theft and non-compliance is on the rise,

b. an individualised system is making compliance and enforcement a difficult resource intensive task; and

c. the risk of litigation for both high and low profile businesses remains low.

59. The AMWU has detailed these factors in its submission 20 March 2018.

"Annualised wage arrangement" should be the nomenclature used

60. The AiGroup say that the terms "annualised salary arrangement" should be used, despite the *Fair Work Act* 2009, using the nomenclature "annualised wage arrangement."

61. The AMWU submits that the term "annualised wage arrangement" should be used. The term better encapsulates the purpose of the arrangement, which is to annualise the wage arrangements for award-reliant workers which includes overtime. Accompanying such arrangements are likely to be explanations that employees will not be paid overtime each week.

62. The use of the word "salary" in common parlance has a connotation of a lack of entitlement to overtime and other entitlements associated with wage workers.

63. To use the term salary, has the potential to obfuscate the real entitlements underpinning the annualised arrangement, giving more weight to arguments that the entitlements have been traded away – as opposed to being incorporated into an annualised arrangement. This is particularly at risk of happening for those arrangements which do not require agreement. If they are able to be offered at the point of employment, the use of the term "salary" provides greater opportunity for exploitation and wage theft by employers.

64. Although the Commission in the footnote number 6 to its 20 February Decision indicated that no distinction is to be made by the use of any particular expression, it is respectfully submitted that there is a cultural impact of Modern Awards, and the existing understandings of what "Salaries" are likely to influence an employee's understanding of what they are being offered. Particularly, if the offer is made as part of the offer of employment and takes effect when the employment commences, as envisaged by the Commission in its decision 20 February 2018.[28]

Specifics of the model clauses

65. In relation to the AiGroup's submissions about the model clauses, the AMWU relies upon its submissions 20 March 2018.

End

13 April 2018

[28] As envisaged by the Commission at paragraph [146] of Annualised wage arrangement provisions – 4 yearly review of modern awards [2018] FWCFB 154