

AM2009/8

**Application by the ASU for the variation of
the Clerks – Private Sector Award 2010**

Submissions



14 August 2009

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1. INTRODUCTION

1. The arguments for and against the inclusion of an exemption rate in the *Clerks – Private Sector Award 2010* (“the Clerks Modern Award”) have been dealt with at length during the award modernisation proceedings.
2. After hearing the arguments for and against, and on the basis of the Commission’s own research and analysis, the Full Bench has decided that:
 - Clause 17 – Exemption Rate should be included in the award; and
 - The inclusion of Clause 17 is consistent with the objectives of award modernisation.
3. Ai Group submits that the issues for determination in these proceeding are:
 - Does the amendment made to the Award Modernisation Request require that Clause 17 be amended or deleted?
 - If an amendment needs to be made to Clause 17, what should that amendment be?
 - What transitional arrangements, if any, are needed to address amendments made to Clause 17?
4. The primary position which Ai Group argues in this submission is that Clause 17 – Exemption Rate, should be retained in the award in its current form as to do so would not conflict with the Amended Award Modernisation Request and would reflect the outcome of the comprehensive review which the Commission has recently completed into this matter.

2. BACKGROUND TO CLAUSE 17

5. The exemption rate in the Modern Clerical Award is in similar terms to the exemption rate in the *NSW Clerical and Administrative Employees State Award*.
6. In the NSW Clerical Award, An exemption rate has applied since the first award was made on 9 June 1916.
7. In a substantial case before the Industrial Relations Commission of NSW (IRCNSW) between 1992 and 1996, the ASU argued for the exemption rate to be removed from the Award. The Commission's decision to retain an exemption rate highlighted the history of the provision, its widespread use within industry, and the fact that the arguments about the exemption had been "well ventilated" before the Commission over recent years (Ref.: *Clerical and Administrative Employees (Classification Structure) State Award [1996] NSWIRComm 190, 25 October 1996*).
8. Also, under s.19 of the NSW *Industrial Relations Act 1996*, the IRCNSW is required to review all awards at least once every three years to ensure that they remain modern and up-to-date. The exemption rate has not been removed during any s.19 review.
9. An exemption rate like that contained within the Modern Clerical Award is not unusual in existing federal awards or modern awards. For example, the modern *Business Equipment Award 2010*:
 - Exempts business equipment technicians from a substantial number of clauses (eg. hours of work, overtime, allowances, shift loadings) where a technician is paid \$46,346 or higher; and
 - Exempts clerical employees in the industry from many clauses in the award if paid a salary of more than 10% above the award.

10. The ASU has pursued extensive arguments in the AIRC opposing the inclusion of an exemption rate in the modern *Clerks – Private Sector Award 2010*. The Full Bench has rejected those arguments and decided that:
- Clause 17 – Exemption Rate should be included in the award; and
 - The inclusion of Clause 17 is consistent with the objectives of award modernisation.
11. The decision of the Commission is not surprising, the modern award is intended to be a safety net, in conjunction with the National Employment Standards. If the exemption rate had not been included in the Clerks Modern Award there would have been a major negative impact upon employers in NSW and various other states.
12. Exemption rates / annualised salary arrangements have long been a feature of awards and NAPSAs which apply to the clerical occupation. These provisions are highly utilized by employers.
13. Of the eight primary federal awards and NAPSAs that have application in a State or Territory, five contain provisions that operate so as to provide for an annualised salary or exemption from some or all of the terms of the award when paid above a particular remuneration level¹.
14. Such flexibility needs to be maintained as to do otherwise would significantly prejudice employers that are utilising these provisions and have determined the rates of pay for their clerical employees on the basis of the existence of such provisions.

¹ Clause 3.2 of the *Clerks (ACT) Award 1998*, Clause 29 & 30 of the *Clerical and Administrative Employees NAPSA (NSW)*, Clause 1.4 of the *Clerical Employees NAPSA (QLD)*, Clause 6 of the *Clerical and Administrative Employees (Private Sector) NAPSA (TAS)*, and Clause 36 of the *Clerks (Commercial, Social and Professional Services) NAPSA (WA)*.

15. Salary rates for senior clerical employees commonly take account of the requirement to work additional hours where required. It would be very unfair and inequitable for employers to be forced to pay penalty rates to employees who are already being compensated through a higher annual salary.
16. In recent years the Commission has decided to include annualised salary arrangements for employees classified at higher levels in at least two major new awards which cover large numbers of clerical employees. That is, the *Contract Call Centre Industry Award 2003* and the *Telecommunications Services Industry Award 2002*. The clauses in these awards were negotiated between Ai Group and relevant unions (the ACTU, ASU, CPSU, CEPU and NUW) and incorporated in the awards by consent. Similar clauses have been included in the *Contract Call Centres Award 2010* and the *Telecommunications Services Award 2010*.

3. NATURE OF CLAUSE 17

17. Clause 17 can be characterized as an exemption rate, but it is more accurately characterized as a provision which provides a more flexible set of conditions for higher paid employees.
18. Clause 17 states that, except for the provisions of the following clauses, the award does not apply to employees employed by the week who are in receipt of a weekly wage in excess of 15% above the Level 5 wage rate in clause 16. The wage rate is not inclusive of overtime payments and/or shift allowances:
 - Clause 14 – Redundancy;
 - Clause 24 – Superannuation;
 - Clause 29 – Annual leave;
 - Clause 30 – Personal/carer’s leave and compassionate leave;
 - Clause 31 – Public holidays; and

- Clause 32 – Community service leave.
19. The above calculation currently results in an exemption rate of \$44,252 per annum.
 20. Unlike the relevant clause in the Clerks Breweries Award (referred to by the ASU at paragraph 43 of its submission of 24 July), Clause 17 does not exempt higher paid employees from coverage under the award. Rather, it provides that certain clauses do not apply to the employees earning more than a certain rate.
 21. Clause 17 is drafted to set out the clauses which do apply to higher paid employees under the award but, equally, a different drafting approach could have been taken and the clauses which do not apply could have been set out.
 22. It is relatively common amongst awards (existing and modern) for more flexible provisions to apply to higher paid employees, and in particular for penalty rates and allowances to not apply.
 23. In concept, Clause 17 is not dissimilar to the provisions which the Commission has inserted into various other modern awards, for example, the annualized salary / exemption rate provisions in the *Business Equipment Award 2010*, the *Contract Call Centres Award 2010* and the *Telecommunications Services Award 2010*.
 24. Clause 17 is also similar to the approach adopted in main awards applying to professional engineers, scientists and ICT professionals which do not contain prescriptive hours of work, penalty rates, etc.

4. THE REVISED AWARD MODERNISATION REQUEST

25. The ASU's application is centred upon the Minister's variation to the Award Modernisation Request, dated 7 May 2009. Relevantly, the variation inserted paragraph 2(f). In context, the new paragraph states that:

"2. The creation of modern awards is not intended to:

....

(f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation."

26. In Ai Group's submission, the Commission, in considering the ASU's application, should have primary regard to the actual wording of the Revised Request set out above.

27. Paragraph 2(f) of the Request is not ambiguous and therefore it is not necessary for the Commission to look beyond the wording in this paragraph in interpreting the variation made to the Request. The key concept contained in the paragraph – the exempting or effect of exempting certain employees from modern award coverage or application – is clear on its face and should be given its ordinary meaning in the context of the legislation.

Clause 17 is not inconsistent with Paragraph 2(f)

28. Ai Group submits that Clause 17 is not inconsistent with Paragraph 2(f).

29. Firstly, Clause 17 is not a clause of the kind to which paragraph 2(f) is directed. That is, it does not exempt or have the effect of exempting employees who are not high income employees from modern award coverage or application. Employees receiving wages in excess of the exemption rate are still "covered" by the modern award, and that modern award would "apply" to them subject to

an agreement being in place. In Ai Group's view, the terms "coverage" and "application" as used in the Request should be given the meanings in the *Fair Work Act 2009* as set out in sections 47 and 48 of the Act.

30. Indeed, employees earning above the exemption rate retain the benefit of a number of clauses in the modern award. It is not to the point that they do not receive the same set of entitlements under the award as other groups of employees covered by the award – this does not have the effect that those employees are not covered by the award.
31. The fact that employees earning above the exemption rate remain covered by the modern award is evident in a number of ways. For example, when the NES commences, such an employee would not be an award-free employee for the purpose of the availability of certain flexibilities, such as the ability to average hours through a written agreement. To take another example, even where such an employee earned above the high income threshold, he or she would not be precluded from bringing an unfair dismissal claim by s.382(b) of the *Fair Work Act*, since the high income threshold exemption only applies to award/agreement free employees.
32. Ai Group also submits that even if Clause 17 could be seen as having the effect of exempting employees from coverage or application, there is a history of similar clauses in a wide range of awards and NAPSAs in the relevant industry or occupation. The Commission effectively reached this conclusion in its Decision of 19 December 2008, when the modern award was published, when it stated:

“**[228]** A number of changes to the exposure draft have been made as a result of these considerations. We have decided to include an exemption provision in line with the NSW NAPSA clause in recognition of the longstanding and widespread use of the concept in federal clerical awards and in NAPSAs.”
33. In Ai Group's submission, this finding should not be disturbed.

The Commission’s power to vary a modern award is discretionary and Paragraph 2(f) is an objective, not a requirement

34. The Commission’s power to vary a modern award, which is governed by section 576H of the *Workplace Relations Act*, is discretionary. The Commission has a broad power to vary a modern award “if the variation is consistent with the award modernisation request”.
35. In its Statement on 26 June 2009, the Full Bench described the approach to be taken to applications to vary modern awards in the following terms:

“[3] Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration. A variation in the Minister’s award modernisation request made after the modern award might constitute such a change. In that respect we repeat what the Full Bench said in its 22 May 2009 statement in relation to the Stage 3 awards:

“[7] Another more general issue arises in connection with the recent variation to the consolidated request. It is likely that the variation will have some significance in relation to modern awards made in the priority stage and in Stage 2. We do not intend, however, to initiate a review of those awards as that course would lead to considerable delay in completing modernisation. A party covered by a modern award who wishes to challenge terms in that award based on the variation to the consolidated request should make an appropriate application.”

[Emphasis added]

36. It is clear from the Commission's comments that a variation to the request "might" be a sufficient basis for the Commission to exercise its discretion to reconsider a modern award, if it constitutes a "significant change in circumstances". The Commission has, in Ai Group's submission, made it clear that there is no automatic right to have a modern award reconsidered, let alone varied, even where it can be shown that a modern award has been affected by a variation to the Request.
37. The discretionary nature of the Commission's task in making modern awards, as well as varying them, is further highlighted by a consideration of the divergent set of factors and issues which the Commission is required to take into account in exercising its functions of award modernisation.
38. In being governed by the Act and the Request, the Commission is required to take into account a wide range of complex and sometimes conflicting factors.
39. The fact that the Request states, in clause 2, that the creation of modern awards is not intended to "disadvantage employees" (para 2(c)) nor to "increase costs for employers" (para 2(d)), is but one example of the difficult parameters of the Commission's role. It is noteworthy that the relevant paragraph added to the Request also appears in this same clause, which commences with the words "*The creation of modern awards is not intended to*". This language is not strict or prescriptive but rather permissive, and it gives rise to a guided discretion. It is in the nature of a set of objectives - a mix of factors for the Commission to consider, as broad parameters, in exercising its award modernisation functions. Clause 2 can be contrasted with many other provisions in the Request which used terms such as "must" and "must not" in relation to the Commission functions (eg. clause 34, "*...the Commission must not include a provision of any kind that deals with long service leave*").

40. Furthermore, Paragraph 2(f) of the Request has no particular status over and above any of the other factors listed in clause 2. It has no more weight in terms of determining the overall outcome for a particular modern award than any of the other factors. If this were not so, it would be open for any union party to bring an application to vary a recently made modern award on the basis that it disadvantaged employees, or for an employer or employer organisation to argue that a modern award should be varied because it increased costs for employers.
41. If the Commission were to vary the award to remove Clause 17 with the aim of achieving the objective in Paragraph 2(f), the result would clearly conflict with the objective in Paragraph 2(d).
42. In Ai Group's view, the Commission should be particularly reluctant to exercise its discretion to vary a modern award in response to an application based on any of the factors identified in clause 2. This should be the case even if it could be shown that the creation of a particular modern award did not entirely achieve one of the objectives listed in clause 2 (such as paragraph 2(f)).
43. Ai Group submits that the Commission should not establish a precedent for varying modern awards on the basis of the factors in clause 2, even where the Request was varied subsequent to the Commission's decision.

5. THE MINISTER'S LETTER

44. In the above section, Ai Group has submitted that the Commission should have primary regard to the actual wording of the Revised Request. We have further submitted that Paragraph 2(f) of the Request is not ambiguous and therefore it is not necessary for the Commission to look beyond the wording in this paragraph in interpreting the variation.

45. The variation to the Request was accompanied by a letter from the Minister and this letter, we submit, should be considered in a similar manner to submissions made by the Commonwealth. Such materials set out important views for the consideration of the Commission but they do not have the significance of wording in the Award Modernisation Request.

46. The relevant extract from the Minister's letter is:

"Award exemption clauses

I note the Commission's comments in the 3 April 2009 decision about award exemption clauses. The request now clearly reflects more clearly the Government's intention that the creation of modern awards should not exempt, or have the effect of exempting from the safety net provided by modern awards, employees other than those expressly listed in the request. Employees who are not high income employees should be protected by a complete and comprehensive modern award safety net of basic entitlements unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation. For example, the Clerks – Private Sector Award 2010 exempts employees employed by the week from certain provisions of the modern award (for example, over time pay, shift and other allowances). The Government considers that this award should not seek to exclude basic award conditions for employees who should be protected by a complete and comprehensive safety net, through both modern awards and the National Employment Standards (NES), given that there is not a history of exemption from these provisions in a wide range of awards and NAPSAs."

47. In considering the Minister's comments, Ai Group urges the Commission to take account of the following matters:

- If the Minister intended to remove the Commission's discretion and require the Full Bench to remove Clause 17 of the Clerks Modern Award, the amendment made to the Award Modernisation Request would have been far more prescriptive. The Government, like all other parties, has a view on decisions which the Commission makes and is entitled to express that view. The expression of such views is very different to the wording incorporated within the Award Modernisation Request or in legislation;

- Clause 17 of the Clerks Modern Award does not “*exempt, or have the effect of exempting from the safety net provided by modern awards, employees other than those expressly listed in the request*”.
- Employees earning above the rate calculated in accordance with Clause 17 remain covered by a “*comprehensive modern award safety net of basic entitlements*”. If the Commission does not believe that the “basic entitlements” listed in Clause 17 are sufficient it is open to the Commission to add some additional clauses, eg. consultation, dispute resolution and access to the modern award and NES. However, we submit, that penalty rates, shift allowances, weekend allowances etc are not “basic entitlements” (or commonly applied entitlements) for higher paid clerical employees.
- All clerical employees covered by the award, including those paid above the rate calculated in accordance with Clause 17, are “*protected by a complete and comprehensive safety net, through both modern awards and the National Employment Standards (NES)*”
- There is a history of exempting employers from applying penalty rates, shift allowances and weekend allowances “*across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation*”. The Commission effectively reached this conclusion in its Decision of 19 December 2008, when the modern award was published, when it stated:

“**[228]** A number of changes to the exposure draft have been made as a result of these considerations. We have decided to include an exemption provision in line with the NSW NAPSA clause in recognition of the longstanding and widespread use of the concept in federal clerical awards and in NAPSAs.”

48. Accordingly, Ai Group submits that, even if Paragraph 2(f) of the Revised Request is read in conjunction with the Minister's letter, it does not compel the conclusion that Clause 17 is contrary to Paragraph 2(f).

6. CLAUSE 17 IS PART OF A PACKAGE OF CONDITIONS WHICH THE FULL BENCH HAS DECIDED IS APPROPRIATE

49. Ai Group submits that any variation to Clause 17 should not be considered in isolation.

50. In determining the terms of the Clerks Modern Award, the Commission considered the extensive submissions of unions and employer representatives and carried out its own research and analysis. Clause 17 was not arrived at in isolation, but was part of a package of conditions which the Commission has decided is appropriate for clerical employees in Australia.

51. It would be very unfair upon employers for an integral element of the package to be removed, but for the other elements of the package to be retained.

52. As the Commission is aware, in many clauses of the award Ai Group sought less costly provisions than those which the Commission has adopted.

7. WHAT SHOULD THE COMMISSION DO IN RESPONSE TO THE ASU'S APPLICATION?

53. For the reasons set out above, the Commission should reject the ASU's application and retain Clause 17 in its current form.

54. In the event that the Commission forms the view, in the light of the variation made to the Award Modernisation Request, that some additional clauses should be added to the list in Clause 17 in order to ensure that all employees covered by the award have access to basic entitlements, then these could be added (eg. consultation, dispute resolution and access to the modern award and NES). However, penalty rates, shift allowances, weekend allowances etc are not basic entitlements (or commonly applied entitlements) for higher paid clerical employees.
55. As set out in Section 3 above, Clause 17 can be characterized as an exemption rate, but it is more accurately characterized as a provision which provides a more flexible set of conditions for higher paid employees.
56. Ai Group does not believe that it is necessary or desirable, but if the Commission decides to convert Clause 17 into an annualised salary clause, then this could be done through the amendments set out below. Subclause 17.3 has been adapted from paragraph 18.5(e) of the *Contract Call Centres Award 2010* and the amended title is consistent with the clauses in this award as well as the *Telecommunications Services Award 2010*.

17. ~~Exemption rate~~ Annualised salary arrangements for higher classifications

17.1 Except as to the provisions of:

- Clause 14—Redundancy;
- Clause 24—Superannuation;
- Clause 30—Annual leave;
- Clause 31—Personal/carer’s leave and compassionate leave;
- Clause 32—Public holidays; and
- Clause 33—Community service leave

this award will not apply to employees ~~employed by the week~~ who are in receipt of a ~~weekly~~ salary or wage in excess of 15% above the Level 5 wage rate in clause 16 provided that the wage is not inclusive of overtime payments and/or shift allowances due to the employee under this award.

- 17.2** The ~~exemption~~ rate will be calculated in multiples of one dollar, amounts of less than \$0.50 being taken to the lower multiple and amounts of \$0.50 or more being taken to the higher multiple.

17.3 Salary review

The salary of an employee paid in excess of the rate calculated in accordance with 17.1 and 17.2 will be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award clauses which do not apply to the employee.

57. If, despite Ai Group's submissions, the Commission decides to delete Clause 17 in its entirety, it is vital that the Commission implement a transitional provision preserving the existing exemption rates and annualised salary arrangements for employers covered by federal awards and NAPSAs (eg. the NAPSA arising from the NSW Clerks award) for five years.