



Arbitral history of exemption provisions

Award modernisation process

The award modernisation process required the (then) Australian Industrial Relations Commission (AIRC) to undertake the process of creating modern awards in accordance with an 'award modernisation request' from the Minister to the President of the AIRC.¹

This request established whether, and how, the AIRC was to deal with particular matters in a modern award.² Any terms the AIRC did include in a modern award had to be consistent with such directions.³

The AIRC included exemption provisions in [at least] six modern awards.⁴ During the process of drafting and finalising modern awards, the AIRC also included exemption rates in [at least] two further modern awards:

- *Clerks – Private Sector Award 2010*

The draft clause proposed for inclusion in this award provided a broad exemption from all award terms - other than those relating to redundancy, superannuation, annual leave, personal/carer's and compassionate leave, public holidays and community service leave – for employees paid a weekly wage of at least 15% above the level 5 rate (the highest classification rate in the award).⁵

¹ Workplace Relations Act, s.576C(1).

² Workplace Relations Act, s.576C(3)(d).

³ Workplace Relations Act, s.576N(2).

⁴ More information is available [Fair Work Commission – Exemption rates \(background document\)](#) of 10 December 2020

⁵ The draft clause was as follows:

17.1 Except as to the provisions of:

- clause 14—Redundancy;
- clause 24—Superannuation;
- clause 30—Annual leave;
- clause 31—Personal/carer's leave and companionate leave;
- clause 32—Public holidays; and
- clause 33—Community service leave

this award will not apply to employees employed by the week who are in receipt of a weekly wage in excess of 15% above the Level 5 wage rate in clause 16; provided that the wage is not inclusive of overtime payments and/or shift allowances due to the employee under this award.

17.2 The exemption rate will be calculated in multiples of one dollar, amounts of less than \$0.50 being taken to the lower multiple and amounts of \$0.50 or more being taken to the higher multiple.

- *Banking, Finance and Insurance Award 2010*

The draft clause proposed for inclusion in this award provided a more limited exemption clause for employees paid at least 15% above the level 5 minimum weekly rate. The exemption applied to certain terms relating to span of hours, overtime and stand-by and call-back allowances.⁶

Exemption clauses were initially included in these two awards on the basis of a significant incidence of exemption clauses in the pre-modern federal awards and notional agreements preserving State awards (NAPSA's) that applied in these industries.⁷

Following the release of exposure draft awards, the Minister's Award Modernisation Request was amended to relevantly clarify the intended operation of the process in relation to exemption of employees from coverage:

2. The creation of modern awards is not intended to: ...

(f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSA's in the relevant industry or occupation;

In response to this variation, the Fair Work Commission decided to remove the proposed exemption clauses from the *Clerks – Private Sector Award* and the *Banking, Finance and Insurance Award*. Annualised salary provisions were, however, included to allow work flexibility to be provided, subject to a range of safeguards.

⁶ The draft clause was as follows:

13.2 Exemption rate

The following clauses will not apply to employees who are paid a salary, before overtime payments and shiftwork allowances, which is more than 15% above the Level 5 minimum weekly rate:

- clause 20.1—Span of hours;
- clause 21.1—Overtime and penalty rates other than call centres;
- clause 21.2(c)—Overtime and penalty rates call centres; and
- clause 16.2(b)(ii)—Stand-by and call-back allowances.

⁷ This background is canvassed in [2009] AIRCFB 922 at [12]-[14] (re Clerks) and [2009] AIRCFB 923 (re Banking, Finance and Insurance) at [5] – extracts below from page 4-10

Arbitral background

In its decision about the *Clerks – Private Sector Award*, the AIRC outlined some of the arbitral history of exemption rates clauses.⁸

The AIRC noted that exemption provisions in many instruments were commonly inserted and maintained by consent. The AIRC noted a trend towards ‘bargains’ being more than notional: “[t]here has been a trend towards such mechanisms being available by written agreement rather than unilaterally.”⁹

One of the cases cited, the *Clerks (Breweries) Consolidated Award* case, provided an outline of what a clause permitting such an arrangement should include:

“[45] Any notional bargain which the parties seek to include in the Award should have the following elements:

- *specify the rate of pay (ie either a flat amount or a percentage above the minimum rates prescribed in the Award);*
- *identify a limited number of award clauses which do not apply to employees in receipt of the specified rate;*
- *provide adequate protection for employees including an entitlement to a specified minimum number of days off per work cycle;*
- *ensure that appropriate records are kept;*
- *provide an overall obligation that an employee will receive no less under the annualised salary than they would have been entitled to if all award obligations had been met; and*
- *provide a review mechanism whereby any employee may lodge a grievance with the Commission.”*¹⁰

⁸ [2009] AIRCFB 922 at [15]-[19]

⁹ [2009] AIRCFB 922 at [19]

¹⁰ Print S6443, 26 May 2000

EXTRACTS FROM FULL BENCH DECISION

Clerks—Private Sector Award 2010 [2009] AIRCFB 922

JUSTICE GIUDICE, PRESIDENT

VICE PRESIDENT LAWLER

VICE PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT ACTON

COMMISSIONER SMITH

MELBOURNE, 16 NOVEMBER 2009

[15] Although exemption provisions in many of the instruments were commonly inserted and maintained by consent, there has been some history of arbitration. In 1985 a Full Bench of the Commission overturned a decision to delete an exemption provision in the *Business Equipment Industry (Technical Service) Award*. Coldham J and Paine C said:

“With all respect to this expression of view the existence of the exemption clause is not to be considered along with the maintenance of records and the benefit to the employer of being spared that obligation. The vital consideration in our view is the concept of a notional bargain made between the employer and the employee per medium of the exemption clause. If the exemption clause is removed the award provisions previously exempted thereby would commence to operate with respect to the previously exempt employee. In order to avoid double counting for the entitlement to payments hitherto precluded by the notional bargain questions of possible adjustment to the over award salaries paid in this minimum rates award would need to be considered. It is not so much the exemption clause itself (and leastwise any benefits given thereby with respect to the recording of the industry since the inception of the award and the effect upon them if the exemption clause were deleted from the subject Award.

... ..

Of course an award is a regulatory instrument but that is not to say that it is therefore designed to apply to and regulate the working conditions of the very people who are excluded by its terms from the operation of certain of its provisions. To cut out of the award the vital exemption provision is in our view calculated to put its operation in a state of imbalance. In this context we refer again to the notional bargain which the exemption clause permits and to the range of consequences generated by its deletion.

Also, we find ourselves unable to associate with the statement that the exemption clause is an anachronism. To the extent that it forms a crucial part of the subject Award, and we consider that it does, it is no more out-of-date nor out of harmony with conditions in the industry where it operates than the award itself. It is the Award itself which must be considered. If the exemption clause is to go the whole subject of the Award must also be reviewed in concept.”¹¹

[16] In 1993 a Full Bench of the Industrial Relations Commission of New South Wales upheld an appeal against the deletion of the exemption rate from the *Clerks’ (State) Award*, one of the awards replaced by the modern award subject to the application before us. The Full Bench said:

“The exemption clause has been demonstrated to have been a feature of this important award, other clerks’ awards and the federal clerks’ award over a significant number of years. Reviews are currently being conducted before Glynn J. as previously described. Whatever was intended by Glynn J. to be the effect of the proviso ordered in her judgment and set out previously, there is no doubt about the way in which the Clerks’ union saw the order apply, namely, that those clerks who were receiving salaries over and above the exemption rate would continue to receive those salaries as well as all of the overtime and other penalties from the moment that the exemption clause was no longer applied to them. The review of the award and the rates, classification and the structural changes necessary to bring this award to a modern instrument must involve a question whether there should or should not be an exemption clause in the award.

The review of the award in the terms of the wage fixation principles must necessarily be impeded by the decision made by Glynn J. particularly with respect to the working out of that decision. If the correct working of the decision of Glynn J. was that suggested by Mr Gallagher, the wages actually paid would, by the effect of the order, be translated into award rates to which all the incidence of the award would apply. Such a result would by implication change at law the salary levels of those persons working overtime and receiving wages above the exemption level. The remarkable disparity between the actual rates paid under this award and the award rates has not been explained except in broad terms of market forces. An inference is available that the existence of the exemption clause within the award may well have increased the level of over award payments. The whole clerks’ industry in the terms of the Clerks’ Award and the application of the award terms can only be properly dealt with in a comprehensive review and it was inappropriate to change the award fundamentally in the manner that Glynn J. did by removing the exemption clause in the case as a narrow issue.”¹²

[17] The Queensland NAPSA, *Clerical Employees Award State 2002*, contains a clause whereby employees employed prior to October 2002 on a rate above the highest rate in the award at the time are exempt from a number of award provisions. The same employment arrangement is available for employees engaged after October 2002 if there is mutual agreement in writing.

[18] During the award simplification process a Full Bench of this Commission granted an application to delete the exemption clause in the *Clerks (Breweries) Consolidated Award* and permitted the parties to develop an alternative provision. The Bench said:

¹¹ Print G1261, 18 December 1985 at p.3

¹² *Employers Fed of NSW & Ors v Federated Clerks Union*, [1993] NSW IR Comm 32 at p.20

“**[45]** Any notional bargain which the parties seek to include in the *Award* should have the following elements:

- specify the rate of pay (i.e. either a flat amount or a percentage above the minimum rates prescribed in the *Award*);
- identify a limited number of award clauses which do not apply to employees in receipt of the specified rate;
- provide adequate protection for employees including an entitlement to a specified minimum number of days off per work cycle;
- ensure that appropriate records are kept;
- provide an overall obligation that an employee will receive no less under the annualised salary than they would have been entitled to if all award obligations had been met; and
- provide a review mechanism whereby any employee may lodge a grievance with the Commission.”¹³

[19] It is clear from this review of provisions and authorities that various tribunals including this Commission have identified an ongoing role for appropriately flexible employment arrangements for clerical employment which can involve the payment of additional or aggregate amounts instead of weekly payments of base rates plus overtime payments. There has been recognition that the terms of relevant instruments need to be looked at in their totality in order to formulate appropriate terms and alternative payment arrangements. There has been a trend towards such mechanisms being available by written agreement rather than unilaterally.

¹³ Print S6443, 26 May 2000

EXTRACTS FROM FULL BENCH DECISION

Clerks—Private Sector Award 2010 [2009] AIRCFB 922

JUSTICE GIUDICE, PRESIDENT

VICE PRESIDENT LAWLER

VICE PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT WATSON

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT ACTON

COMMISSIONER SMITH

MELBOURNE, 16 NOVEMBER 2009

[12] The Australian Federation of Employers and Industries (AFEI) referred to Australian Bureau of Statistics (ABS) data indicating the following incidence of clerical employment throughout Australia:¹⁴

State	% Share of National Clerical Occupation
NSW	33
VIC	26
QLD	20
SA	7
WA	10
TAS	1
NT	1
ACT	2

¹⁴ ABS 6291.0.55.003 E-08 Feb Qtr 2009.

[13] According to the AFEI, awards and NAPSAs which contain exemption provisions have application to two thirds of clerical employees nationally.

[14] Exemption provisions are contained in the common rule clerical NAPSAs applying in New South Wales, Queensland, Western Australia, Australian Capital Territory and Tasmania. In addition, annual salaries clauses which provide for the non-application of certain award provisions when annual salaries of a certain level are paid are contained in various other clerical instruments. A clause of one type or another is contained in the following current instruments:

New South Wales

*Clerical and Administrative Employees (State) Award*¹⁵

*Clerical and Administrative Employees in Temporary Employment Services (State) Award*¹⁶

*Real Estate Industry (Clerical and Administrative) Employees (State) Award*¹⁷

*Clerical Employees in Metropolitan Newspapers (State) Award*¹⁸

*Clerical and Administrative Employees in Permanent Building Societies (State) Award*¹⁹

*Clerical and Administrative Employees Legal Industry (State) Award*²⁰

*Clerical and Administration Employees, Hire Cars and Taxis (State) Award*²¹

Queensland

*Clerical Employees' Award- Permanent Building Societies- State 2003*²²

*Clerical Employees Award State 2002*²³

Western Australia

*Permanent Building Societies (Administrative and Clerical Officers) Award 1975*²⁴

*Clerks (Timber) Award No. 61 of 1947*²⁵

¹⁵ AN120664.

¹⁶ AN120130.

¹⁷ AN120457.

¹⁸ AN120676.

¹⁹ AN120129.

²⁰ AN120675.

²¹ AN120131.

²² AN140069.

²³ AN140067.

²⁴ AN160244.

²⁵ AN160067.

*Clerks' (Taxi Services) Award of 1970*²⁶

*Clerks (Commercial Radio and Television Broadcasters) Award of 1970*²⁷

*Clerks (Commercial, Social and Professional Services Award) No. 14 of 1972*²⁸

*Clerks' (Credit and Finance Establishments) Award*²⁹

*Clerks' (Hotels, Motels and Clubs) Award 1979*³⁰

*Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947*³¹

Australian Capital Territory

*Clerks (A.C.T.) Award 1998*³²

Tasmania

*Clerical and Administrative Employees (Private Sector) Award*³³

Pre-reform Awards

*Clerks (Road Transport Industry) Award 2002*³⁴

*Clerical Industry – Shipping Officers Award 2003*³⁵

*Clerical and Administrative Staff – International Freight Forwarding and Customs Clearing Industry Award 2003*³⁶

*Clerical and Salaried Staffs' (Agribusiness) Award 1999*³⁷

²⁶ AN160079.

²⁷ AN160065.

²⁸ AN160066.

²⁹ AN160072.

³⁰ AN160075.

³¹ AN160080.

³² AP772208.

³³ AN170017.

³⁴ AP818787.

³⁵ AP826731.

³⁶ AP826032.

³⁷ AP772066.

EXTRACTS FROM FULL BENCH DECISION

BANKING, FINANCE AND INSURANCE AWARD 2010 [2009] AIRCFB 923

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT LAWLER
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER SMITH

MELBOURNE, 16 NOVEMBER 2009

[5] In the banking, finance and insurance industries there are a large number of enterprise awards which will not be directly affected by the making of this industry award. Of the 17 industry awards which will be replaced by this award, nine contain a partial exemption provision, in the sense that certain award provisions, sometimes only overtime, are not payable to employees paid in excess of a particular salary level. Of the 73 industry awards and enterprise awards applying across the sector, 44 have partial exemption provisions of one type or another.