

# Alert

## EMPLOYMENT LAW

### Key Changes for Award Based Annualised Wages Ready or not from 1 March 2020!

By Ben Duggan

#### Summary

The Fair Work Commission (**FWC**) has, subject to one final clarifying issue in relation to the hospitality industry, finalised its consideration of Annualised Wage Arrangements as part of the four-yearly review of Modern Awards.

A key change to the current Annualised Wage Arrangements is the move towards 2 model clauses for annual salary arrangements that will introduce the following requirements for the first time:

- a record keeping obligation for employers; and
- the need for employers to conduct a reconciliation each year.

The FWC has established a commencement date for the introduction of these changes of 1 March 2020.

We discuss the proposed key changes to Annualised Wage Arrangements to be introduced by these changes below.

#### The Statutory Framework

A Modern Award may include a number of terms that are identified in the *Fair Work Act* (Cth) 2009 (**FW Act**), including:

Annualised Wage Arrangements that:

- have regard to the patterns of work in an occupation, industry or enterprise;
- provide an alternative to the separate payment of wages and other weekly entitlements; and
- include appropriate safeguards to ensure that individual employees are not disadvantaged.

The FWC is, in turn, required to conduct a four-yearly review of the terms of Modern Awards in accordance with section 156 of the FW Act.

#### Current Annualised Wage Arrangements

A total of 19 Modern Awards,

including key awards such as the *Private Sector Clerks Award* and the *Manufacturing Industry Award*, contain a term which regulates Annualised Wage Arrangements.

The Annualised Wage Arrangements clause which is contained in the *Private Sector Clerks Award* which is similar, in effect, to the same clause found in other modern awards and is as follows:

- 17.1 Annual salary instead of award provisions
- An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
    - clause 16—Minimum weekly wages;
    - clause 19—Allowances;
    - clauses 27 and 28—Overtime and penalty rates; and
    - clause 29.3—Annual leave loading.

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b. Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

#### 17.2 Annual salary not to disadvantage employees

- a. The annual salary 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 salary is paid (or if the employment ceases earlier over such lesser period as has been worked).
- b. The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

#### 17.3 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 16 minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

#### The four-yearly review

An initial four-yearly review of the terms of modern awards was commenced in 2014 (the **Review**).

The FWC identified a number of key terms as contained in Modern Awards for consideration including annual leave, award flexibility, casual employment, payment of wages and annual salary arrangements during the Review.

On 31 May 2016 the President, Justice Ross, issued a statement which indicated his view that he was satisfied that a 'broader review of all annualised salary terms (as contained in those Modern Awards that contain such a term) was required.'

A full bench of the FWC subsequently handed down its decision following a comprehensive review of Annualised Wage Arrangement terms contained in Modern Awards on 20 February 2018 (**Primary Decision**).

The Primary Decision reached a number of conclusions about Annualised Wage clauses, in particular, the following 5 key principles:

- the annualised wage arrangement should be in writing;
- a requirement for an agreement to be reached with an employee before an annualised wage arrangement is introduced in circumstances where the working hours of work are highly variable;
- an agreed annualised wage arrangement should be able

to be terminated on an annual basis by either the employer or the employee;

- an annualised wage clause must not allow an employee to receive less pay over the course of a year than they would have received had they been paid in accordance with the terms of the Modern Award; and
- annualised wage arrangements should only have application to full-time employees unless a workable proposition can be identified for the application of such provisions to part-time employees.

The FWC provisionally proposed some 4 model clauses that were proposed to give effect to these conclusions for insertion into those Modern Awards that had Annualised Wage Arrangements.

In 2019 the FWC has delivered two further decisions that refine its conclusions reached in the Primary Decision, in particular, narrowing to just 2 the number of model clauses (the form of which is set out below), given consideration to transitional arrangements and established a commencement date for the introduction of its changes to the Annualised Wage Arrangement term for Modern Awards of 1 March 2020.<sup>1</sup>

#### New Annualised Wage Arrangements

In its four yearly review of Modern Awards, the FWC has sought, where possible, to

<sup>1</sup> *Annualised Salary Arrangements (4 yearly review)* [2019] FWCFB 1289 and *Annualised Salary Arrangements (4 yearly review)* [2019] 4368.

introduce model clauses in order to standardise common terms across Modern Awards.

As such, the FWC's move to introduce just 2 model Annualised Wage clauses (Model Clause 1 and Model Clause 3 from the Primary Decision) across those Modern Awards that contain such clauses should not be a surprise to stakeholders or commentators.

The 2 model Annualised Wage clauses are in substantially the same form with Model Clause 1 to be introduced into those Modern Awards where employees work reasonable stable hours and Model Clause 3 to be introduced into those Modern Awards where the hours are highly variable.

Employers Groups are disappointed with the form of the 2 model clauses that will introduce new requirements, in particular advice about the Annual Wage Arrangements, record keeping obligations and reconciliation requests, that will increase the compliance requirements on employers who utilise Annualised Wage Arrangements.

The FWC rationale for the introduction of a reconciliation requirement was that a number of Annual Wage Arrangements clauses in existing model awards were not drafted in such a manner as to ensure that employees were not disadvantaged as required by section 139(1)(iii) of the FW Act.

A reconciliation requirement was thought to be the most effective means of ensuring that there was no employee disadvantaged by an Annualised Wage Arrangement entered into under a Modern Award.

This is consistent with the FWC's approach towards loaded rate terms in an enterprise agreement, which where they include a reconciliation requirement that provides for an audit or reconciliation of employees earnings under the enterprise agreement compared to what their earnings would have been under the relevant Modern Award, are more likely to pass the BOOT and be approved by the FWC.<sup>2</sup>

The FWC also concluded that a record keeping requirement (directed towards recording hours of work and breaks from work) was a necessary incident of the requirement to conduct an annual reconciliation.

### Future steps

A number of private sector employers use Annual Wage Arrangements for the award based employees in their business primarily for administrative and payroll convenience.

The FWC's decision that there is a need to introduce additional

<sup>2</sup> See *Loaded Rates Agreement Case* [2018] FWCFB 3610.

requirements, in particular, the need to provide advice about the Annual Wage Arrangements, the record keeping obligations and the reconciliation requirements will increase the administrative burden of these annual salary arrangements for employers.

Employers are likely to continue with Annual Wage Arrangements despite these proposed additional requirements diminishing some of the advantages to employers in entering into such arrangements.

To obtain advice as to your compliance obligations in preparation for these additional requirements for Annual Wage Arrangements for award based employees which will commence on 1 March 2020 please contact a member of our Employment Team.



[MORE INFO](#)

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**Appendix - Model Clauses to be Inserted Into Modern Awards:**

**Model Clause 1**

**X. Annualised wage arrangements**

*X.1 Annualised wage instead of award provisions*

- (a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:
- (i) clause X – Minimum weekly wages;
  - (ii) clause X – Allowances;
  - (iii) clause X – Overtime penalty rates;
  - (iv) clause X – Weekend and other penalty rates; and
  - (v) clause X – 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 X.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 X.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.

*X.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 X.2(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

*X.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 X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

## Model Clause 3

### X. Annualised wage arrangements

#### X.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time employee an annualised wage of an amount that is at least X% more than the minimum weekly wage prescribed in clause X multiplied by 52 for the work being performed in satisfaction, subject to clause X.1(b), of any or all of the following provisions of the award:

- (i) clause X – Minimum weekly wages;
- (ii) clause X – Allowances;
- (iii) clause X – Overtime penalty rates;
- (iv) clause X – Weekend and other penalty rates; and
- (v) clause X – Annual leave loading.

(b) The employee must not be required by the employer in any pay period or roster cycle to work in excess of:

- (i) an average of X ordinary hours which would attract a penalty rate under the provisions of this award per week; or
- (ii) an average of X overtime hours per week without being entitled to an amount in excess of the annualised wage in accordance with clause X.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 in clause X.1(b), 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.

(d) 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; and
- (iii) 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 under clause X.1(b) without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

#### X.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 X.2(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

#### X.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 X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.