

FAIR WORK COMMISSION

s.156 - 4 Yearly Review of Modern Awards

Matter No.: AM2019/5

Professional Employees Award 2020

Outline of Submissions

on

**APESMA Application to Vary Clause 13 – Ordinary Hours of Work of
the Professional Employees Award 2020**



**Association of Professional Engineers, Scientists and Managers,
Australia (APESMA)**

DATE: 28 August 2020

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Introduction and Variations Sought

1. These submissions are filed by the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) in accordance with the Directions of the Full Bench as contained in paragraph [87] of its Decision in these proceedings of 22 April 2020 (the Decision of 22 April 2020)¹.
 1. In response to the Full Bench’s Decision of 22 April 2020, APESMA now seeks the proposed award variation set out in the Draft Determination filed along with these submissions on 28 August 2020 (**APESMA’s August 2020 Draft Determination**).
 2. Essentially APESMA’s August 2020 Draft Determination addresses the Full Bench’s comments at paragraph [85] of the Decision of 22 April 2020 where it stated (in relation to the draft variation determination jointly submitted by Ai Group and APESMA on 18 December 2019):

“As we have mentioned, the proposed clause inappropriately conflates terms dealing with ordinary hours, overtime, annual salary and time off in lieu of overtime (TOIL). These subject matters need to be dealt with separately and the parties need to justify any departure from the principles enunciated by the Annualised Wage Arrangements Full Bench.”
 3. APESMA’s August 2020 Draft Determination deals with the four matters separately and does not depart from the principles enunciated by the Annual Wage Arrangements Full Bench.²

Ordinary Hours

4. Subclauses 13.1 and 13.2 of the Award deal with Ordinary Hours and remain unchanged by APESMA’s August 2020 Draft Determination. Subclauses 13.1 and 13.2 provide as follows:

13.1 For the purpose of the [NES](#), ordinary hours of work under this award are 38 per week.

¹ [2020] FWCFB 2057

² [2018] FWCFB 154

13.2 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.

Annualised Wage Arrangements

5. APESMA's proposed Clause 13B (set out at **[B]** in APESMA's August 2020 Draft Determination), proposes to insert Model Clause 1 from the Annualised Wage Arrangements Full Bench Decision of 20 February 2018 (the Annualised Wage Decision).³
6. APESMA's proposed Clause 13B inserts Model Clause 1 unchanged except for
X.1 (iv) clause X – Weekend and other penalty rates
as the Professional Employees Award 2020 does not make provision for Weekend and other penalty rates.

Time Off In lieu of Overtime

7. APESMA's proposed Clause 13A.10 (set out at **[B]** in APESMA's August 2020 Draft Determination), proposes to insert unchanged, the Final model TOIL term which is Attachment A to the Full Bench decision of 11 July 2016 dealing with Time Off In Lieu of payment for Overtime as part of the 4 yearly review⁴ (the TOIL Full Bench Decision).
8. APESMA's proposed Schedule F (set out at **[C]** in APESMA's August 2020 Draft Determination), proposes to insert unchanged, the model template Agreement for Time Off Instead of Payment For Overtime which is contained in Attachment A to the TOIL Full Bench Decision.

³ [2018]FWCFB154 at [130]

⁴ [2016]FWCFB 4579 at Attachment A

Overtime

9. Section 134 (1) of the Fair Work Act 2009 (Cth) (the Act) sets out the modern awards objective and provides that the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters set out in section 134 subclauses (a) to (da). Section 134 (1)(da) provides as follows:

FAIR WORK ACT 2009- SECT 134

The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

.....

(da) the need to provide additional remuneration for:

- (i) employees working overtime; or*
- (ii) employees working unsocial, irregular or unpredictable hours; or*
- (iii) employees working on weekends or public holidays; or*
- (iv) employees working shifts; and*

10. In APESMA's submission, for the Professional Employees Award 2020 (the Award), to provide a fair and relevant minimum safety net of terms and conditions, it must make provision for employees covered by the Award to be paid *additional* remuneration in the circumstances set out section 134 (1) (da) of the Act.

11. Clause 13.3 of the Professional Employees Award 2020 (the Award) currently provides an entitlement to all employees covered by the award (regardless of Level) to compensation for:

- (a)** time worked regularly in excess of ordinary hours of duty;
- (b)** time worked on-call-backs;
- (c)** time spent standing by in readiness for a call-back;

(d) time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours over the telephone or via remote access arrangements; or

(e) time worked on afternoon, night or weekend shifts.

12. The provision of compensation for the time worked in the circumstances described in sub clauses 13.3 (a) to (e) is not optional for employers. Clause 13.3 states that “employers *must* compensate for” time worked in all those circumstances (italics have been added for emphasis).
13. Further, while Subclause Clause 13.4 provides that the compensation may take a number of forms, (for example, the granting of special additional remuneration, granting a special allowance or loading), the wording of subclause 13.6 makes it clear that the compensation must be set “at an appropriate level having regard to the factors listed in clause 13”.
14. Subclause 13.5 provides that where employees covered by the Award work in establishments where the majority of employees have entitlements to conditions such as penalty rates, then employees covered by the Award will similarly have an entitlement to compensation that reflects those penalty rates and other conditions. This means that currently, professional engineers and professional scientists that work in workplaces where the majority of employees are covered by the Manufacturing and Associated Industries and Occupations Award 2020 will have an entitlement to be paid overtime at the rate of 150% of the ordinary hourly rate for the first 3 hours, and 200% of the ordinary hourly rate thereafter (see clause 32.2 of the Manufacturing and Associated Industries and Occupations Award 2020).
15. The entitlements employees covered by the Award currently enjoy courtesy of Clause 13 of the Award clearly constitute entitlements of the type contemplated by section 134(1)(da) of the Act, despite the fact that Clause 13 is not titled ‘Overtime’ as similar clauses are in most Awards.
16. In APESMA’s submission the current drafting of Subclauses 13.3 to 13.6 of the Award is insufficient in detail regarding the rates at which overtime must be paid. As such the insufficiency in detail of the subclauses prevents the Award meeting the

modern Awards objective in so far as Section 134 (1)(da) requires it to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours or shift work. As such, APESMA submits that subclauses 13.3 to 13.6 (both inclusive) be deleted from the Award and be replaced with an overtime clause that meets the modern award objective while maintaining the entitlements to additional remuneration for working overtime that are clearly set out in the current Clause 13 of the Award.

17. Further, for the Model Annualised Wage Arrangements and Model TOIL clauses to have any legal efficacy, the Award requires the insertion of an overtime clause which stipulates the actual rates at which overtime is to be calculated.

18. APESMA's proposed Clause 13A (set out at [B] in APESMA's August 2020 Draft Determination), proposes to insert a new Overtime clause in the Award based on Clause 21 Overtime and penalty rates from the Telecommunications Services Award 2010. Clause 21 of the Telecommunications Services Award 2010 was selected as it makes specific provision for 'Call back', 'Remote service / support' and 'Stand-by' scenarios which are all specifically provided for in the current Subclause 13.3 of the Professional Employees Award 2020.

Association of Professional Engineers Scientists Managers Australia (APESMA)

28 August 2020

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s156 - 4 Yearly reviews of modern awards

Professional Employees Award 2020

[AM2019/5]

PRESIDENT ROSS

VICE PRESIDENT HATCHER

COMMISSIONER JOHNS

SYDNEY, XX MM 2018

4 yearly review of modern awards – Professional Employees Award 2010 – substantive claims

Further to the Decision and Reasons for Decision in AM2019/5, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Professional Employees Award 2020 be varied as follows:

[A] Clause 13 – by deleting subclauses 13.3, 13.4, 13.5 and 13.6; and

[B] Insert a new Clause 13A as follows:

13A Overtime

13A.1 Overtime rates

(a) For all work done at the direction of the employer in excess of ordinary hours, an employee will be paid at the rate of time and a half for the first three hours and double time thereafter.

(b) In computing overtime, each day's work will stand alone.

(c) Employees who are late starting or are absent for part of their ordinary hours on unpaid leave will complete their ordinary hours for that day prior to the entitlement to overtime.

13A.2 Minimum payment

(a) An employee required to work overtime on a Saturday or Sunday will be paid for a minimum of three hours at the appropriate rate except where such overtime is worked prior to or at the conclusion of ordinary hours of work.

(b) In such circumstances, the employee will receive payment at the rate prescribed in clause 21.1 hereof for the actual time worked.

13A.3 Rest break during overtime

An employee working overtime will be allowed a rest break of 20 minutes without deduction of pay after each four hours of overtime if the employee continues to work after such rest break.

13A.4 Rest period after overtime

(a) When overtime work is necessary, it will wherever reasonably practicable be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.

(b) An employee (other than a casual or part-time employee), who works so much overtime between the termination of the ordinary work on one day and the commencement of the ordinary work on the next day that the employee did not have at least 10 consecutive hours off duty between those times will, subject to this clause, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(c) If on the instructions of the employer an employee resumes or continues work without having had such 10 consecutive hours off duty, the employee will be paid at the rate of time and a half for the first three hours and double time thereafter until released from duty for such period and then is entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay.

(d) The provisions of this clause will not apply to call backs or in circumstances where an employee provides service or support over the telephone or via remote access arrangements where the time worked is less than three hours during the call back or each call back. Provided that where the total number of hours worked on more than one call back is four hours or more then the provisions of clauses 13A.4(b) and (c) will apply.

13A.6 Call back

(a) An employee recalled to work overtime at the direction of the employer after leaving work will be paid a minimum of three hours at the appropriate overtime rate for each time recalled, except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

An employee will not be required to work the full three hours if the job(s) they are recalled to perform are completed within a shorter period.

(b) Notwithstanding the above, where an employee has completed the call back and left work and is recalled within the three hour minimum period for that call back, the

balance of the three hours' minimum period for that call back will be cancelled and the employee will only be paid up to the commencement of the next call back. The employee will then be entitled to be paid for a minimum of three hours for the next call back.

(c) The provisions of this clause will not apply in circumstances where an employee provides service or support over the telephone or via remote access arrangements.

(d) Overtime worked in circumstances specified in this clause will not be regarded as overtime for the purposes of clause 13A.4 where the time worked is less than three hours during the call back or each call back. Provided that where the total number of hours worked on more than one call back is four hours or more then the provisions of clauses 13A.4(b) and (c) will apply.

13A.7 Remote service/support

(a) An employee required to work overtime **at the direction of the employer** providing service or support over the telephone or via remote access arrangements will be paid for each occasion that such work is carried out:

(i) for a minimum of half an hour at the appropriate overtime rate where such work commences between 5.00 am and up to 10.00 pm;

(ii) for a minimum of one hour at the appropriate overtime rate where such work commences after 10.00 pm and up to midnight; or

(iii) for a minimum of one and a half hours at the appropriate overtime rate where such work commences after midnight and before 5.00 am;

except where the overtime is continuous (subject to a meal break) with the commencement or completion of ordinary hours.

Provided that the employee will not be required to work the full half an hour or one hour or one and a half hours, as the case may be, if the work which the employer requires to be performed is completed within a shorter period.

(b) Notwithstanding the above, where an employee has completed the job and finished work and is required to perform further work within the minimum period specified in clause 13A.7 for that job, the balance of the minimum period for that job will be cancelled and the employee will only be paid up to the commencement of the next work period. The employee will then be entitled to be paid for a minimum of half hour, one hour or one and a half hours, as the case may be, for the next work period.

(c) Overtime worked in circumstances specified in this clause will not be regarded as overtime for the purposes of clause 13A.4 where the time worked is less than three hours during the work period or each work period. Provided that where the total number of hours worked on more than one work period is four hours or more then the provisions of clauses 13A.4(b) and (c) will apply.

(d) Overtime worked in circumstances specified in this clause will not be regarded as overtime for the purposes of clause 13A.10.

13A.8 Stand-by

- (a) An employee who is required to remain in readiness for a return to work outside their normal working hours will be paid an allowance of 20% of the hourly rate for their classification for each hour they are required to stand by.
- (b) While receiving the appropriate overtime rate, the stand-by allowance will not be paid.

13A.9 Reasonable Overtime

- a) Subject to s.62 of the Act and this clause, an employer may require an employee - other than a casual - to work reasonable overtime hours at overtime rates.
- b) An employee may refuse to work overtime hours if they are unreasonable.
- c) In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the factors set out in s.62(3) of the Act are to be taken into account

13A.10 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 13A.10.
- (c) An agreement must state each of the following:
 - (i) the number of overtime hours to which it applies and when those hours were worked;
 - (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
 - (iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule F. There is no requirement to use the form of agreement set out at Schedule F. An agreement under clause 13A.10 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

- (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 13A.10 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 13A.10 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph **(e)**, the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause 13A.10 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 13A.10 will apply, including the requirement for separate written agreements under paragraph **(b)** for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 13A.10 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 13A.10.

[B] Insert a new Clause 13B as follows:

13B. Annualised wage arrangements

13B.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause 13B.1(c), of any or all of the following provisions of the award:

- (i) clause 14 – Minimum weekly wages;
- (ii) clause 16 – Allowances;
- (iii) clause 13A – Overtime penalty rates
- (iv) clause 18.2 – Annual leave loading

(b) Where an annualised wage is paid the employer must advise the employee in writing, and keep a record of:

- (i) the annualised wage that is payable;
- (ii) which of the provisions of this award will be satisfied by payment of the annualised wage;
- (iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and
- (iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 13B.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 13B.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

13B.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 13B.2(b). This record must be signed by the employee each pay period or roster cycle.

13B.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 14—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

[C] Insert a new schedule F as follows:

SCHEDULE F

AGREEMENT FOR TIME OFF INSTEAD OF PAYMENT FOR OVERTIME

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:

Date and time overtime started: ___/___/20___ am/pm

Date and time overtime ended: ___/___/20___ am/pm

Amount of overtime worked: _____ hours and _____ minutes

The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the

overtime when worked and must be made in the pay period immediately following the request.

Signature of employee: _____

Date signed: ___ / ___ /20 ___

Name of employer
representative: _____

Signature of employer
representative: _____

Date signed: ___ / ___ /20 ___

The determination shall operate on and from XX MM 2018

BY THE COMMISSION