



DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Annualised Wage Arrangements (AM2016/13)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT SAUNDERS

SYDNEY, 23 DECEMBER 2019

Review of annualised salary provisions in modern awards – draft determinations.

[1] Arising from our decision of 4 July 2019¹ (July 2019 decision), a schedule of draft variation determinations for the following awards is published with this decision:

Banking, Finance and Insurance Award 2010
Broadcasting and Recorded Entertainment Award 2010
Clerks - Private Sector Award 2010
Contract Call Centres Award 2010
Horticulture Award 2010
Hospitality Industry (General) Award
Hydrocarbons Industry (Upstream) Award 2010
Legal Services Award 2010
Local Government Industry Award 2010
Manufacturing and Associated Industries and Occupations Award 2010
Marine Towage Award 2010
Mining Industry Award 2010
Oil Refining and Manufacturing Award 2010
Pastoral Award 2010
Pharmacy Industry Award 2010
Rail Industry Award 2010
Restaurant Industry Award 2010
Salt Industry Award 2010
Telecommunications Services Award 2010
Water Industry Award 2010
Wool Storage, Sampling and Testing Award 2010

[2] In respect of clause 27.1 of the *Hospitality Industry (General) Award 2010* (*Hospitality Award*) applying to non-managerial employees, as well as clause 13.2 of the *Marine Towage Award*

¹ [2019] FWCFB 4368

Award and clause 28 of the *Restaurant Industry Award*, we determined in paragraph [32] of the July 2019 decision that the existing provisions should be replaced with model clause 4. We have not yet received submissions concerning the “outer limit” numbers of hours that should apply in subclause X.1(b)(i) and (ii) with respect to these awards. In respect of the *Hospitality Award* and the *Restaurant Industry Award*, where there is a pay uplift of 25%, we have provisionally decided that the outer limit of ordinary-time penalty rate hours under clause X.1(b)(i) shall be an average of 16 over the pay period or roster, and the outer limit of overtime hours under clause X.1(b)(ii) shall be an average of 10 over the pay period. In the *Marine Towing Award*, where the required pay uplift is 40%, the respective figures shall be 20 and 15. These provisional conclusions are reflected in the draft determinations for these awards.

[3] In respect of clause 27.2 of the *Hospitality Award*, which applies to managerial staff, we noted in the July 2019 decision a submission advanced by the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motel Accommodation Association (Hospitality Associations) that the clause should continue in its current form since it was structurally identical to clause 17.3(a) of the *Registered and Licensed Clubs Award (Clubs Award)*.² In light of this submission, we invited further submissions, including as to the following questions:

(1) Are clauses 17.3(a) of the *Clubs Award* and clause 27.2 of the *Hospitality Award* to be regarded as provisions concerned with annualised wage arrangements as contemplated by s 139(1)(f) of the *Fair Work Act 2009*, or are they provisions of a different nature?

(2) If they are to be treated as annualised wage arrangement provisions, should both be replaced by Model Clause 2?

[4] In response:

- The Hospitality Associations submitted that clause 27.2 of the *Hospitality Award* (and clause 17.3(a) of the *Clubs Award*) is not an annualised wage arrangements clause, but rather a minimum wages clause which provides for an exemption from certain provisions of the award if the uplifted rate is paid. It provides for a certain outcome in terms of remuneration, and no reconciliation is necessary. The Hospitality Associations further submitted that clause 27.2 should be re-located in clause 20.2 as part of the minimum wages provision, as had been the case prior to August 2013.
- Clubs Australia Industrial supported and adopted the position of the Hospitality Associations.
- The Club Managers’ Association opposed any changes to clause 17.3(a) of the *Clubs Award*, which it submitted was an exemption provision and had operated effectively in the past.
- The United Workers’ Union supported the position of the Club Managers’ Association in respect of the *Clubs Award* but submitted that clause 27.2 of the *Hospitality*

² [2019] FWCFB 4368 at [13]

Award should be replaced by the relevant model clause subject to the retention of the 25% pay uplift requirement.

[5] Given the lack of any support to change clause 17.3(a) of the *Clubs Award*, and the fact that clause 27.2 of the *Hospitality Award* is structurally and conceptually identical, we do not propose to proceed with any variation to these provisions. We are not satisfied that they are in fact annualised wage arrangements provisions at all; they may better be characterised as exemption provisions operating in conjunction with minimum wages provisions. Consistent with the submissions made by the Hospitality Associations, clause 27.2 will be relocated to clause 20.2 to separate it from the annualised wages provision to apply to non-managerial employees. The attached draft determination for this award will reflect this.

[6] We note that on 9 December 2019, we received a detailed submission from the Australian Financial Markets Association (AFMA) concerning the proposed addition of model clause 1 to the *Banking, Finance and Insurance Award*. The AFMA has not previously made any submissions at any stage of these proceedings, which have extended over a period of three years. The AFMA's submissions seek to re-open a range of the merit issues which we have already determined in our previous submissions. The submissions include a proposal to exempt employers from any record-keeping provisions where a salary is paid which is 50% or more in excess of the minimum award rate.

[7] We do not propose to re-open the proceedings at this very late stage, as proposed by the AFMA. Like all interested parties, it has had an opportunity to put forward submissions for the consideration of the Commission at a number of stages over the last three years, but has failed to do so. We note, as stated in paragraph [22] of the July 2019 decision, that employers may, pursuant to private contractual arrangements, pay employees in accordance with a salary arrangement that compensates for or "buys out" identified award entitlements without engaging with the annualised wage arrangements provision in the applicable award.

[8] Parties will have until 31 January 2020 to comment upon the draft determinations. In respect of all awards other than the *Hospitality Award*, the *Marine Towing Award* and the *Restaurant Industry Award*, any comment will be confined at this stage to technical and drafting matters, and they will proceed on the basis of an operative date of 1 March 2020 as determined in paragraph [31] of the July 2019 decision. Submissions concerning the *Hospitality Award*, the *Marine Towing Award* and the *Restaurant Industry Award* will necessarily have to deal with the more substantive matters identified in paragraph [2] above. Because these issues may require further consideration by us, the operative date of 1 March 2020 will not apply in respect of these awards, and a new operative date will be determined in due course.

[9] We have decided not to publish a draft determination for the *Health Professionals and Support Services Award 2010 (Health Professionals Award)* at this stage. In respect of this award, we expressed the conclusion in the July 2019 decision that Model Clause 3 should be added to this award on the basis that it be applicable to the classifications of Support Services employee Levels 8 and 9 and Health Professional Levels 1-4.³ This confirmed the provisional views expressed in paragraph [142] of our decision of 20 February 2018⁴ (February 2018 decision) and paragraph [59] of our decision of 27 February 2019⁵ (February 2019 decision)

³ Ibid at [29]-[30]

⁴ [2018] FWCFB 154

⁵ [2019] FWCFB 1289

that managerial and supervisory-level employees under the *Health Professionals Award* should have access to an appropriate annualised wage arrangements provision. However, in a submission dated 1 August 2019, the Health Services' Union (HSU) contended that Health Professional Levels 1-3 do not in fact perform managerial or supervisory duties. The HSU submitted that, consistent with the February 2018 decision and the February 2019 decision, the new annualised wage arrangements provision should only apply to the classifications of Support Services employee Levels 8 and 9 and Health Professional Level 4.

[10] It is apparent that there is a disjuncture between the reasoning in the February 2018 decision and the February 2019 decision on the one hand and the conclusion stated in the July 2019 decision on the other hand. We note that the Ai Group, which originally applied for the addition of an annualised wage arrangements provision to the *Health Professionals Award*, submitted on 10 April 2019 (at [32]) that “...*Model Clause 3, with the minor amendments proposed in section 2 of this submission, should be inserted into the Health Professionals Award for managerial and supervisory employees*”. However in a subsequent submission in response to the HSU submissions referred to above, the Ai Group pointed to paragraph [142] of the February 2018 decision, in which we invited further submissions about whether model clauses 3 or 4 should apply “in relation to the classes of employees encompassed by the Ai Group’s claim”, which included Health Professional Levels 1-3. In the circumstances described, we consider that we should defer the publication of a draft determination and the date of operation for any annualised wage arrangements provision in the *Health Professionals Award* and invite further submissions concerning this issue. Such submissions might usefully address the questions of whether the classifications of Health Professional Levels 1-3 perform managerial or supervisory duties and whether there is any other rationale for an annualised wage arrangements provision to apply to these classifications. We will in the first instance invite further submissions from the Ai Group on this issue, to be filed on or before 31 January 2020. The HSU and any other party may file submissions in reply within three weeks after that date.



VICE PRESIDENT

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