9 December 2019

Vice President Hatcher
Fair Work Commission
GPO Box 1994
Melbourne VIC 3001

By email: chambers.hatcher.vp@fwc.gov.au

Dear Vice President Hatcher

Re: BANKING, FINANCE AND INSURANCE AWARD 2010 [MA000019] – Annualised Wage Arrangements

The Australian Financial Markets Association (AFMA) welcomes the opportunity to make comment on the proposals in [2019] FWCFB 4368 in relation to the BANKING, FINANCE AND INSURANCE AWARD 2010 [MA000019] (**Award**) Annualised Wage Arrangements. AFMA represents the collective interests of over 120 members, which are involved in all aspects of the financial markets and wholesale banking.

We seek to raise a small number of significant concerns relating to the current proposals and their timing. The substantive issues with the Award we will raise are limited to the annualised wage arrangements.

While we note that ideally we would have joined the process at a much earlier stage, we believe there are still significant improvements that can be made to the Award at this draft stage. We trust that our submission will bring further context and industry knowledge that might assist in optimising the Award design.

Workforce participation

We are concerned about the introduction of time recording and proof of work requirements for employees covered by the Award. Many firms in the financial services industry devote considerable effort to ensure their internal cultures support flexible workplaces where employees are free to work in ways, and at times, that suit their personal needs. In many instances, employees are also empowered and trusted to focus on work delivery rather than working set hours. This fits within the broad social expectations of contemporary Australian society and is part of meeting corporate social responsibilities.

The industry has made significant inroads to increasing flexible employment supported by the Government's Office for Women and other initiatives.

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These include the ability to work at multiple periods of the day to fit around family and care commitments and other personal and administrative responsibilities that arise from time to time. They often include the ability to work from home and thereby avoid long commutes, and in doing so make roles accessible to a much wider range of people than would otherwise be the case if the roles were more regimented in their requirements.

This has been of direct benefit to women, and an increasing number of men, who take on family care duties, those that have other care responsibilities as well as older Australians and other professionals, where the ability to configure working hours and work remotely has allowed those individuals to meet their personal responsibilities and their personal preferences to achieve a work life balance.

A move to a requirement for timesheets and proof of work periods is likely to be a retrograde step for these initiatives. Over time these requirements could reasonably be expected to increase the need to have staff on casual contracts to meet varying periods of high demand and to make roles impractical for many individuals with family and care commitments whose available hours do not align with more standard workplace hours. This is not an outcome the industry would welcome as it is not in keeping with community expectations or the well-being of our employees.

Timesheets are retrograde in that they return us to older rigid work paradigms from the last century and communicate a message that time at work is more important than the delivery of an agreed quality product. This runs against the needs of an innovative, agile, knowledge-based economy. In addition to the benefits for workforce participation and flexibility, a more flexible workplace is a highly valued employee benefit and, increasingly, a key drawcard for attracting and retaining employees. It creates the opportunity to work in a culture of agility and flexibility that encourages achievement to not be reflected in actual hours worked, but more related to meeting agreed objectives.

Introducing a system and requirement to track exactly which hours are worked, may have a negative impact on individuals' motivation, productivity and reduce their ability to be flexible and meet their personal and work objectives. While firms in the industry would be using timesheets only as required to meet legal requirements there is a risk that employees will feel that they are being monitored for hours at work and this could have a negative and unwelcome impact on productivity, performance, employee satisfaction and wellbeing.

The requirements for timesheets thereby run counter to the Government's aims around greater workforce participation and flexible working arrangements to support this.

This also comes at a time when the financial services industry is having some difficulty in attracting, recruiting and retaining talent. Any steps which make the work environment less attractive will exacerbate that problem.

The industry would prefer to continue to offer an environment that is dynamic and responsive to employees and not to return to the days of clocking on and off, particularly where, as we will discuss below, there is little risk of underpayment.

Timesheets for employees paid well above minimum Award base salaries

We understand and support the aim of the requirements of the Decision - [2019] FWCFB 4368 to ensure that individuals are not disadvantaged compared to their entitlements under the Award.

Timesheets, as required by the Decision, while from another era, can provide a protection mechanism to ensure that this is the case. We note the reasoning supporting the need for timesheets:

> [42] As earlier set out, a number of employer submissions opposed the introduction of a requirement to keep a record of the hours worked by employees on annualised wage arrangements. However, none of these submissions explained how a reconciliation exercise, or the existing requirements that employees not receive less pay under an annualised wage arrangement than under the normal modern award provisions, could operate without a record of the hours worked by the employee. Nor was it contended, contrary to the conclusion stated in paragraphs [123] and [124] of the 2018 decision, that the Fair Work Regulations already prescribed a requirement to keep records of hours worked. Accordingly, we maintain our conclusion that a record-keeping requirement is a necessary incident of the requirement to conduct an annual reconciliation.

We agree that a record keeping requirement is necessary to conduct an annual reconciliation if one is required. However, for employees remunerated well above the Award, the annual review, and therefore the record keeping burden, may be redundant as there is no real risk of them being paid below the minimum Award rates of pay.

In these cases, there will be a burden that is created for the employees and damage to flexibility with no potential for additional gain for the employees. This risk reward profile should be avoided where possible.

Currently, the pay point where the regulations effectively recognise that an individual will not be paid any less than the Award entitlements is the High Income Threshold (HIT).

The HIT, currently set at $148,700 per annum, is at an appropriate level to determine access to unfair dismissal for non-Award covered staff. However, at over $90,000 above, or 2.5 times the maximum full-time Award annual rate for Level 6, and over 3.6 times the rate for Level 1 employees, it does not appear to be appropriately calibrated for the purposes of determining whether there is a real risk that the annualised salary cannot reasonably be expected to cover all Award entitlements.

We note it is also not responsive to the different rates of pay applicable to different levels, and many other Award entitlements such as overtime, loadings and shift penalties which are calculated on a proportionate basis on the rates of pay applicable to each classification

level i.e. one reference level is effectively set for exclusion regardless of the applicable pay level of the employee.

We respectfully submit that a more appropriate threshold for record keeping by employees (and review by employers) might be constructed in a similar way to the three awards (set out below) which require that the annualised wage be a minimum percentage above the minimum ordinary-time wage rate specified in the Award for the relevant classification of the employee.

To allow salaries to be annualised the Marine Towage Award provides for a minimum additional 40%, and the Hospitality Award and the Restaurant Award an additional 25%, above the minimum ordinary-time wage rate specified in the relevant award.

For an abundance of caution, we propose that the level at which record keeping by employees and review by employers is no longer required, be set higher still, at 50% above the minimum ordinary-time wage rate specified in the Award for the relevant classification in the Award. For Level 6 employees this equates to approximately an extra $30,000 above the minimum ordinary-time wage rate specified in the Award, or a little under $90,000 in total.

Understandably, the requirement to complete timesheets is not welcomed by the affected employees, and we anticipate that this proposal for those already remunerated well in excess of the Award would be welcomed.

By way of illustration, an employee classified at Level 6 of the Award, who is paid an annual salary of $90,000, could work 10.1 hours a day (2.5 hours of overtime every day) on every working day (260 days) for a full year and still have received in excess of the minimum rate of pay required by the Award.

Our suggested amendments to address these issues is outlined below (with strike out representing deletion and bold representing addition):

> b) **Except where the annualised wage is equivalent to an hourly rate at least 50 per cent higher than the minimum ordinary-time wage rate specified in the award for the relevant classification of the employee:**
>
> > **(i)** The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.
> >
> > ~~(c)~~**(ii)** The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause X.2(b)**(i)**. This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

Annual Review Timing

We also suggest as per the mark up in X.2 (b) below that the review be changed to a calendar year basis.

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

Changing the reconciliation period to calendar year (and upon termination), would allow a single annual process for all employees that fit in with existing variable remuneration processes and is far less onerous on firms. Employees would not be disadvantaged, and given the size and financial position of firms and for many their prudentially regulated status there is *de minimis* risk around an inability to make good any shortfalls or risks of bankruptcy impacting payments.

Inclusion of variable remuneration

Many organisations use variable pay to drive a high performing culture. As presently drafted payments that cannot be determined in advance cannot form part of the annualised salary calculation model. We note that the Australian Taxation Office classes performance bonuses as salary[1] and more generally these are a significant component of remuneration and widely used in the industry.

At a minimum the annual reconciliation calculation by employers that ensures there is no disadvantage as compared to entitlements under the Award should take into account discretionary payments which have already been paid. For a backwards looking review process these payments are no longer uncertain having already been made. However, the current drafting in X.2 (a) and (b) uses the term 'annualised wage' which may be read as not to include the discretionary components that have been paid.

We respectfully submit that the term 'annualised wage' should be replaced in X.2 (a) and (b) with 'annualised wage combined with any variable remuneration payments already made' as in the below:

[1] See https://www.ato.gov.au/business/super-for-employers/how-much-to-pay/checklist--salary-or-wages-and-ordinary-time-earnings/#bonuses

X.2 *Annualised wage **arrangements** not to disadvantage employees*

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

b) **Except where the annualised wage is equivalent to an hourly rate at least 50 per cent higher than the minimum ordinary-time wage rate specified in the award for the relevant classification of the employee:**

(i) The employer must ~~each 12 months from~~ **once in each full calendar year that follows** the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage **combined with any variable remuneration payments** actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

Variable remuneration and the APRA remuneration standard

While not yet finalised the APRA draft Prudential Standard CPS 511 is expected, consistent with the recommendations of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report*, to require that, consistent with prevailing industry practices, downward adjustments in variable remuneration (including to zero) be used in the sector to address misconduct issues for more senior officers. Consistent with the draft standard the approach to remuneration at firms in the industry generally emphasises that a significant portion of pay at all levels (and not limited to senior officers) should be "at risk" to address behavioural factors and incentivise appropriate conduct.

AFMA notes that there are risks that the revised approach to annualised salaries and variable remuneration that the Commission proposes will result in pressure being placed on firms to reduce the use of variable remuneration. This may take the form of a lower variable component or role-based allowances, both of which would limit or remove the capacity of firms to address misconduct through variable remuneration as encouraged by the direction of the APRA Prudential Standard.

Timing

AFMA supports extending the start date so that employees as well as employers can be educated and prepared for such a significant change.

More time is needed to introduce and configure more formal time tracking systems and payroll processes to accommodate the recording of hours, reconciliations and payment calculations in ways that are convenient and fully understood by employees.

The requirement comes at a time when there is substantial regulatory driven technology load already on firms in the industry. To name a few:

- 1 July 2019 saw the introduction of the APRA standard for information security. Firms are implementing the guidance to this which was released a few weeks before the introduction.
- The full roll out of Open Banking is currently underway officially launching on 1 July 2019 with further releases due in February, this is a program that links core banking platforms with external fintech providers for the benefit of customers in a secure way.
- The ASX is replacing the clearing and settlement system CHESS in a pioneering multi-year project that is the largest in many years undertaken by the industry.
- Some firms have extensive programs underway to respond to developments in relation to anti-money laundering and reviews of system governance.

More generally, and consistent with other feedback the Commission has received and that we regularly provide to regulatory bodies, 12 months is more appropriate for projects requiring significant change. The process is reasonably standardised within the industry internationally and involves (often international) budgeting, approval processes, scheduling, and the need to avoid standard international 'change freeze' periods over the year-end period.

Further, for those organisations who would like to explore the use of IFAs as a means of retaining flexibility for their workforce, that process will necessitate several months of communication and a change management process to ensure employees are properly appraised of their rights, prior to entering into any IFAs. For these reasons significantly more time before the implementation of the annualised Award requirements would be appropriate to ensure employees are not disadvantaged.

Conclusion

We trust that this submission is of assistance. If you would like further information, please do not hesitate to contact me via the AFMA Secretariat.

Yours sincerely

Damian Jeffree

Director of Policy and Professionalism