Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Professional Employees Award 2020

(AM2019/5)

28 August 2020

4 YEARLY REVIEW OF MODERN AWARDS

AM2019/5 – PROFESSIONAL EMPLOYEES AWARD 2020

Index

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) to address issues raised by the Full Bench of the Fair Work Commission (**Commission**) in its 22 April 2020 Decision (**April 2020 Substantive Claims Decision**) [1] concerning an hours of work claim of the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) relating to the *Professional Employees Award 2020* (**Professionals Award**).

2. As a primary position, this submission proposes several amendments to clause 13 of the Award to address the issues raised by the Commission in the April 2020 Substantive Claims Decision.

3. If the Full Bench does not support Ai Group's primary position, as a secondary position this submission proposes the addition of two new clauses, in addition to the proposed amendments to clause 13:

    a. Clause 14A – Exemptions

    b. Clause 14B – Additional hours (Levels 1 and 2)

[1] [2020] FWCFB 2057.

2. THE NATURE OF THE PROCEEDINGS

4. The proceedings pertain to substantive claims made by APESMA and Ai Group to vary the Professionals Award.

5. The substantive claims pursued in the proceedings were:

   a. A claim by APESMA for amendments to the hours of work clause in the Professionals Award; and

   b. A claim by Ai Group for the updating of a number of definitions, given changes made by various professional bodies to their membership categories.

6. In the *Preliminary Jurisdictional Issues Decision*,[2] the Full Bench confirmed that a party pursuing a substantive claim is required to file probative evidence properly directed to demonstrating the facts supporting the variation that the party has proposed:

> **[23]** …… 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.
>
> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award…….

7. In the proceedings APESMA did not pursue an overtime clause or an annualised salary clause, nor did it file evidence in support of such clauses. The evidence filed by APESMA in the proceedings was filed in support of changes to the hours of work clause in respect of employees at classification Levels 1 and 2.

[2] [2014] FWCFB 1788.

3. THE APRIL 2020 SUBSTANTIVE CLAIMS DECISION

8. In the April 2020 Substantive Claims Decision,[3] the Full Bench stated:

> **[19]** Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)*: as follows:
>
> > '[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.
> >
> > [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, <u>come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net</u>.'
>
> **[20]** In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and <u>evaluate whether the posited terms with a variation met the objective</u>.'
>
> **[21]** <u>We will apply the above principles in this decision</u>.

9. In applying the above principles, the Full Bench decided that:

   a. The award variations proposed in Ai Group's claim were necessary to achieve the modern awards objective and would be granted.[4]

   b. The amendments to the hours of work clause proposed in APESMA's claim are appropriately characterised as an annualised wage arrangement clause.[5]

[3] [2020] FWCFB 2057.

[4] Paragraphs [30]-[33].

[5] Para [75].

c. The amendments to the hours of work clause proposed in APESMA's claim lack merit and are rejected.[6]

d. The current hours of work clause in the award does not achieve the modern awards objective.[7]

10. In conclusion, the Full Bench said:

> **[87]** We propose to provide the parties an opportunity to rectify the deficiencies in their proposed award variation. APESMA and Ai Group will have until 4pm on Friday 3 July 2020 to file a revised proposed variation and submissions in support. If nothing is filed by the prescribed time, we will review the clause 18 and publish our *provisional* views as to its amendment.

11. The Full Bench subsequently amended the filing date in response to a request from Ai Group and APESMA.

12. It is important to note that the changes to the hours of work clause reflected in APESMA's claim (as reflected in the determination jointly filed by Ai Group and APESMA in 2019) are a claim of APESMA, not Ai Group.

13. Consistent with the approach that Ai Group and APESMA have taken throughout the past 50 years to the terms of the awards covering professional engineers, professional scientists and ICT professionals, Ai Group endeavoured to reach agreement with APESMA on an acceptable variation to the hours of work clause in satisfaction of APESMA's claim.

14. Despite the efforts of Ai Group, the Full Bench has rejected APESMA's claim and therefore the claim should have little or no relevance to the remainder of the proceedings.

15. At no stage has the Full Bench held that the existing hours of work clause in the Professionals Award is an annualised wage arrangement clause.

[6] Para [86].

[7] Para [61].

16. If the Commission was of the view that the existing hours of work clause in the Professionals Award is an annualised wage arrangement clause, the clause would have no doubt been reviewed during the *4 Yearly Review – Annualised Wage Arrangements Case* during which the annualised wage arrangement clauses in all modern awards were reviewed.

17. There are obviously major differences between the existing hours of work clause and the clause proposed in APESMA's claim, including:

    a. The existing clause does not prescribe a rate for the payment of hours worked beyond 38 hours per week, whereas the clause in APESMA's claim proposed a rate of ordinary time for additional hours worked; and

    b. The existing clause does not contain any reconciliation requirement, whereas the clause in APESMA's claim proposed a periodic reconciliation requirement

18. The only issue that remains to be dealt with in the proceedings is the Full Bench's conclusion that the current hours of work clause in the award does not achieve the modern awards objective.[8]

19. As stated by the Full Bench:

> **[60]** APESMA submits that the current provision is unenforceable and fails to meet the modern awards objective in that it fails to provide a fair and relevant safety net and, accordingly, changes are 'necessary' to achieve the modern awards objective.
>
> **[61]** We agree with APESMA's assessment. In its current form clause 18 does not achieve the modern awards objective.
>
> - - -
>
> **[87]** ….we will review the clause 18 and publish our *provisional* views as to its amendment.

20. The variations that Ai Group proposes to the existing clause are set out below.

[8] Para [61].

4. THE VARIATIONS THAT Ai GROUP PROPOSES TO THE AWARD

21. Given the Commission's conclusion that the existing hours of work clause does not meet the modern awards objective, Ai Group proposes the following variations to the clause. (Note: clause 18 has been renumbered as clause 13 in the 2020 version of the Award).

22. Our **primary position** is that the only amendments that should be made to the Award are the following amendments to clause 13:

> **13. Ordinary hours of work**
>
> **13.1** For the purpose of the NES, ordinary hours of work under this award are 38 per week.
>
> **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 a six month ~~the~~ cycle.
>
> Note: Section 62 of the Act prohibits an employer requiring an employee to work more than 38 hours in a week unless the additional hours are reasonable. Subsection 62(3) of Act sets out various matters which must be taken into account in determining whether additional hours are reasonable or unreasonable.
>
> ~~**13.3** Employers must compensate 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.~~
>
> ~~**13.4** Compensation may include:~~
>
> ~~**(a)** granting special additional leave;~~
>
> ~~**(b)** granting special additional remuneration;~~
>
> ~~**(c)** taking the factors in clause 13.3 into account in the fixation of annual remuneration; or~~

~~**(d)** granting a special allowance or loading.~~

~~**13.5** Where relevant, compensation in clause 13.4 must include consideration of the penalty rate or equivalent and conditions applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.~~

~~**13.6** The compensation in clause 13.4 must be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in clause 13.~~

13.3~~7~~ Transfers

(a) An employee who is transferred permanently from day work to shiftwork or from shiftwork to day work must receive at least one month's notice unless the employer and the employee agree on a lesser period of notice.

(b) Clause 13.3~~7~~(a) is subject to the requirements of clause 25—Consultation about changes to rosters or hours of work.

23. If the Commission is of the view that further amendments are necessary in order for the Award to meet the modern awards objective, our **secondary position** is that the following new clauses 14A and 14B should be added to the Award, in addition to the above amendments to clause 13:

14A Exemptions

The following award provision will not apply to an employee in receipt of a salary for a Level 3 employee (**$66,396)** or higher:

(a) clause 14A – Additional hours.

14B Additional hours (Levels 1 and 2)

14B.1 Employers must compensate an employee classified at Level 1 or Level 2 for:

(a) time required by the employer to be worked regularly in excess of ordinary hours of work ~~duty~~;

(b) time required by the employer to be worked on-call-backs;

(c) time required by the employer to be spent standing by in readiness for a call-back;

(d) time required by the employer to be 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 required by the employer to be worked on afternoon, night or weekend shifts.

14B.2 ~~Compensation may include:~~ An employee is entitled to be compensated in one of the following ways:

(a) granting ~~special additional leave~~ time off instead of being paid for additional hours worked in accordance with clause 14B.3.

(b) granting additional remuneration of no less than the minimum hourly rate for each additional hour worked beyond an average of 38 hours per week.

~~**(c)** taking the factors in clause 13.3 into account in the fixation of annual remuneration; or~~

~~**(d)** granting a special allowance or loading.~~

14B.3 Time off instead of payment for additional hours worked

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular number of additional hours that have been worked by the employee.

(b) Any additional hours that have 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 14B.3.

(c) An agreement must state each of the following:

(i) the number of additional 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 additional hours;

(iii) that, if the employee requests at any time, the employer must pay the employee, for the additional hours covered by the agreement but not taken as time off, at the minimum hourly rate;

(iv) that any payment mentioned in clause 14B.3(c)(iii) must be made in the next pay period following the request.

NOTE: An example of the type of agreement required by clause 14B.3 is set out at Schedule F—Agreement for Time Off Instead of Payment for Additional Hours. There is no requirement to use the form of agreement set out at Schedule F—Agreement for Time Off Instead of Payment for Additional Hours. An agreement under clause 14B.3 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 additional hours worked.

EXAMPLE: By making an agreement under clause 14B.3 an employee who worked 2 additional hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the additional hours are 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 additional hours covered by an agreement under clause 14B.3 but not taken as time off, the employer must pay the employee for the additional hours, in the next pay period following the request, at the minimum hourly rate.

(g) If time off for additional hours that has been worked is not taken within the period of 6 months mentioned in clause 14B.3(e), the employer must pay the employee for the additional hours, in the next pay period following those 6 months, at the minimum hourly rate.

(h) The employer must keep a copy of any agreement under clause 14B.3 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 additional hours.

(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 additional hours worked by the employee. If the employer agrees to the request then clause 14B.3 will apply, including the requirement for separate written agreements under clause 14B.3(b) for additional hours that have 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 additional hours worked by the employee to which clause 14B.3 applies has not been taken, the employer must pay the employee for the additional hours at the minimum hourly rate.

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 14B.3.

5. THE IMPACT OF THE PANDEMIC ON BUSINESSES THAT EMPLOY PROFESSIONAL ENGINEERS, PROFESSIONAL SCIENTISTS AND ICT PROFESSIONALS

24. The COVID-19 pandemic is having a major, adverse impact on the industries in which most professional engineers, professional scientists and ICT professionals are employed, i.e. the manufacturing industry; the construction industry; the information media and telecommunications industry; and the professional, scientific and technical services industry.

25. The ABS *5676.0.55.003 – Business Impacts of COVID-19 Survey, August 2020* report, which was released on 27 August 2020, identified that the following proportions of businesses had experienced decreased revenue in the past month:

    a. 42% of businesses in the manufacturing industry;

    b. 47% of businesses in the construction industry;

    c. 50% of businesses in the information media and telecommunications industry;

    d. 36% businesses in the professional, scientific and technical services industry.

26. The ABS *6160.0.55.001 - Weekly Payroll Jobs and Wages in Australia, Week ending 8 August 2020* report, which was released on 25 August 2020, identified the following job losses between 14 March 2020 and 8 August 2020:

    a. Manufacturing industry - 3.7%

    b. Construction industry - 6.1%

    c. Information media and telecommunications industry -9.1%

    d. Professional, scientific and technical services industry -4.8%

27. The above figures only cover the period up to 8 August and do not fully take account of the job losses resulting from the Victorian Stage 4 restrictions which were imposed from 2 August 2020, and which have had a large negative impact on the manufacturing, construction and most other industries.

28. In the current environment it is very obvious that businesses cannot afford increased costs or reduced flexibility. If increased costs or reduced flexibility are imposed on businesses as a result of these proceedings, the result will be more job losses and potentially more business closures.

29. The issue of what constitutes "a fair and relevant minimum safety net" for the purposes of the modern awards objective needs to be assessed at the time that the Commission makes a decision in proceedings relating to proposed award variations.

30. Many decisions of the Commission [9] during the current COVID-19 crisis highlight that it is consistent with the modern awards objective, and necessary to achieve the modern awards objective, to:

    a. Give employers access to more flexible award provisions than the current award provisions;

    b. Avoid imposing less flexible award provisions on employers; and

    c. Take a very cautious approach when considering any change that would impose a cost increase on employers.

[9] For example, this approach is evident in the *Annual Wage Review 2019-20 Decision* and in numerous decisions to include COVID-19 schedules in awards.

31. The recovery from the COVID-19 recession is likely to be lengthy and difficult. For example, the RBA's *Statement of Monetary Policy – August 2020* contains the following forecasts for the unemployment rate:

Year-ended					
Jun 2020	Dec 2020	Jun 2021	Dec 2021	Jun 2022	Dec 2022
7.0	10	9	8½	7½	7

32. The current economic and business environment weighs heavily in favour of the award variations that Ai Group has proposed, and against any more prescriptive and costly provisions that APESMA may propose in these proceedings.

6. THE NUMBER OF PROFESSIONAL ENGINEERS, PROFESSIONAL SCIENTISTS AND ICT PROFESSIONALS

33. Clause 4.1 of the Professionals Award provides for coverage on an occupational basis for professional engineers and professional scientists and on an industry basis for certain professional employees in the information technology, telecommunications, quality auditing and medical research industries.

34. According to the *Australian Jobs 2019* Report of the Department of Jobs and Small Business, in November 2018:[10]

    a. 752,200 were employed in the "Design, Engineering, Science and Transport Professionals" subgroup, with 74% holding a bachelor degree or higher; and

    b. 291,000 were employed in the "ICT Professionals" subgroup, with 72% holding a bachelor degree or higher.

35. The Department of Education, Skills and Employment's latest *Australian Jobs – Occupation Matrix*, which gives the total number of people employed in particular occupations, shows that as at November 2018 there were:

    a. 50,300 civil engineers (professional);

    b. 30,400 industrial, mechanical and production engineers (professional);

    c. 9,900 electrical engineers (professional);

    d. 5,300 electronics engineers (professional);

    e. 13,200 telecommunications engineering professionals;

    f. 95,900 professional scientists;

    g. 123,000 professional software and applications programmers;

[10] Page 27.

h. 37,700 computer network professionals; and

i. 12,300 ICT support and test engineers (professional).

36. *ABS 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, May 2020* (Data Cube EQ08) contains more recent information and identifies the following number of employees in relevant occupations as at May 2020:

ANZSCO occupation	Employment, '000 May-2020
2330 Engineering Professionals nfd	10.9
2331 Chemical and Materials Engineers	4.1
2332 Civil Engineering Professionals	65.3
2333 Electrical Engineers	22.5
2334 Electronics Engineers	8.5
2335 Industrial, Mechanical and Production Engineers	44.7
2336 Mining Engineers	10.4
2339 Other Engineering Professionals	15.8
2340 Natural and Physical Science Professionals nfd	4.9
2341 Agricultural and Forestry Scientists	9.5
2342 Chemists, and Food and Wine Scientists	8.2
2343 Environmental Scientists	21.6
2344 Geologists, Geophysicists and Hydrogeologists	9.1
2345 Life Scientists	9.9
2346 Medical Laboratory Scientists	25.6
2600 ICT Professionals nfd	12.7
2610 Business and Systems Analysts, and Programmers nfd	2.6
2611 ICT Business and Systems Analysts	37.9
2612 Multimedia Specialists and Web Developers	16.6
2613 Software and Applications Programmers	140.1
2621 Database and Systems Administrators, and ICT Security Specialists	44.4
2630 ICT Network and Support Professionals nfd	3.3
2631 Computer Network Professionals	37.4
2632 ICT Support and Test Engineers	11.7
2633 Telecommunications Engineering Professionals	12.9

7. THE HOURS OF WORK OF PROFESSIONAL ENGINEERS, PROFESSIONAL SCIENTISTS AND ICT PROFESSIONALS

37. *ABS 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, May 2020* (Data Cube EQ05) identifies that full-time, permanent employees in the Professional, Scientific and Technical Services sector work on average 38.9 hours per week.

MAY 2020 Original data unadjusted	Average weekly hours (full-time)	Average weekly hours (part-time)
Employee with paid leave entitlements	38.9	21.9
Employee without paid leave entitlements	35.5	14.7

38. *ABS 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, May 2020* (Data Cube EQ08) provides average weekly hours of work for workers in relevant professional occupations:

Actual work hours, average per worker. ANZSCO	Hours May-2020
2330 Engineering Professionals nfd	37.4
2331 Chemical and Materials Engineers	38.7
2332 Civil Engineering Professionals	39.7
2333 Electrical Engineers	39.6
2334 Electronics Engineers	39.9
2335 Industrial, Mechanical and Production Engineers	39.1
2336 Mining Engineers	49.2
2339 Other Engineering Professionals	40.3
2340 Natural and Physical Science Professionals nfd	30.9
2341 Agricultural and Forestry Scientists	38.7
2342 Chemists, and Food and Wine Scientists	33.2
2343 Environmental Scientists	33.8
2344 Geologists, Geophysicists and Hydrogeologists	36.0
2345 Life Scientists	37.4
2346 Medical Laboratory Scientists	38.9

Actual work hours, average per worker. ANZSCO	Hours May-2020
2600 ICT Professionals nfd	37.4
2610 Business and Systems Analysts, and Programmers nfd	36.5
2611 ICT Business and Systems Analysts	38.5
2612 Multimedia Specialists and Web Developers	39.1
2613 Software and Applications Programmers	37.3
2621 Database and Systems Administrators, and ICT Security Specialists	38.7
2630 ICT Network and Support Professionals nfd	35.8
2631 Computer Network Professionals	37.9
2632 ICT Support and Test Engineers	40.6
2633 Telecommunications Engineering Professionals	35.9

8. THE NATURE OF PROFESSIONAL EMPLOYMENT

39. The nature of the work carried out by the professional employees covered by the Award requires work methods and a level of expertise which make excessive prescription regarding hours of work inappropriate, both for employers and employees.

40. The classifications in the Professionals Award are set out in Schedules A and B.

41. The lowest classification in Schedule A applies to graduate engineers, graduate information technology employees and qualified scientists. At this level, employees are required to exercise judgement and initiative and carry out tasks requiring accuracy and adherence to prescribed methods of professional engineering or professional scientific/information technology analysis.

42. At the highest level in the classification structure, employees are expected to be able to coordinate work programs and make responsible decisions not usually subject to technical review. A Level 4 Professional is clearly expected to exercise managerial discretion in order to be able to supervise groups of professionals or exercise authority and technical control over a group of professional staff.

43. The lowest classification levels in both Schedule A, applicable to professional engineers, scientists and ICT professionals, and Schedule B, applicable to medical research employees, require education at the graduate level.

44. Outside the coverage of the Professionals Award (and a few other awards), professional work and a professional level of education are indicative of an absence of award coverage. For example, s.143(7) of the FW Act provides that a modern award must not be expressed to cover classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards or who perform work that is not of a similar nature to work that has traditionally been regulated by such awards. In addition, clause 4.2 of the Miscellaneous Award 2020 excludes from coverage *"managerial*

employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists".

45. Although engagement in a professional occupation is not necessarily incompatible with award coverage, it suggests a level of expertise which makes excessive prescription in work practices and time recording unnecessary and undesirable.

46. Professional employees, even at the graduate level, undertake work which may involve reading and drafting emails at home or on public transport, keeping up to date in their relevant field and attending industry events. Often, the boundary between 'work' and other activities becomes blurred as many of the pursuits carried out by a professional employee are a necessary part of their chosen career. In addition, professionals often choose to work additional hours for various reasons.

47. Most professions are award-free. The professions covered by the Professionals Award have a history of award regulation but that history is characterised by awards which have never contained overtime penalty rates or a prescriptive annualised wage arrangements clause. The awards have typically been made by consent and the basis of that consent was the absence of overtime penalty rates and other similarly inappropriate provisions that are ill-suited to professional employment.

48. Overtime penalty rates and the Commission's model annualised wage arrangements clauses are inconsistent with the nature of the professions covered by the Professional Employees Award, and it would not be appropriate to include such clauses in the Award.

9. THE SIGNIFICANCE OF SECTIONS 62 AND 63 OF THE FW ACT

49. Employees employed under the Professionals Award are typically employed under an annual salary which takes into account any reasonable requirements to work additional hours.

50. Section 62 of the FW Act protects employees from being required to work any hours in a week beyond 38 hours, unless the additional hours are reasonable. In deciding whether additional hours are reasonable or unreasonable, the matters in s.62(3) must be taken into account. These factors include: (emphasis added)

> (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
>
> - - -
>
> (g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;
>
> (h) the nature of the employee's role, and the employee's level of responsibility;
>
> (i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer under section 64;

51. With regard to s.62(3)(i) and s.63 of the FW Act, the current award includes an averaging term in clause 13.2. Ai Group has proposed the following amendment to clause 13.2, which would increase protection for employees. This amendment was agreed between Ai Group and APESMA during the exposure draft stage of the review of the Professionals Award, but has not yet been reflected in the Award:

> **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 a six month ~~the~~ cycle.

52. In explaining the intent of s.63(3), the Explanatory Memorandum to the *Fair Work Bill 2008* relevantly states (emphasis added):

> 250. The relevance of each of these factors and the weight to be given to each of them will vary according to the particular circumstances. In some cases, a single factor will be of great importance and outweigh all others. Other cases will require a balancing exercise between factors. For example:
>
> - There may be a situation where, although an employer provides advance notice of the requirement to work additional hours and the requirement to work those hours is based on the needs of the workplace, the hours are nonetheless unreasonable when the risks to employee health and safety or the employee's family responsibilities are taken into account.
>
> - The significant remuneration and other benefits paid to a senior manager, together with the nature of the role and level of responsibility, may be sufficient to ensure that additional hours are reasonable in many cases.
>
> - The additional hours an employee is required to work may also be reasonable if the hours are worked at a particular time and in a particular manner in order to meet the employer's operational requirements, or are worked in accordance with a particular pattern or roster that is prevalent in a particular industry, such as the fly-in-fly-out arrangements in the mining industry. The fact that a requirement to work additional hours is set out in the offer of employment accepted by an employee will also be relevant, though not determinative.

53. The Explanatory Memorandum for the *Workplace Relations Amendment (Work Choices) Bill 2005*, relating to the somewhat similar provision in s.226(4) of the Australian Fair Pay and Conditions Standard in the *Workplace Relations Act 1996*, stated: (emphasis added)

> 493. Subsection 91C(5) would set out a non-exhaustive list of factors that must be taken into account in determining what are reasonable additional hours for the purposes of proposed paragraph 91C(1)(b). These factors are consistent with the AIRC Full Bench decision in the 'Working Hours Test Case' [Print 0792002].

54. The clause that arose from the 2002 Working Hours Test Case, which was included in various modern awards, was recently considered by a Full Bench of the Commission during the *4 Yearly Review of Modern Awards – Plain Language Re-drafting – Reasonable Overtime* proceedings. In a decision of 29 October 1998, the Full Bench determined the following model term: (emphasis added)

x. Reasonable overtime – model term

x.1 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.

x.2 An employee may refuse to work overtime hours if they are unreasonable.

x.3 In determining whether overtime hours are reasonable or unreasonable for the purpose of this clause the following must be taken into account:

(a) any risk to employee health and safety from working the additional hours;

(b) the employee's personal circumstances, including family responsibilities;

(c) the needs of the workplace or enterprise in which the employee is employed;

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms in this award inserted pursuant to section 63 of the Act, that applies to the employee; and

(j) any other relevant matter.

55. It can be seen from the above that the Commission's model award term expressly contemplates in x.3(d) that some award-covered employees are not entitled to receive overtime payments or penalty rates, and receive *"a level of remuneration that reflects an expectation of, working additional hours"*.

56. The Professionals Award is one such award where it is not appropriate to include overtime penalty rates.

10. APESMA'S EVIDENCE AND ANY CLAIM FOR SPECIFIC OVERTIME PENALTIES

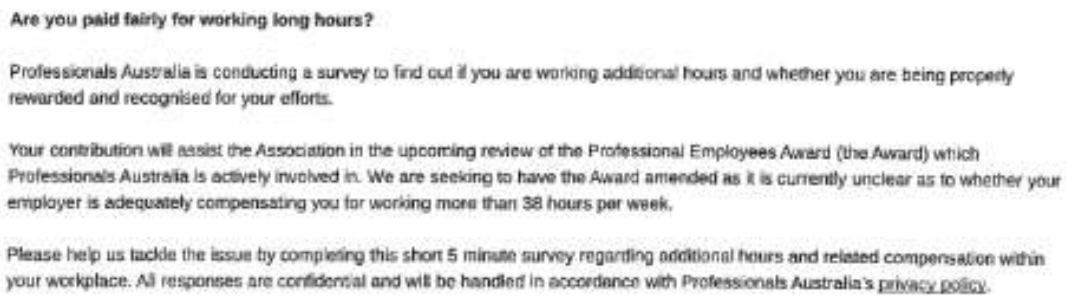
Flawed evidence / methodology

57. APESMA filed evidence from two witnesses in the proceedings. The Commission should give that evidence very little, if any, weight because:

    a. The two witnesses are both employees of APESMA; indeed one of the witnesses is now APESMA's advocate in these proceedings;

    b. APESMA's hours of work survey only related to professional engineers - only one of several professions covered by the Professionals Award; and

    c. APESMA's survey was distributed with the following inappropriate note informing respondents that the survey was in support of the union's claim and associated application to the Commission.



Are you paid fairly for working long hours?

Professionals Australia is conducting a survey to find out if you are working additional hours and whether you are being properly rewarded and recognised for your efforts.

Your contribution will assist the Association in the upcoming review of the Professional Employees Award (the Award) which Professionals Australia is actively involved in. We are seeking to have the Award amended as it is currently unclear as to whether your employer is adequately compensating you for working more than 38 hours per week.

Please help us tackle the issue by completing this short 5 minute survey regarding additional hours and related compensation within your workplace. All responses are confidential and will be handled in accordance with Professionals Australia's privacy policy.

58. Undoubtedly, if Ai Group attempted to file the results of a survey carried out with methodology like that used by APESMA, the relevant union/s would strongly object and seek that the Commission disregard it.

59. It is unnecessary for the Full Bench to give any weight to APESMA's flawed evidence about the number of hours that professional engineers allegedly work, when ABS statistics are readily available (see section 7 of this submission).

The evidence was filed in support of award variations for employees at Levels 1 and 2 only

60. In its submissions APESMA sought to rely on its evidence in support of more prescriptive hours of work provisions for employees classified at **Levels 1 and 2 only**. The added prescription included:

    a. A more detailed time off instead of compensation for additional hours provision (see clause 18.4(b) in the draft determination jointly filed by APESMA and Ai Group on 18 December 2019); and

    b. Compensation for additional hours, where time off is not granted, **at the minimum award rate** (see clause 18.4(f) in the draft determination filed on 18 December 2019).

61. APESMA did not seek to argue that its evidence supported more prescriptive hours of work provisions for employees classified at Levels 3, 4 or 5.

62. As stated by Mr Michael Butler, the then Director – Industrial Relations of APESMA: (emphasis added)

> PN82
> MR BUTLER: And I take on board what Mr Smith has said. Just for our part, the hours of work issue has quite a few aspects to it in that it's a very broad issue of concern to professionals. For us, we were faced with an award provision that in our view is unenforceable. But in approaching this and in negotiations with the AiGroup we sought to draw a distinction between different categories of professionals between levels 1 and level 2, the more junior professionals; and levels 3 and levels 4. And that's been our approach that instead of treating all professionals the same, to acknowledge the differences. And that was our approach to these proceedings. Now it could be argued, for example, that someone at level 4 who might be a manager, is in a different position from a recent graduate. And so that has underpinned our approach to what is a very important issue for our members.

APESMA's claim, and associated evidence, was not for overtime penalty rates

63. APESMA's evidence was not filed in support of overtime penalty rates in the Professionals Award. Neither the Professionals Award, nor any of the main predecessor awards have ever contained overtime penalty rates (see the award history in sections 7.2 and 7.3 of Ai Group's submission of 30 September 2019).

64. If at any stage APESMA decides to pursue overtime penalty rates for the Professionals Award, consistent with the duties of the Commission under s.577 to perform its functions and exercise its powers in a manner that is 'fair and just' and its duty to afford procedural fairness to interested parties, the Commission should require APESMA to pursue such a claim in a proper manner. This would involve:

    a. APESMA filing an application to vary the Award and a draft determination;

    b. APESMA filing probative evidence and detailed submissions in support of its claim;

    c. Ai Group and other interested parties having the opportunity to file evidence in reply and detailed submissions in opposition to APESMA's claim; and

    d. Ai Group and other interested parties having the opportunity to challenge evidence and survey materials and cross-examine APESMA's witnesses.

65. APESMA has not pursued overtime penalty rates in these proceedings and therefore it would be extremely inappropriate for the Commission to vary the Award to include such penalty rates as an outcome of these proceedings, particularly given the significance, cost impacts and disruption that would be caused by such an outcome.

66. Consistent with the arguments of APESMA during these proceedings, if the Commission decides that more prescriptive hours of work or remuneration provisions are warranted, such provisions should only apply to employees classified at Levels 1 and 2. Also, such provisions should not take the form of overtime penalty rates.

11. THE MERITS OF Ai GROUP'S PROPOSED AMENDMENTS

Primary position

67. Ai Group's **primary position** is that the only amendments that should be made to the Award are the following amendments to clause 13:

> **13. Ordinary hours of work**
>
> **13.1** For the purpose of the NES, ordinary hours of work under this award are 38 per week.
>
> **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 a six month ~~the~~ cycle.
>
> Note: Section 62 of the Act prohibits an employer requiring an employee to work more than 38 hours in a week unless the additional hours are reasonable. Subsection 62(3) of Act sets out various matters which must be taken into account in determining whether additional hours are reasonable or unreasonable.
>
> ~~**13.3** Employers must compensate 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.~~
>
> ~~**13.4** Compensation may include:~~
>
> ~~**(a)** granting special additional leave;~~
>
> ~~**(b)** granting special additional remuneration;~~
>
> ~~**(c)** taking the factors in clause 13.3 into account in the fixation of annual remuneration; or~~
>
> ~~**(d)** granting a special allowance or loading.~~
>
> ~~**13.5** Where relevant, compensation in clause 13.4 must include consideration of the penalty rate or equivalent and conditions applicable from time to time to the majority of employees employed in a particular establishment in which~~

~~the employee is employed.~~

~~**13.6** The compensation in clause 13.4 must be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in clause 13.~~

13.3~~7~~ Transfers

(a) An employee who is transferred permanently from day work to shiftwork or from shiftwork to day work must receive at least one month's notice unless the employer and the employee agree on a lesser period of notice.

(b) Clause 13.3~~7~~(a) is subject to the requirements of clause 25—Consultation about changes to rosters or hours of work.

68. The following submissions explain the purpose and merits of the above proposed amendments.

Clause 13.2

69. The proposed amendment to clause 13.2 addresses a potential deficiency in the existing provision, which does not identify the length of the cycle over which ordinary hours can be averaged.

70. During the exposure draft stage of the 4 Yearly Review of the Professionals Award, it was agreed between Ai Group and APESMA that a 6-month period of averaging was appropriate. This is intended to provide some flexibility to take account of seasonal and other fluctuations in working hours from one pay period to another.

71. Consistent with ss.62 and 63 of the FW Act, any hours worked beyond 38 hours in a week need to be reasonable, regardless of whether the hours exceed 38 due the effects of an averaging term in an award.

72. Ai Group has proposed that a Note be included in clause 13.2 to bring s.62 of the FW Act to the attention of employers and employees, including the factors in s.62(3).

Clauses 13.3, 13.4, 13.5 and 13.6

73. APESMA has submitted that clauses 13.3 to 13.6 of the current clause are unenforceable. These submissions of APESMA are highlighted by the Full Bench at paragraph [60] of the April 2020 Substantive Claims Decision. At paragraph [61], the Full Bench expresses agreement with APESMA's assessment.

74. At least some aspects of these award provisions, by design, was not intended to be enforceable. In its Stage 3 Award Modernisation Decision of 4 September 2009, the Full Bench of the Australian Industrial Relations Commission (**AIRC**) made the following relevant comments: (emphasis added)

> **[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.

75. Given that clauses 13.3, 13.4, 13.5 and 13.6 are unenforceable, such provisions cannot be necessary to achieve the modern awards objective. Accordingly, these clauses should be deleted.

Clause 13.7

76. This clause is an important existing award provision which for obvious reasons needs to be retained in the Award. If clauses 13.3, 13.4 and 13.5 are deleted, as Ai Group has proposed, clause 13.7 should re-numbered as clause 13.3.

Secondary position

77. If the Commission is of the view that further amendments are necessary in order for the Award to meet the modern awards objective, our **secondary position** is that the following new clauses 14A and 14B should be added to the Award, **in addition to the above amendments to clause 13**:

14A Exemptions

The following award provision will not apply to an employee in receipt of a salary for a Level 3 employee (**$66,396)** or higher:

(a) clause 14A – Additional hours.

14B Additional hours (Levels 1 and 2)

14B.1 Employers must compensate an employee classified at Level 1 or Level 2 for:

(a) time required by the employer to be worked regularly in excess of ordinary hours of work ~~duty~~;

(b) time required by the employer to be worked on-call-backs;

(c) time required by the employer to be spent standing by in readiness for a call-back;

(d) time required by the employer to be 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 required by the employer to be worked on afternoon, night or weekend shifts.

14B.2 ~~Compensation may include:~~ An employee is entitled to be compensated in one of the following ways:

(a) granting ~~special additional leave~~ time off instead of payment for additional hours worked in accordance with clause 14B.3.

(b) granting additional remuneration of no less than the minimum hourly rate for each additional hour worked beyond an average of 38 hours per week.

~~**(c)** taking the factors in clause 13.3 into account in the fixation of annual remuneration; or~~

~~**(d)** granting a special allowance or loading.~~

14B.3 Time off instead of payment for additional hours worked

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular number of additional hours that have been worked by the employee.

(b) Any additional hours that have 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 14B.3.

(c) An agreement must state each of the following:

(i) the number of additional 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 additional hours;

(iii) that, if the employee requests at any time, the employer must pay the employee, for the additional hours covered by the agreement but not taken as time off, at the minimum hourly rate;

(iv) that any payment mentioned in clause 14B.3(c)(iii) must be made in the next pay period following the request.

NOTE: An example of the type of agreement required by clause 14B.3 is set out at Schedule F—Agreement for Time Off Instead of Payment for Additional Hours. There is no requirement to use the form of agreement set out at Schedule F—Agreement for Time Off Instead of Payment for Additional Hours. An agreement under clause 14B.3 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 additional hours worked.

EXAMPLE: By making an agreement under clause 14B.3 an employee who worked 2 additional hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the additional hours are 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 additional hours covered by an agreement under clause 14B.3 but not taken as time off, the employer must pay the employee for the additional hours, in the next pay period following the request, at the minimum hourly rate.

(g) If time off for additional hours that has been worked is not taken within the period of 6 months mentioned in clause 14B.3(e), the employer must pay the employee for the additional hours, in the next pay period following those 6 months, at the minimum hourly rate.

(h) The employer must keep a copy of any agreement under clause 14B.3 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 additional

hours.

(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 additional hours worked by the employee. If the employer agrees to the request then clause 14B.3 will apply, including the requirement for separate written agreements under clause 14B.3(b) for additional hours that have 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 additional hours worked by the employee to which clause 14B.3 applies has not been taken, the employer must pay the employee for the additional hours at the minimum hourly rate.

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 14B.3.

Amendments to Clause 13

78. The reasons why the proposed amendments to clause 13 have merit are outlined above in the section dealing with Ai Group's primary position.

Clause 14A – Exemptions

79. Proposed clause 14A reinforces the position that the prescriptive provisions relating to additional hours do not apply to highly paid employees, including employees classified at Levels 3, 4 and 5. Professionals in these classifications are in senior roles and even APESMA's evidence does not support the position that more prescriptive provisions are warranted for these employees.

80. Most professionals are award-free (e.g. accountants, solicitors, HR professionals) and the proposed exemption rate recognises the nature of professional employment (see section 8 of this submission).

81. The proposed exemption rate would also preserve very longstanding existing award flexibility for highly paid employees under the Award, including employees classified at Levels 3, 4 and 5, and their employers.

82. The exemption rate aligns with the award rate for Level 3 (i.e. $66,396). This would increase to $67,558 on 1 November 2020 when the Annual Wage Review increase becomes operative in the Award.

83. The proposed exemption rate is higher than the exemption rate for technicians under the *Business Equipment Award 2020* of $61,991 (which will increase to $63,076 on 1 November 2020). The Business Equipment Award and the Professionals Award are the two most significant awards applying in the ICT industry.

84. The proposed exemption rate is also higher than those in the *Hospitality Industry (General) Award 2020* and the *Registered and Licensed Clubs Award 2010*.[11]

85. The higher levels of remuneration provided to professional employees engaged under the Professionals Award reflects the seniority and competence of the occupations covered. The lowest classification in the Professionals Award is entitled to a minimum hourly rate ($25.98) that is higher than the C7 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*.

86. For the lower classifications under the Award, the proposed amendments would provide significant protections to ensure that employees are adequately compensated for working 'additional hours'. The methods of compensation for employees classified at Level 1 and 2 are: (see clause 14B below)

    a. A detailed provision providing for time off instead of additional hours worked, based on the Commission's model clause; and

[11] Under the *Hospitality Industry (General) Award 2020*, managerial staff (hotels) are excluded from the application of the provisions listed in cl. 25.2 if they are paid at least 125% of the minimum annual salary in clause 18.2 i.e. $61,281.25; A number of separate exemption rates apply under the *Registered and Licensed Clubs Award 2010*. For example, the provisions listed in cl. 17.3(a)(i) are excluded from application to a Level A Manager earning an annual salary of $60,368.4.

b. An employee entitlement to payment for any additional hours worked at a rate no less than the minimum hourly rate for each additional hour worked beyond an average of 38 hours per week.

87. For employees classified at Levels 3, 4 and 5, the above protections are unnecessary. Employees engaged at these higher classifications have a lot more experience and are further developed in their careers. They are able to negotiate higher salaries and are more likely to have a more substantial degree of control over their hours of work and work practices.

88. Exemption rates are terms about minimum wages and therefore supported by s.139(1)(a) of the FW Act. Moreover, an exemption provision can legitimately be considered a term that is incidental to a term that is permitted or required to be in a modern award and is essential for the purpose of making a particular term operate in a practical way (s.142).

89. Recognition of the distinct nature of exemption rate provisions is reflected in the Full Bench's 23 December 2019 Decision which confirmed that clause 27.2 of the *Hospitality Industry (General) Award 2010* and clause 17.3 of the *Registered and Licensed Clubs Award 2010* were appropriately characterised as exemption provisions operating in conjunction with minimum wages provisions.[12]

90. Exemption rates are typically targeted at higher earning employees or employees in higher classifications.

91. Some modern awards include provisions that operate like exemption provisions even though they are not included in a separate clause. For example, the following clause 28.1(b) in the *Nurses Award 2010* exempts the two highest nursing classifications from the overtime provisions:

> **(b)** Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.

[12] [2019] FWCFB 8583, [5].

92. In a Decision made on 3 April 2009 in the course of the Part 10A Award Modernisation process, the AIRC referred to 'exemption rates' as the "specification of a rate of pay above which an employee is not entitled to specified award provisions".[13] The AIRC made clear that its approach in respect of such clauses would be to determine whether to include exemption provisions in modern awards, in part at least, on the basis of the extent to which such a provision appeared in relevant pre-reform awards and NAPSAs. The Full Bench said at pargaraphs [46] – [47]:

> Exemption provisions are not uncommon in some areas of federal and State award regulation, although the number of award entitlements they exclude varies. There are exemption provisions in a number of the priority modern awards. The detailed provisions of the Act and the consolidated request do not expressly prohibit exemption provisions. To the extent that the ACTU, supported by the ASU, has asked us to decide a question of principle we have concluded that we have neither the material nor the breadth of argument to do so at this stage. It is desirable, however, that we indicate the approach we have adopted.
>
> In considering whether to include exemption provisions in modern awards, and where relevant the terms of the exemption, a number of matters have been considered. Those matters include the extent to which exemption provisions appear in pre-reform awards and NAPSAs which the modern award will replace, the level of the exemption rate in those instruments and the award entitlements which the various exemption provisions exclude. We have been conscious of the need to provide a safety net which as far as practical recognises existing arrangements. The provisions we have decided upon in each of the modern awards reflect our examination and assessment of a diverse range of award provisions in all of the relevant pre-reform awards and NAPSAs including those without exemption clauses. It should be clear that in this decision the Commission is not deciding any questions of principle relating to exemption provisions. Such questions must wait for another time.

93. The Professionals Award and the main predecessor awards have never included specific compensation for additional hours worked. As such, to date an exemption rate has not been necessary. However, if the Commission does not adopt the award provisions proposed in Ai Group's primary position, an exemption rate will be necessary in order for the award to achieve the modern awards objective.

[13] [2009] AIRCFB 345, [44].

Clause 14B – Additional hours (Levels 1 and 2)

94. Ai Group's proposed clause 14B provides compensation for Level 1 and Level 2 employees who work additional hours.

95. The additional hours are those that employees are "required by the employer to be worked". The inclusion of these additional words was agreed upon between Ai Group and APESMA, as can be seen by the draft determination jointly filed on 18 December 2019.

96. The clause includes two methods of compensation, in line with the main two methods agreed upon between APESMA and Ai Group and included in the draft determination jointly filed on 18 December 2019:

    a. A detailed provision providing for time off instead of additional hours worked, based on the Commission's model clause; and

    b. An employee entitlement to payment for any additional hours worked at a rate no less than the minimum hourly rate for each additional hour worked beyond an average of 38 hours per week (as reflected in clause 18.4(f) in the draft determination jointly filed on 18 December 2019).

Issues resolved by the proposed amendments

97. The following submissions address various issues raised by the Full Bench in the April 2020 Substantive Claims Decision.

The principles in the Commission's Annualised Wage Arrangements Decision

98. At no stage has Ai Group intended to propose an annualised wage arrangements clause for the Professionals Award. Also, at no stage has the Commission determined that the existing clause is appropriately characterised as an annualised wage arrangement clause (see section 3 of this submission).

99. As a result of the April 2020 Substantive Claims Decision, Ai Group has abandoned the clause set out in the draft determination jointly filed by Ai Group and APESMA on 18 December 2019. This proposed clause was characterised by the Full Bench as an annualised wage arrangements clause.

100. Ai Group opposes the inclusion of an annualised wage arrangements clause in the Professionals Award and none of the amendments proposed in Ai Group's primary position or secondary position in this submission are annualised wage arrangement provisions. Therefore, the Commission's annualised wage arrangement principles are not relevant to the amendments that Ai Group has proposed.

Separate treatment of subject matters

101. In the April 2020 Substantive Claims Decision, Full Bench stated that the clause that had been agreed upon between Ai Group and APESMA inappropriately conflated terms dealing with ordinary hours, overtime, annual salary and time off in lieu of overtime.

102. Ai Group has addressed the Commission's concerns by dealing with the relevant matters in separate clauses. Ordinary hours of work and a limit on averaging arrangements are addressed in proposed clauses 13.1 and 13.2. Annual salaries are deal with in clauses 14 and 14A, and compensation for additional hours, including time off in lieu, is addressed in clause 14B.

Period over which hours can be averaged

103. The relevant existing clause (i.e. clause 13.2) does not provide any limit on the period over which hours of work can be averaged.

104. On 21 March 2018, a Full Bench issued a decision dealing with substantive, technical and drafting issues arising from the publishing of the exposure drafts for the Group 4A–E awards, including the Professionals Award. The decision noted Ai Group and APESMA's consent position for an averaging period of 12

months but expressed concern that this did not provide a reasonable duration over which to average ordinary hours of work.[14]

105. In response to the Full Bench's concerns, the draft determination jointly filed by Ai Group and APESMA on 18 December 2019 proposed a six-month limit on the averaging of hours. Ai Group continues to support this period for the averaging of hours. Section 9 of this submission addresses various matters of relevance to the six-month limit that Ai Group has proposed.

Enforceability

106. In the April 2020 Substantive Claims Decision, the Full Bench concurred with APESMA's view that clauses 13.3 to 13.6 in the Professionals Award are unenforceable (see paragraphs [60] and [61] of the Decision).

107. The amendments proposed by Ai Group address this concern. All of the proposed amended award provisions would be enforceable, and civil penalties of up to $630,000 would apply for a breach of the provisions (see ss.45, 539, 546 and 557A of the Act).

[14] [2018] FWCFB 1548, [618].

12. THE REASONS WHY Ai GROUP'S PROPOSED AMENDMENTS ARE NECESSARY TO ACHIEVE THE MODERN AWARDS OBJECTIVE

108. In making any amendments to a modern award in the context of the 4 Yearly Review, the Commission is required to 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 considerations in s.134(1)(a)-(h).

109. In addition, s.138 of the Act provides that a modern award must only include terms that are necessary to achieve the modern awards objective.

Section 138

110. Given that existing clauses 13.3, 13.4, 13.5 and 13.6 are unenforceable (see section 11 of this submission), such provisions cannot be necessary to achieve the modern awards objective. Accordingly, these clauses should be removed from the Award.

The modern awards objective

111. The modern awards objective is set out in s.134 of the Act. As stated in the Commission's *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'".[15]

[15] [2017] FWCFB 1001, [115], [116] and [196].

A fair and relevant minimum safety net

112. In considering what is 'fair', it is well established that this requires consideration of fairness to employers as well as fairness to employees.

113. It would not be fair to employers for overtime penalties to be imposed on businesses as an outcome of this case, when the case was listed to address two "substantive claims" of industrial parties; neither of which was a claim for overtime penalties. It would be particularly unfair given that the Award and the relevant pre-modern awards have never included overtime penalties throughout their long history.

114. The amendments that Ai Group has proposed are fair to all parties. They increase protections for lower paid employees, whilst preserving vital flexibility for both employers and employees.

115. The amendments would preserve a "relevant" safety net.

116. The inclusion of overtime penalties in the Award would result in award provisions that are not "relevant" to the professional employees covered by the Award.

s.134(1)(a) – relative living standards and the needs of the low paid

117. The employees covered by the Professionals Award are not low paid and therefore this is a neutral consideration.

s.134(1)(b) – the need to encourage collective bargaining

118. This is a neutral consideration for the purposes of these proceedings.

119. Employees covered by the Professionals Award are typically employed under individual common law contracts of employment and are rarely covered under enterprise agreements.

134(1)(c) – the need to promote social inclusion through increased workforce participation

120. Ai Group's proposed amendments are likely to have a neutral impact on workforce participation.

121. However, this consideration weighs heavily against any overtime penalties, prescriptive annualised wage arrangement provisions, or other provisions that would increase costs or reduce flexibility for businesses, which may be proposed by APESMA. Such provisions would discourage employers from hiring new staff and lead to less job security for existing staff, and hence reduced workforce participation. Such provisions would also reduce flexibilities for employees, discouraging workforce participation.

122. For the reasons set out in section 5 of this submission, the current economic and business environment that has resulted from the pandemic weighs heavily against any more prescriptive and costly provisions that APESMA may propose in these proceedings.

s.134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

123. This consideration weighs in favour of the amendments that Ai Group has proposed because the amendments preserve flexibility for employers and employees, and reflect contemporary work practices.

124. This consideration weighs heavily against any overtime penalties, prescriptive annualised wage arrangement provisions, or other provisions which may be proposed by APESMA. Overtime penalties and prescriptive annualised wage arrangement provisions, are not "flexible" or "modern", particularly for professional employees who are not currently employed under those arrangements.

125. We rely on the matters set out in sections 8 and 11 of this submission in respect of this element of the modern awards objective.

s.134(1)(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;

126. The nature of the Commission's task in considering s.134(1)(da) was outlined in the *Penalty Rates Decision 2017* in which the following was said:[16] (emphasis added)

> **[193]** As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the Restaurants 2014 Penalty Rates decision) made the following observation about s.134(1)(da):
>
> > 'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.' (emphasis added)
>
> **[194]** To the extent that the above passage suggests that s.134(1)(da) '*requires* additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the need for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the *need* for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.
>
> **[195]** Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

[16] [2017] FWCFB 1001, [193] - [199], cited in [2017] FWCFB 3541, [545].

> ‘To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant’.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. 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’.

[197] A further contextual consideration is that ‘overtime rates’ and ‘penalty rates’ (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility decision*:

> ‘… s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which must be included in modern awards…’

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.”

127. The Commission’s *Penalty Rates Decision* was upheld by the Full Court of the Federal Court in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

128. With regard to the current proceedings, the following relevant principles (amongst others) can be distilled from the above extract from the Commission’s *Penalty Rates Decision*:

a. Section 134(1)(da) does not *require* additional remuneration to be included in awards for working overtime, unsocial hours, on weekends, on public holiday or on shifts;

b. The requirement to take s.134(1)(da) into account does not mean that it is a determinative consideration. No particular primacy is attached to any of the s.134 considerations. 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;

c. Overtime rates and penalty rates are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award.

129. Ai Group has included in proposed clause 14B a provision which provides for compensation for additional hours at the minimum hourly rate for those earning less than $66,396 per annum. This is an appropriate method of ensuring such employees are adequately compensated without significantly disturbing the structure of the remuneration arrangements in the Award or the flexibility that is so important for employers and employees covered by the Award. The rate is in line with that agreed upon between Ai Group and APESMA and reflected in clause 18.4(f) of the draft determination jointly filed on 18 December 2019.

130. Paragraph 134(1)(da) requires consideration of the need for "additional compensation" in various circumstances. The compensation proposed by Ai Group in clause 14B is "additional compensation" for additional hours worked. Notably 134(1)(da) does not require "additional compensation at a higher rate" for additional hours worked.

s.134(1)(e) – the principle of equal remuneration for work of equal or comparable value

131. This is a neutral consideration.

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

132. With regard to the impact on employment costs and the regulatory burden, Ai Group acknowledges that its proposed variation may result in increased costs and add to the compliance burden encountered by employers. However, the variations proposed respond to concerns expressed by the Commission regarding the unenforceability of elements of the current hours of work clause in the Professionals Award. To this extent, Ai Group considers the proposed variations resolve the issues of concern raised by the Commission in a manner which imposes as little disruption and burden as possible on businesses or employees.

133. Although this consideration weighs against making the variations proposed, Ai Group considers that the proposed variations would provide, on balance, for a fair and relevant minimum safety net of terms and conditions and addresses issues raised by the Commission.

134. This consideration weighs heavily against any overtime penalties, prescriptive annualised wage arrangement provisions, or other provisions that would increase costs or reduce flexibility for businesses, which may be proposed by APESMA.

135. For the reasons set out in section 5 of this submission, the current economic and business environment that has resulted from the pandemic weighs heavily against any more prescriptive and costly provisions that APESMA may propose in these proceedings.

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

136. This consideration weighs in favour of the amendments proposed by Ai Group. The amendments are simple, easy to understand and enforceable.

137. Ai Group's proposed amendments are simpler and easier to understand than the existing provisions, particularly given the Commission's determination that the existing provisions are not enforceable.

138. This consideration weighs heavily against any prescriptive annualised wage arrangement provisions, or other complex provisions, that may be proposed by APESMA.

s.134(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

139. Ai Group's proposed amendments are likely to have a neutral impact on the matters identified in s.134(h).

140. However, for the reasons set out in section 5 of this submission, the current economic and business environment that has resulted from the pandemic weighs heavily against any more prescriptive and costly provisions that APESMA may propose in these proceedings.

13. CONCLUSION

141. Ai Group urges the Commission to adopt the proposed amendments set out in Ai Group's primary position.

142. If the amendments in Ai Group's primary position are not supported by the Commission, Ai Group urges to the Commission to adopt the amendments set out in Ai Group's secondary position.

143. APESMA has not pursued overtime penalty rates in these proceedings and therefore it would be extremely inappropriate for the Commission to vary the Award to include such penalty rates as an outcome of these proceedings, particularly given the significance, cost impacts and disruption that would be caused by such an outcome.

144. If at any stage APESMA decides to pursue overtime penalty rates for the Professionals Award, consistent with the duties of the Commission under s.577 to perform its functions and exercise its powers in a manner that is 'fair and just' and its duty to afford procedural fairness to interested parties, the Commission should require APESMA to pursue such a claim in a proper manner. This would involve:

    a. APESMA filing an application to vary the Award and a draft determination;

    b. APESMA filing probative evidence and detailed submissions in support of its claim;

    c. Ai Group and other interested parties having the opportunity to file evidence in reply and detailed submissions in opposition to APESMA's claim; and

    d. Ai Group and other interested parties having the opportunity to challenge evidence and survey materials and cross-examine APESMA's witnesses.

145. Consistent with the arguments of APESMA during these proceedings, and the evidence filed by APESMA in the proceedings, if the Commission decides that more prescriptive hours of work or remuneration provisions are warranted, such provisions should only apply to employees classified at Levels 1 and 2. Also, such provisions should not take the form of overtime penalty rates.