

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Outline of Submission

Professional Employees

Award 2010

(AM2019/5)

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**4 YEARLY REVIEW OF MODERN AWARDS
AM2019/5 – PROFESSIONAL EMPLOYEES AWARD 2010**

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1. INTRODUCTION

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the Amended Directions (**Directions**) issued by the Fair Work Commission (**Commission**) on 28 May 2019
2. These proceedings (AM2019/5) concern the substantive claims of the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) and Ai Group to vary the *Professional Employees Award 2010* (**Professionals Award**). There are two claims that are being pressed:
 - a. An APESMA claim to vary the hours of work clause; and
 - b. An Ai Group claim to vary the Award to update the references in the classification structure to a membership grade of the Australian Computer Society (**ACS**), given a recent change that the ACS has made to that grade.
3. Given the nature of these proceedings (i.e. substantive claim proceedings), we submit that the outcome should be limited to the Commission determining whether or not to accept the two substantive claims and the award variations proposed by the parties.
4. Extensive negotiations took place between Ai Group and APESMA over several months, and a position was eventually reached. The position is set out in Attachment A to APESMA's submission of 15 July 2019. Since APESMA filed its submission on 15 July, a couple of minor issues have been identified with the wording in Attachment A. Some minor modifications have been discussed between Ai Group and APESMA to address these issues and it is Ai Group's understanding that APESMA intends to file an updated version of Attachment A.
5. Ai Group has consulted with its Members covered by the Professionals Award throughout the negotiations with APESMA.

6. Ai Group does not oppose the package of award amendments set out in Attachment A to APESMA's submission, but this position is based on the Commission's support for the whole package. Ai Group would strongly oppose APESMA's hours of work claim, if the package is disturbed in any way that imposes more restrictions, inflexibilities or costs upon employers.
7. Ai Group has not filed evidence in these proceedings on the basis that the proceedings pertain to the substantive claims of the parties and, in that context, we do not envisage that the Commission will vary the Award in any manner that would impose a more restrictive, inflexible or costly outcome upon employers than the outcome reflected in the package in Attachment A.
8. However, in the interests of natural justice, if the Full Bench contemplates varying the Professionals Award to impose more restrictive, costly or inflexible provisions on employers than those included in the package agreed upon between Ai Group and APESMA, Ai Group would seek the opportunity to file detailed evidence and make further detailed submissions in these proceedings before the Award is varied.

2. ROLE AND APPROACH OF Ai GROUP AND APESMA REGARDING THE PROFESSIONALS AWARD

9. Ai Group and APESMA are the two main industrial parties for employers and employees covered by the Professionals Award. The modern award was based on a draft award jointly submitted to the Australian Industrial Relations Commission (**AIRC**) by Ai Group and APESMA, as discussed in section 7.3 of this submission.
10. In addition, Ai Group and APESMA were the two main industrial parties for the key predecessor instruments which were:
 - a. *The Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998;*
 - b. *The Technical Services Professional Engineers (General Industries) Award 1998;*
 - c. *The Scientific Services Professional Scientists Award 1998;*
 - d. *The Information Technology Industry (Professional Employees) Award 2001; and*
 - e. *The Telecommunications Industry (Professional Employees) Award 2002.*
11. For many decades Ai Group and APESMA have endeavoured, wherever possible, to work through issues of contention relating to the Professionals Award and the predecessor awards and to reach agreement on any award variations. This approach has served the members of Ai Group, APESMA and the broader community well over many years.
12. Both Ai Group and APESMA have a deep knowledge of the types of businesses and employees covered by the Professionals Award and the working arrangements in place within those businesses. Ai Group submits that the Commission should be very mindful of this when considering proposals that are

the outcome of extensive discussions and negotiations between Ai Group and APESMA.

13. While, of course, the Full Bench needs to ensure that any award variations are consistent with the modern awards objective, the main industrial parties are very well placed to assess the impact of particular variations on employers and employees.

3. A POSITION HAS BEEN REACHED AFTER EXTENSIVE NEGOTIATIONS BETWEEN Ai GROUP AND APESMA, AND THE ELEMENTS OF THE POSITION ARE A PACKAGE

14. As stated in APESMA's submission of 15 July 2019, the draft award amendments set out in Attachment A to that submission are the outcome of extensive discussions and negotiations between Ai Group and APESMA.
15. Ai Group and APESMA have had numerous meetings over recent months in a concerted endeavour to reach agreement on the substantive claims.
16. The draft award variations in Attachment A are the outcome of those extensive negotiations. The draft variations are a package and significant and difficult concessions have been made by each party on that basis.
17. Ai Group does not oppose the package of award amendments set out in Attachment A to APESMA's submission, but this position is based on the Commission's support for the whole package. Ai Group would strongly oppose APESMA's hours of work claim, if the package is disturbed in any way that imposes more restrictions, inflexibilities or costs upon employers.
18. Ai Group has not filed evidence in these proceedings on the basis that the proceedings pertain to the substantive claims of the parties and, in that context, we do not envisage that the Commission will vary the Award in any manner that would impose a more restrictive, inflexible or costly outcome upon employers than the outcome reflected in the package in Attachment A.
19. However, in the interests of natural justice, if the Full Bench contemplates varying the Professionals Award to impose more restrictive, costly or inflexible provisions on employers than those included in the package agreed upon between Ai Group and APESMA, Ai Group would seek the opportunity to file detailed evidence and make further detailed submissions in these proceedings before the Award is varied.

4. THE STATUTORY FRAMEWORK AND THE COMMISSION'S APPROACH TO THE 4 YEARLY REVIEW

20. The substantive claims of APESMA and Ai Group, that are the subject of these proceedings, are being pursued in the context of the 4 Yearly Review of Modern Awards.
21. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Amending Act)* removed the requirement for the Commission to conduct 4 Yearly Reviews from the beginning of 1 January 2018. Schedule 4 of the Amending Act inserted Part 5 of Schedule 1 of the *Fair Work Act 2009 (FW Act)* which allows for the continued application of Division 4 of Part 2-3, (including s.156) in the context of the current 4 Yearly Review proceedings.
22. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138) and, to the extent applicable, the minimum wages objective (s.284).
23. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.
24. In the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision (Preliminary Jurisdictional Issues Decision)*¹, the Full Bench accepted that s.138 is relevant to the Review and endorsed the observations of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*² that a distinction is to be drawn between that which

¹ [2014] FWCFB 1788, [39].

² *SDA v NRA (No 2)* (2012) 205 FCR 227.

is necessary and that which is desirable:

That which is necessary must be done. That which is desirable does not carry the same imperative for action.

25. Relevant to the current proceedings, in the Preliminary Jurisdictional Issues Decision the Full Bench made the following comments above the requirements upon parties pursuing variations during the 4 Yearly Review: (emphasis added)

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.³

26. In the Preliminary Jurisdictional Issues Decision, the Commission also indicated that the Review will have regard to the historical context applicable to each award, and proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made: (emphasis added)

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.⁴

³ [2014] FWCFB 1788, [23].

⁴ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [24].

27. In the *4 Yearly Review of Modern Awards – Penalty Rates Decision* (the **Penalty Rates Decision**), the Full Bench made the following comments about the modern awards objective:

While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions... fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.⁵

28. As stated in the *Penalty Rates Decision*, no particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award:

“The Commission’s task is to take into account the various considerations and ensure that the modern award provides a ‘fair and relevant minimum safety net’”.⁶

29. The FWC’s task in the context of the 4 Yearly Review was summarised at paragraph [269] of the *Penalty Rates Decision* as follows: (emphasis added)

1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.
2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

⁵ [2017] FWCFB 1001, [116] – [117].

⁶ [2017] FWCFB 1001, [115], [116] and [196].

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
- the legislative context which pertained at that time may be materially different from the FW Act;
 - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
 - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.

5. COVERAGE OF THE PROFESSIONALS AWARD

30. The Professionals Award provides occupational coverage for professional engineers and professional scientists and industry award coverage for professionals in four other specified industries.
31. In summary:
 - a. Professional engineers are covered in all industries, other than those industries identified in subclauses 4.4 and 4.5 (see subclause 4.1);
 - b. Professional scientists are covered in all industries, other than those industries identified in subclauses 4.4 and 4.5 (see subclause 4.1);
 - c. Information technology professionals are only covered if their employer is principally engaged in the information technology industry (see subclause 4.2);
 - d. Telecommunications professionals are only covered if their employer is principally engaged in the telecommunications services industry (see subclause 4.2);
 - e. Quality auditing professionals are only covered if their employer is principally engaged in the quality auditing industry (see subclause 4.2);
and
 - f. Medical research professionals only covered if their employer is principally engaged as a medical research institute (see subclause 4.3).

6. UPDATING OF ACS MEMBERSHIP GRADE

6.1 Explanation of, and merits of, the proposed change

32. In these proceedings, Ai Group is pursuing a claim to update the ACS membership grade referred to in the definitions of *Experienced information technology employee*, *Graduate information technology employee* and *Professional information technology duties* in clause 2 – Definitions and Interpretation, of the exposure draft (clause 3 in the current Award).

33. The changes that are sought are as follows:

Experienced information technology employee means a professional information technology employee with the undermentioned qualifications in any particular employment the adequate discharge of any portion of the duties of which employment requires:

- (a) that they have graduated with a university degree, with a science or information technology major (three, four or five year course) and had four years' experience on professional information technology duties since graduating; or
- (b) that they, not having so graduated, have sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society plus a further four years' experience on professional information technology duties.

Graduate information technology employee means a person who:

- (a) holds a university degree with a science or information technology major (three, four or five year course) accredited by the Australian Computer Society at professional level; or
- (b) has sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society.

professional information technology duties means duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires a person to:

- (a) hold a university degree with a science or information technology major (three, four or five year course) accredited by the Australian Computer Society at professional level; or
- (b) has sufficient qualifications and experience to be ~~eligible for admission as a member~~ a Certified Professional of the Australian Computer Society.

34. The above changes have been agreed upon between Ai Group and APESMA, as can be seen from Attachment A to APESMA's submission of 15 July 2019.
35. The current ACA membership grade of "Certified Professional" is similar to the former membership grade of "Member", as currently appears in the Award.
36. In 2001, the *Information Technology (Professional Engineers) Award 1999* was varied, by consent between Ai Group and APESMA, to include an information technology stream. At the time the name of the award was varied to become the *Information Technology (Professional Employees) Award 2001*.
37. It can be seen from the submissions of APESMA and Ai Group, as recorded on the [transcript of the proceedings before Deputy President Kaufman on 19 November 2001](#), that the ACS grade of "Member" had rigorous qualification and experience requirements. These align with what the ACS now calls a "Certified Professional".
38. The reason why Ai Group is pursuing this matter as a substantive claim, rather than a minor matter to be dealt with in the exposure draft process, largely relates to the timing of when Ai Group identified the issue.
39. During the exposure draft process, APESMA identified that the membership grades for various professional scientific bodies referred to in the Award had recently changed and should be amended to refer to the current membership grades that most closely align with the qualification and experience requirements intended when the relevant provisions were included in the Award. This issue was worked through between Ai Group, APESMA, ABI and AFEI during the exposure draft process before Commissioner Cirkovic in 2017. The following amended wording for the Professionals Award was agreed upon, which appears to have been inadvertently omitted from the latest exposure draft:

Academic schedule

- (a) A degree in science from an Australian, New Zealand or United Kingdom university or from an Australian tertiary educational institution.

- (b) Academic qualifications acceptable to the Royal Australian Chemical Institute for admission to the grade of Graduate Chemist (MRACI), Early Career Chemist (MRACI)(CChem) or Member (MRACI).
- (c) Academic qualifications acceptable to The Australian Institute of Physics for admission to the grade of Member (MAIP).
- (d) Academic qualifications in metallurgy, metallurgical engineering or technology acceptable to either the Australasian Institute of Mining and Metallurgy for admission to the grade of Graduate Member, or the Institution of Materials, Minerals Mining (London) for admission to the grades of Professional Graduate Member or Associate Member.
- (e) Academic qualifications acceptable to the Australian Institute of Agricultural Science and Technology for admission to the category of 1st Year Graduate Member, 2nd Year Graduate Member or Full Member.
- (f) Academic qualifications acceptable to the Australian Institute of Food Science and Technology for admission to the grade of Graduate Member.
- (g) Academic qualifications acceptable to a pharmacy board or council within the Commonwealth of Australia provided that the award will not apply to pharmacists employed in a retail pharmacy shop.

Experienced scientist means a Professional scientist possessing the following qualifications and engaged in any particular employment, the adequate discharge of any portion of the duties of which, requires the possession of such qualifications.

The qualifications are:

- (a) A degree or diploma and the following further experience in professional scientific duties obtained after their degree or diploma:
 - (i) when a graduate (four or five year course) – four years' experience;
 - (ii) when a graduate (three year course) – five years' experience, or
- (b) that they possess qualifications acceptable to:
 - (i) the Royal Australian Chemical Institute for admission to the grade of Chartered Member; or
 - (ii) the Australian Institute of Physics for admission to the grade of Member (MAIP); or
 - (iii) the Australasian Institute of Mining and Metallurgy for admission to the grade of Member; or
 - (iv) the Australian Institute of Food Science and Technology for admission to the grade of Professional Member.

40. In its submission of 15 July 2019, APESMA expresses support for Ai Group’s proposed amendment to the Award. APESMA also concurs with Ai Group’s view that the ACS matter is similar in nature to the amendments that were agreed upon between the parties during the exposure draft process to update the membership grades for various professional scientific bodies. The following paragraph 7 of APESMA’s submission of 12 July 2019 is relevant:

7. The proposed variation to the membership requirements for the Australian Computer Society which are relevant to the definition of Information Technology Employees were outlined in the Ai Group claim filed on 12th October 2019 and are in a similar vein to the upgrading of the Professional Scientists definitions. APESMA supports the Ai Group’s proposed variations to Clause 2.

41. With regard to the requirements that need to be met by the proponent of a substantive claim, Ai Group’s claim falls with the category of a “self-evident” claim, as referred to in paragraph [23] of the Preliminary Jurisdictional Issues Decision, that can be determined with little formality: (emphasis added)

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁷

6.2 The modern awards objective

42. The proposed amendment is necessary to achieve (s.138), and is consistent with, the modern awards objective (s.134).

43. The current lack of clarity about the information technology professional classifications in the Award is inconsistent with the maintenance of a fair and relevant safety net of award conditions. The changes would update the Award

⁷ [2014] FWCFB 1788, [23].

and, hence, make the Award more relevant.

44. The proposed amendments are consistent with the following elements of the modern awards objective:

- **s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden:**

Increased clarity about the information technology professional classifications covered by the Award would reduce cost risks and the regulatory burden for businesses. Accordingly, the proposed variation furthers s.134(1)(f) of the FW Act.

- **s.134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards:**

The current lack of clarity about the information technology professional classifications covered by the Award is not conducive to the maintenance of a simple and easy to understand modern award system.

Also, allowing award coverage to change simply because the ACS decides to re-label its membership grades is not consistent with the maintenance of a stable safety net.

45. The other elements of the modern awards objective are neutral considerations

46. For the above reasons, Ai Group's proposed variation has substantial merit and meets all of the relevant legislative and other requirements.

7. APESMA'S HOURS OF WORK CLAIM

7.1 Explanation of the draft hours of work clause

47. APESMA's proposed variations would introduce additional hours of work safeguards for employees classified at Level 1 and Level 2 under the Professionals Award, including:
- a. A requirement that an employee be advised of the method by which the employee will be remunerated for any additional hours or shiftwork that an employer requires the professional employee to work;
 - b. Additional record-keeping obligations;
 - c. A periodic reconciliation requirement;
 - d. More detailed time off in lieu provisions; and
 - e. More detailed requirements in respect of certain professional employees who are working shift work and/or public holiday work in an office of other establishment where the majority of employees are carrying out similar work in the same work environment and are entitled to loadings or penalties for such work under a different award.

7.2 History of the hours of work provisions in the relevant pre-modern awards

48. The main pre-modern awards that the Professionals Award replaced were:
- a. The *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998*;
 - b. The *Technical Services Professional Engineers (General Industries) Award 1998*;
 - c. The *Scientific Services Professional Scientists Award 1998*;

- d. The *Information Technology Industry (Professional Employees) Award 2001*; and
 - e. The *Telecommunications Industry (Professional Employees) Award 2002*.
49. The history of the pre-modern awards that covered the types of employees who are now covered by the Professionals Award demonstrates that the Commission's predecessors have recognised with marked consistency over the past four decades that the award provisions applicable to such highly educated employees should include a significant degree of flexibility.
50. A clause entitled "Overtime" was inserted into the *Metal Industry Award 1971 – Part III – Professional Engineers* through a decision of the Australian Conciliation and Arbitration Commission on 10 August 1982.⁸ The Award did not include an hours of work clause. The significant degree of flexibility provided to employers in determining the method of compensation for additional hours is demonstrated by the wording of the clause, which bears some similarity to hours of work clause in the Professionals Award:

8 – Overtime

Employers will compensate for time worked regularly in excess of normal hours either by:

- (a) granting other compensation such as special additional leave, or
 - (b) granting special additional remuneration, or
 - (c) taking this factor into account in the fixation of annual remuneration
51. Notably, the *Metal Industry Award 1971 – Part III – Professional Engineers* only provided for annual salaries and did not include any weekly or hourly wage rates.

⁸ 279 CAR 175.

52. The *Metal Industry Award 1984 – Part III – Professional Engineers* included an identical clause 8 to the above “Overtime” clause in the *Metal Industry Award 1971 – Part III*. Similar to the 1971 Award, the 1984 Award did not include an hours of work clause.
53. An identical “Overtime” clause was included in the *Metal Industry Award 1984 – Part IV – Professional Scientists* (at clause 12). This award did not include an hours of work clause.
54. Various modified forms of the above provision were included in the pre-modern awards which applied to professional engineers, professional scientists and professional information technology and telecommunications employees. None of the pre-modern awards included overtime penalty rates.
55. Relevant provisions from the key pre-modern awards, that were replaced by the Professionals Award, are set out below:

Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998

5.3 HOURS OF WORK AND OVERTIME

5.3.1 The ordinary hours of work of an employee should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. Employers will compensate for time worked regularly in excess of ordinary hours of duty either by:

5.3.1(a) taking this factor into account in the fixation of annual remuneration;

5.3.1(b) granting special additional remuneration; or

5.3.1(c) granting other compensation such as special additional leave.

Technical Services Professional Engineers (General Industries) Award 1998

15. HOURS OF DUTY

15.1 The ordinary hours of duty of a professional engineer should not exceed the normal hours of duty in the particular industry or sector of industry in which the professional engineer is employed. Employers will compensate for time worked regularly in excess of normal hours of duty either by:

15.1.1 taking this factor into account in the fixation of annual remuneration;

15.1.2 granting special additional remuneration; or

- 15.1.3 granting other compensation such as special additional leave.

Scientific Services Professional Scientists Award 1998

15. HOURS OF DUTY

The ordinary hours of duty of a professional scientist should not exceed the normal hours of duty in the particular industry or sector of industry in which the professional scientist is employed. Employers will compensate for time worked regularly in excess of ordinary hours of duty either by:

- 15.1 taking this factor into account in the fixation of annual remuneration; or
- 15.2 granting special additional remuneration; or
- 15.3 granting other compensation such as special additional leave.

Information Technology Industry (Professional Employees) Award 2001

21. HOURS OF WORK AND RELATED MATTERS

21.1 The ordinary hours of work of an employee should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. Employers will compensate for:

- 21.1.1 time worked regularly in excess of ordinary hours of duty;
- 21.1.2 time worked on call backs;
- 21.1.3 time spent standing-by in readiness for a call back;
- 21.1.4 time spent carrying out professional engineering duties or professional information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
- 21.1.5 time worked on afternoon, night or weekend shifts;
either by:
 - 21.1.6 taking this factor into account in the fixation of annual remuneration;
 - 21.1.7 granting special additional remuneration; or
 - 21.1.8 granting a special allowance or loading; or
 - 21.1.9 granting other compensation such as special additional leave

21.2 Upon a request in writing being made to the employer, an employee shall be advised in writing of the method of compensation being used in respect of any of the matters specified in 21.1.1, 21.1.2, 21.1.3, 21.1.4 and 21.1.5. The methods of compensation are set out in 21.1.6, 21.1.7, 21.1.8 and 21.1.9. If the employer is compensating the employee by a method identified in 21.1.7 or 21.1.8, the employer shall identify the special additional remuneration, allowance or loading which is being paid.

Telecommunications Industry (Professional Employees) Award 2002

21. HOURS OF WORK AND RELATED MATTERS

- 21.1** The ordinary hours of work of an employee should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. Employers will compensate for:
- 21.1.1** time worked regularly in excess of ordinary hours of duty;
 - 21.1.2** time worked on call backs;
 - 21.1.3** time spent standing-by in readiness for a call back;
 - 21.1.4** time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
 - 21.1.5** time worked on afternoon, night or weekend shifts;
either by:
 - 21.1.6** taking this factor into account in the fixation of annual remuneration;
 - 21.1.7** granting special additional remuneration; or
 - 21.1.8** granting a special allowance or loading; or
 - 21.1.9** granting other compensation such as special additional leave
 - 21.2** Upon a request in writing being made to the employer, an employee shall be advised in writing of the method of compensation being used in respect of any of the matters specified in 21.1.1, 21.1.2, 21.1.3, 21.1.4 and 21.1.5. The methods of compensation are set out in 21.1.6, 21.1.7, 21.1.8 and 21.1.9. If the employer is compensating the employee by a method identified in 21.1.7 or 21.1.8, the employer shall identify the special additional remuneration, allowance or loading which is being paid.

56. It can be seen from the above that the key pre-modern awards included hours of work provisions that gave an employer a substantial amount of flexibility in deciding how an employee should be compensated for any additional hours worked and, in respect of the *Information Technology Industry (Professional Employees) Award 2001* and the *Telecommunications Industry (Professional Employees) Award 2002*, for shift work.

57. The hours of work clauses in the *Information Technology Industry (Professional Employees) Award 2001* and the *Telecommunications Industry (Professional Employees) Award 2002* were negotiated between Ai Group and APESMA and were implemented by consent.

7.3 Award modernisation developments

58. Ai Group was heavily involved in the development of the Professionals Award in the course of the Part 10A Award Modernisation Process.
59. During Stage 2 of the Award Modernisation Process, Ai Group and APESMA submitted a joint draft [*Information Technology and Telecommunication Services Industries Professional Employees Award 2010*](#) to the AIRC on 10 December 2008. The joint draft award included an agreed hours of work clause that was very similar to the clauses in the *Information Technology Industry (Professional Employees) Award 2001* and the *Telecommunications Industry (Professional Employees) Award 2002*.
60. In its Stage 2 Award Modernisation Statement of 23 January 2009,⁹ the Full Bench advised that it had decided to defer consideration of an award for information technology and telecommunication professionals until Stage 3: (emphasis added)

[87] We publish an exposure draft of a *Telecommunications Services Industry Award 2010* (Telecommunications Modern Award). The telecommunication services industry covers...

[88] The draft award covers all current award-covered employees apart from professional employees. The parties to the current award agree that the nature of professional employment in the sector makes it more appropriate that there be a separate award for professional employees. The employers proposed an information technology and telecommunications industry award confined to professional employees engaged in those industries. The Association of Professional Engineers, Scientists and Managers, Australia proposed an occupational award covering information technology and telecommunications professionals.

[89] We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process. The nature of awards covering professional employees generally will be considered in Stage 3 and the alternative approaches can be considered in that broader context.

⁹ [2009] AIRCFB 50.

61. During Stage 3 of the Award Modernisation Process, Ai Group and APESMA submitted a joint draft [Professional Engineers and Scientists - Private Sector - Award 2010](#) on 6 March 2009. Some elements of the hours of work clause in the joint draft were agreed and others were not, as highlighted below:

24. Ordinary hours of work and compensation for additional hours

24.1 The ordinary hours of duty of an employee must not exceed 38 per week.
(APESMA CLAUSE)

24.1 The ordinary hours of work of an employee should not exceed the ordinary hours of duty in the particular industry or sector of industry in which the employee is employed. **(Ai GROUP CLAUSE)**

24.2 Employers will compensate for time worked regularly in excess of ordinary hours of duty either by:

- (a) Granting other compensation such as special additional leave; or
- (b) Granting special additional remuneration; or
- (c) Taking this factor into account in the fixation of annual remuneration;
or

APESMA CLAUSE:

- (d) Payment at the same penalty rate and upon the same conditions as are applicable from time to time to the majority of employees employed in the particular establishment in which the employee is employed.

62. The hours of work clause in the Exposure Draft of the Professionals Award, that was issued by the AIRC on 22 May 2009, was largely based on the clause in the joint Ai Group/APESMA draft *Information Technology and Telecommunication Services Industries Professional Employees Award 2010* that had been submitted to the AIRC during Stage 2. A notable exception was the underlined wording below that appears to be a modified version of clause 24.2(d) that APESMA was seeking for the proposed *Professional Engineers and Scientists – Private Sector – Award 2010*: (emphasis added)

18. Ordinary hours of work and rostering

18.1 For the purpose of the NES, ordinary hours of work under this award are 38 per week. An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over the cycle.

18.2 Employers will compensate for:

- (a) time worked regularly in excess of ordinary hours of day;
- (b) time worked on call backs;
- (c) time spent standing-by in readiness for a call back;
- (d) time spend carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
- (e) time worked on afternoon, night or weekend shifts; either by
 - (i) granting other compensation such as special additional leave; or
 - (ii) granting special additional remuneration; or
 - (iii) taking this factor into account in the fixation of annual remuneration; or
 - (iv) granting a special allowance or loading.

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

18.3 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

18.4 Transfers

Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice. However, the employer and the employee may agree on a lesser period of notice.

63. At paragraphs 378 – 388 of Ai Group's submissions of 12 June 2009, the following points were made:

Clause 18 – Hours of work

378. Ai Group strongly opposes the hours of work clause in the exposure draft. This clause is far more prescriptive than the provisions of the existing major awards applicable to engineers, scientists, IT and telecommunications professionals.

379. As set out above, the major federal awards covering these types of professionals are essentially consent awards between Ai Group and APESMA and the longstanding consent position (which revolves around a flexible, non-prescriptive approach) should not be disturbed in the name of award modernisation.

380. The provision which Ai Group is most concerned about is the following paragraph of sub-clause 18.2:

“Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as

applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

381. This provision is totally inappropriate for an award covering professional employees. It is very common for professional employees to work in establishments where non-professional employees receive penalty rates. Such rates should have no bearing on the rates paid to professional employees.
382. The rates of pay applicable to professional employees (both award rates and over-award rates) take into account the nature of professional employment. Professional employees are very rarely paid penalty rates.
383. In setting remuneration for professional employees, employers take into account:
 - Award minimum salaries;
 - The specific duties and responsibilities of the role;
 - The qualifications required of the employee; and
 - Market conditions.
384. The responsibilities, duties, technical expertise and qualifications required of professional employees are different to the responsibilities, duties, expertise and qualifications of non-professional employees. These differences are reflected in the remuneration arrangements for these positions, including any additional or irregular hours worked.
385. Professional employees are typically paid an annual salary which compensates the employee for discharging the responsibilities and duties associated with the job. In discharging these duties professional employees are sometimes required to work irregular or additional hours beyond their ordinary hours.
386. In addition to the professional employees who are required by their employer to work reasonable additional hours, there are a very large number of professional employees who choose to work additional hours because of such factors as:
 - Their motivation and work ethic;
 - The satisfaction which they derive from their job;
 - The enjoyment and recognition that they receive from their job;
 - Their desire for career progression; and
 - Their desire to perform at a high level and achieve work goals.
387. Far from being modern, the above paragraph of sub-clause 18.2 belongs in an era long gone. The provision is totally inconsistent with the nature of professional employment and the needs of contemporary workplaces.
388. If the inappropriate paragraph is removed, the rest of sub-clause 18.2 is largely similar to the hours of work clause in the *Information Technology Industry (Professional Employees) Award* and the *Telecommunications Industry (Professional Employees) Award*. These consent clauses have worked well in practice and have not operated unfairly for employees or employers.

64. In its decision of 4 September 2009, the AIRC acknowledged Ai Group's concerns regarding clause 18.2 in the Exposure Draft, but highlighted that the provision was not prescriptive:¹⁰

[236] An important change sought by AiGroup related to the way in which employers would consider a total remuneration package for employees having regard to patterns of work. We have retained the provision contained in the exposure draft. In our view this is not prescriptive but nonetheless alerts employers to the need to take into consideration the demands placed upon professional employees when fixing remuneration.

65. It is clear from the above paragraph [236] that the intent of the AIRC was to ensure that a significant degree of flexibility was retained, reflective of the pre-modern awards that had been applicable to the sector.
66. Following the making of the Professionals Award, APESMA sought transitional provisions to be included in the Award reflecting certain NAPSAs which provided for specified rates of pay during periods of overtime. Ai Group opposed the inclusion of such provisions. The relevant section from Ai Group's Reply Submission in the Stage 3 – Transitional Provisions proceedings is reproduced below:

Overtime – penalty rates

19. Throughout the course of proceedings in relation to the *Professional Employees Award 2010*, Ai Group vigorously pressed for flexible hours of work provisions to be included within the modern award. These flexible hours of work provisions included flexibilities in relation to working of additional hours and the method of compensation for such hours.
20. In making the Award, the Full Bench noted that whilst it had not adopted the precise proposal which we had advanced in respect of hours of work, they had considered the need for a non-prescriptive approach to the hours of work performed under the award.¹¹
21. We submit that this determination in relation to the appropriateness of flexible hours of work and overtime provisions applying to professional employees, should not be displaced, even on a transitional basis, as suggested by APESMA.
22. We further contend that prescription in relation to additional hours of work is entirely unnecessary when one considers the provision regarding compensation which has been inserted into the modern award. Clause 18.2 and 18.3 of the *Professional Employees Award 2010* provides:

¹⁰ [2009] AIRC 826, [236].

¹¹ [2009] AIRCFB 826; at [236]

“18.2 Employers will compensate for:

- (a) time worked regularly in excess of ordinary hours of day;
- (b) time worked on call backs;
- (c) time spent standing-by in readiness for a call back;
- (d) time spend carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or
- (e) time worked on afternoon, night or weekend shifts; either by
 - (i) granting other compensation such as special additional leave; or
 - (ii) granting special additional remuneration; or
 - (iii) taking this factor into account in the fixation of annual remuneration; or
 - (iv) granting a special allowance or loading.

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

18.3 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.”

23. The Full Bench in its decision of 4 September 2009 explained the retention of this clause, despite Ai Group’s objections, in the following terms:

“[236] An important change sought by AiGroup related to the way in which employers would consider a total remuneration package for employees having regard to patterns of work. We have retained the provision contained in the exposure draft. In our view this is not prescriptive but nonetheless alerts employers to the need to take into consideration the demands placed upon professional employees when fixing remuneration.”

(Emphasis Added)

24. The dual operation of clauses 18.2 and 18.3 within the modern award prevent employees from exposure to the substantial disadvantage for which transitional provisions are intended to protect against. Indeed, as with the submissions advanced by APESMA in relation to the retention of the BHP Overtime Provision, there is no identification of employee disadvantage beyond the simplistic assertion that the modern award does not contain provisions identical to those found in a single pre-reform award and a limited number of NAPSAs. We submit that this provides no meritorious basis for modification of the Model Provisions.

67. In its decision,¹² rejecting APESMA’s proposed transitional arrangements, the Full Bench said: (emphasis added)

[20] In relation to the *Professional Employees Award 2010* the Association of Professional Engineers, Scientists and Managers, Australia (APESMA), sought a number of additional transitional arrangements. First, it sought the continuation of some provisions specific to a named employer. We have generally not retained

¹² [2009] AIRCFB 943.

conditions applicable to specific employers, even on a transitional basis, as they rarely constitute part of the safety net. It would not be appropriate to make an exception in this case. Such matters are capable of being dealt with by agreement. Secondly, APESMA sought special transitional provisions related to overtime and public holiday penalty rates. We note that cl.18.3 and 18.4 of the *Professional Employees Award 2010* provide a system of compensation for work in excess of ordinary hours. APESMA seeks to preserve the terms of Notional Agreements Preserving State Awards (NAPSAs) which provide that hours worked in excess of ordinary hours attract penalty rates for a period of five years. This would be inconsistent with the terms of the modern award, as APESMA concedes. The modern award provision should be implemented. APESMA also sought to preserve until 31 December 2014 a vehicle allowance...

68. These developments again highlight the AIRC's recognition of the importance of the flexible, non-prescriptive provisions which are inherent in the hours of work clause in the Professionals Award. The Full Bench determined that the compensation provided for in clauses 18.3 and 18.4 of the Professionals Award provided an appropriate system for dealing with hours of work, including any additional hours.

7.4 The hours of work clause in the Professionals Award is not an annualised wage arrangement provision

69. The hours of work clause in the Professionals Award has never been regarded as an annualised wage arrangement provision and, if varied in accordance with the draft variations in Attachment A to APESMA's submission of 15 July 2019, it would remain an hours of work provision and not an annualised wage arrangement provision.
70. Annualised wage arrangement provisions are typically found in the wages clauses of awards, not in hours of work clauses.
71. The amendments that APESMA has proposed to the hours of work clause of the Professionals Award, and which Ai Group is not objecting to, are not annualised wage arrangements.
72. Employees covered by the Professionals Award are typically paid an annual salary – not an annualised wage.

73. As stated in s.139(1)(f)(ii), annualised wage arrangements “provide an alternative to the separate payment of wages and other monetary entitlements”. This is not what the hours of work clause in the Professionals Award does. The Award and its predecessors have never included specific overtime penalties, shift penalties or weekend penalties.
74. The hours of work clause in the Professionals Award and the clauses in the predecessor pre-modern awards have never been characterised as, or considered to be, an annualised wage arrangement provision.
75. The inclusion of some additional safeguards in the hours of work does not alter the character of the clause.

7.5 The clause is not intended to invalidate or regulate and common law “set off” arrangements

76. Ai Group and APESMA have agreed that changes to the hours of work clause in the Professionals Award must not invalidate or regulate common law “set off” arrangements for employees covered by the Award.
77. The terms of the agreement reached on this matter are set out in the following paragraph 4 of APESMA’s submission of 15 July 2019:
 4. APESMA and Ai Group have also agreed that the award clauses do not seek to invalidate or regulate an annual salary arrangement that compensates for or “buys out” various identified award entitlements in accordance with the principles stated in *Australia and New Zealand Banking Group v Finance Sector Union of Australia* 111 IR 227 and *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* 240 FCR 578.
78. Common law set off arrangements are very common in employment contracts that apply to professional employees, including employees covered by the Professionals Award.

7.6 The elements of the draft hours of work clause are a package – Ai Group would strongly oppose APESMA’s hours of work claim if the package is disturbed

79. As stated in APESMA’s submission of 15 July 2019, the draft award amendments set out in Attachment A to that submission are the outcome of extensive discussions and negotiations between Ai Group and APESMA. Ai Group’s claim to update the ACS membership grade is not contentious and, therefore, not surprisingly, the negotiations focussed on APESMA’s hours of work claim.
80. Ai Group and APESMA have had numerous meetings over recent months in a concerted endeavour to reach agreement on changes to the hours of work clause.
81. The draft award variations in Attachment A to APESMA’s submission of 15 July 2019 are the outcome of those extensive negotiations. The draft variations are a package and significant and difficult concessions have been made by each party on that basis.
82. Ai Group does not oppose the package of award amendments set out in Attachment A to APESMA’s submission, but this position is based on the Commission’s support for the whole package. Ai Group would strongly oppose APESMA’s hours of work claim, if the package is disturbed in any way that imposes more restrictions, inflexibilities or costs upon employers.
83. In the interests of natural justice, Ai Group seeks that the Commission give Ai Group the opportunity to file detailed evidence and make further detailed submissions if the package of award variations is not supported by the Commission and more inflexible or costly provisions are proposed.

7.7 APESMA's evidence

84. Ai Group has not filed reply evidence in these proceedings on the basis that the proceedings pertain to the substantive claims of the parties and, in that context, we do not envisage that the Commission will vary the Award in any manner that would impose a more inflexible or costly outcome upon employers than the outcome reflected in the package in Attachment A.
85. Given that a package of award variations was arrived at as a result of detailed negotiations between the parties, Ai Group has not taken issue in this submission with any aspects of APESMA's evidence. Also, given the package reached, Ai Group has not filed any reply evidence.
86. However, the position that Ai Group has expressed in this submission should not be taken as indicating that we accept, or agree with, all of the evidence filed by APESMA.
87. As stated above, in the interests of natural justice, if the Full Bench contemplates varying the Professionals Award to impose more restrictive, costly or inflexible provisions on employers than those included in the package agreed upon between Ai Group and APESMA, Ai Group would seek the opportunity to file detailed evidence and make further detailed submissions in these proceedings before the Award is varied.

7.8 The modern awards objective

88. The package of award variations in Attachment A of APESMA's submission of 15 July are consistent with the modern awards objective. However, any more restrictive, inflexible or costly amendments to the hours of work provisions in the Award would not be consistent with the following elements of the modern awards objective:
- a. s.134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work;

- b. s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- c. 134(1)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.