



# BACKGROUND PAPER

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards – *Clerks—Private Sector Award 2010*** (AM2019/17)

MELBOURNE, 29 APRIL 2020

*Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.*

### **Introduction**

[1] The Commission has produced this background paper in order to facilitate discussions at the conference listed on 30 April 2020 (see [notice of listing](#)) in relation outstanding issues in the *Clerks—Private Sector Award 2010* (Clerks Award).

[2] In a decision issued on 23 March 2020 by the Finalisation Full Bench<sup>1</sup> (the March 2020 decision), the Clerks Award was identified as an award with outstanding issues, particularly in relation to amendments made by the Annualised Wage Arrangements Full Bench.<sup>2</sup>

[3] The issue relating to the provisions surrounding Annualised Wage Arrangements was raised by the Australian Industry Group (Ai Group) in their submission of [2 March 2020](#).

[4] In the March 2020 decision, the Full Bench outlined a short background to the outstanding Annualised Wage Arrangement provisions at [36]-[38] and noted that a conference of the parties will be convened to discuss the issue.

[5] A further decision was issued on 27 April 2020 by the Finalisation Full Bench<sup>3</sup> in relation to the outstanding awards in Tranche 2 which confirmed that a conference would be convened.

### **Outstanding issue**

[6] The outstanding issue relates to the new annualised wage arrangements clause which was inserted into the current Clerks Award from 1 March 2020.

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<sup>1</sup> [\[2020\] FWCFB 1541](#).

<sup>2</sup> [\[2020\] FWCFB 1541](#) at [38].

<sup>3</sup> [\[2020\] FWCFB 1814](#).

[7] Ai Group submit that the new provision at clause 18.1(a) should include of the penalties applicable when an employee is required to work through a meal break (cause 15.4). Ai Group submit that these are appropriately considered to be ‘Overtime penalty rates’, as referred to in clause X.1(a)(ii).

### **AM2016/13 – Annualised salaries**

[8] A decision and a schedule of draft variation determinations was issued on 23 December 2019 by the Annualised Wage Arrangements Full Bench.<sup>4</sup> That Full Bench invited interested parties to comment on the draft variation determinations, including the Clerks Award, by 31 January 2020.

[9] Ai Group filed a submission on 31 January 2020<sup>5</sup> in the Annualised salaries common issue matter (AM2016/13) which sought an amendment to the draft variation determination in respect of a number of awards, including the Clerks Award.

[10] With respect to the Clerks Award, the amendments sought by Ai Group were not included in the final variation determination issued by the Annualised Wage Arrangements Full Bench.<sup>6</sup>

### **AM2019/17 – Final stage proceedings**

[11] In a decision issued on 14 February 2020 by the Finalisation Full Bench<sup>7</sup> (the February 2020 decision), the Full Bench noted at [11] that final variation determinations were issued by the Annualised Wage Arrangements Full Bench on 12 February 2020 which affected a number of tranche 2 awards, the Clerks Award being one of them.

[12] The Finalisation Full Bench noted that revised draft variation determinations would be issued on 19 February 2020 in respect of the affected awards incorporating the variations issued by the Annualised Wage Arrangements Full Bench.

[13] As previously mentioned, in the March 2020 decision<sup>8</sup> the Finalisation Full Bench noted the remaining issue in the Clerks Award at [36] to [38] which was raised by Ai Group.

[14] In the April 2020 decision, the Finalisation Full Bench again noted that a conference would be convened to discuss the issue regarding amendments to the Annualised Wage Arrangements provisions<sup>9</sup> and any other outstanding matters in respect of the variation determination of the Clerks Award.<sup>10</sup>

### **Submissions**

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<sup>4</sup> [\[2019\] FWCFB 8583](#).

<sup>5</sup> Ai Group [submission](#), 31 January 2020.

<sup>6</sup> See [Schedule of determinations](#) published on 12 February 2020.

<sup>7</sup> [\[2020\] FWCFB 690](#).

<sup>8</sup> [\[2020\] FWCFB 1541](#).

<sup>9</sup> Ai Group [submission](#), 2 March 2020, paragraph 2.

<sup>10</sup> [\[2020\] FWCFB 1814](#) at [4].

[15] Ai Group have filed two submissions in relation to this issue. One to the Annualised Wage Arrangements Full Bench and the second to the Finalisation Full Bench.

*Submission filed in respect of the Annualised salaries matter – 31 January 2020*

[16] In their [submission](#) filed in the Annualised salaries common issue matter, dated 31 January 2020, Ai Group referred to clause X.1(a) in each Model clause which lists provisions in satisfaction of which an annual salary may be paid.<sup>11</sup> Ai Group noted that the Commission expressed its intention for the provision to be added to the model clause, where an existing ‘annualised wage arrangement’ provision provided for other entitlements which were not included in cl. X.1(a).<sup>12</sup>

[17] Ai Group relied on paragraphs [54] and [61] of the Full Bench decision [\[\[2019\] FWCFB 1289\]](#) issued on 27 February 2019 and paragraph [25] of the Full Bench decision [\[\[2019\] FWCFB 4368\]](#) issued on 4 July 2019. The relevant paragraphs are as follows:

‘[54] Model Clause 1 sets out in paragraph (a) of subclause X.1 five classes of award entitlement for which an annualised wage may be paid in satisfaction thereof: minimum weekly wages, allowances, overtime penalty rates, weekend and other penalty rates, and annual leave loading. Where a modern award in Category 1 currently allows a wider range of award entitlements to be encompassed in an annualised wage arrangement, those award entitlements may be added to subclause X.1. In the case of the *Legal Services Award*, having regard to the conclusions stated in paragraph [140] of the 2018 decision, shift allowances will be added to the classes of award entitlements in subclause X.1.

...

[61] Subclause X.1(a) of the respective model clauses will however be modified to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement.’<sup>13</sup>

‘[25] As noted in paragraph [61] of the 2019 decision, clause X.1(a) of each model clause will need to be modified to contain the full range of award entitlements which may currently be encompassed in an annualised wage arrangement.’<sup>14</sup>

[18] Ai Group submits that clause X.1(a)(iv) lists ‘weekend clauses and other penalty rates’ as one of the entitlements which may be encompassed in an annualised wage arrangement. It was submitted that ‘other penalty rates’ is a broad term to refer to any penalty rate.<sup>15</sup>

[19] Ai Group noted that not all penalty rates have been listed as entitlements in satisfaction of which an annualised wage arrangement may be paid.<sup>16</sup>

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<sup>11</sup> Ai Group [submission](#), 31 January 2020, paragraph 7.

<sup>12</sup> Ai Group [submission](#), 31 January 2020, paragraph 8.

<sup>13</sup> [\[2019\] FWCFB 1289](#) at [54] and [61].

<sup>14</sup> [\[2019\] FWCFB 4368](#) at [25].

<sup>15</sup> Ai Group [submission](#), 31 January 2020, paragraph 13.

<sup>16</sup> Ai Group [submission](#), 31 January 2020, paragraph 13.

[20] Ai Group proposed that the draft determination be varied to include all penalty rates (including any relevant penalty rates applicable to shift workers, any which apply on public holidays or which apply when an employee works through a meal break) as entitlements that are satisfied as a result of an annualised salary payment.<sup>17</sup>

[21] In particular, Ai Group noted that clauses 26.1 and 31.4 of the Clerks Award contain entitlements in satisfaction of which an annualised salary may be paid (pursuant to clause X.1(a)(iv) of the Model Clause) and that were omitted from the provision. The relevant clauses are below:

**‘26.1 Meal break**

Subject to the provisions of clause 28—Shiftwork of this award, a meal period of not less than 30 minutes and not more than 60 minutes must be allowed to each employee. Such meal period must be taken not later than five hours after commencing work and after the resumption of work from a previous meal break. Employees required to work through meal breaks must be paid double time for all time so worked until a meal break is allowed.

...

**31. Public holidays**

...

**31.4** Work on a public holiday or a substituted day must be paid at double time and a half. Where both a public holiday and substitute day are worked public holiday penalties are payable on one of those days at the election of the employee. An employee required to work on a public holiday is entitled to not less than four hours pay at penalty rates provided the employee is available to work for four hours.’

*Submission filed in respect of the final stage proceedings – 2 March 2020*

[22] Ai Group’s [submission](#) dated 2 March 2020 in the final stage proceedings matter proposed that clause 18.1(a) of the draft award variation determination in respect of the Clerks Award published on 21 February 2020 be amended to include applicable penalties.

[23] As noted earlier, Ai Group submitted at paragraph [2]:<sup>18</sup>

‘clause 18.1(a) should provide for an annualised wage arrangement to encompass penalties applicable when an employee is required to work through a meal break (clause 15.4). These are appropriately considered to be ‘Overtime penalty rates’, as referred to in clause X.1(a)(iii).’

[24] The relevant clauses are below:<sup>19</sup>

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<sup>17</sup> Ai Group [submission](#), 31 January 2020, paragraph 14.

<sup>18</sup> Ai Group [submission](#), 2 March 2020.

<sup>19</sup> [Draft award variation determination – Clerks—Private Sector Award 2010](#) – published 21 February 2020.

**15.4** An employer must pay an employee who is required to work through their meal break 200% of the minimum hourly rate from when the meal break would have commenced until a meal break is allowed.

...

### **18.1 Annual wage instead of award provisions**

**(a)** An employer may pay an employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:

**(i)** clause 13.8 (Make-up time); and

**(ii)** clause 16—Minimum rates; and

**(iii)** clause 19—Allowances; and

**(iv)** clause 21—Overtime (employees other than shiftworkers); and

**(v)** clause 22—Rest period after working overtime (employees other than shiftworkers); and

**(vi)** clause 23—Time off instead of payment for overtime (employees other than shiftworkers); and

**(vii)** clause 24—Penalty rates (employees other than shiftworkers); and

**(viii)** clause 26—Ordinary hours of work and rostering for shiftwork; and

**(ix)** clause 28—Overtime for shiftwork; and

**(x)** clause 29—Time off instead of payment for overtime for shiftwork; and

**(xi)** clause 30—Rest period after working overtime for shiftwork; and

**(xii)** clause 31—Penalty rates for shiftwork; and

**(xiii)** clause 32.3—Annual leave loading'