

MODERN AWARDS REVIEW 2014

PAYMENT OF WAGES (AM2016/8)

**SUBMISSIONS ON BEHALF OF AUSTRALIAN
BUSINESS INDUSTRIAL & THE NSW BUSINESS
CHAMBER**

A. INTRODUCTION

1. BACKGROUND

- 1.1 These reply submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the directions issued in paragraph 198 of the Full Bench's decision in these proceedings [2016] FWCFB 8463 (**the Decision**).
- 1.2 In order to reply to the various submissions filed, ABI and NSWBC intends to make submissions in relation to three general matters, before responding to some specific issues raised by the parties.
- 1.3 The general matters that will be addressed are as follows:
- (a) Uniformity of award-clauses does not necessarily advance the goal of achieving a simple, stable and sustainable modern awards system.
 - (b) The regulation of over-award payments.
 - (c) The difficulties associated with compelling an employer to nominate a specific pay day in writing.

2. UNIFORMITY OF AWARD CLAUSES AND THE GOAL OF ACHIEVING A SIMPLE, STABLE AND SUSTAINABLE MODERN AWARD SYSTEM

- 2.1 On its face, the introduction of a model term across all awards appears beneficial as it achieves a level of uniformity in the regulatory framework regarding a particular subject matter. It is acknowledged that uniformity of regulation can assist reduce confusion and may contribute to a better level of public awareness regarding certain regulations.
- 2.2 However, in the context of a modern award safety net, it should not be assumed that uniformity automatically equates with simplicity.
- 2.3 Modern awards have arisen in a context where various industries have long standing practices in relation to particular employment conditions. These practices are often well known within the respective industries and, accordingly, changing such practices can give rise to confusion and misunderstanding, as opposed to achieving simplicity.
- 2.4 It is for this reason that the Full Bench of the Fair Work Commission appropriately identified in its Preliminary Issues Decision that:

*"...the need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation."*¹

The need to advance a merit argument for change, supported by probative evidence², ensures that award provisions and longstanding industry practices are not altered without good reason.

- 2.5 Furthermore, there may be industry considerations which warrant the adoption of a particular approach in one industry, which are not present in other industries. A common approach which does not reflect these industry specific differences risks disruption in those industries, and one which does risks over-regulation.

¹ *Four Yearly Review of Modern Awards - Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60]

² The need for probative evidence is addressed in *Four Yearly Review of Modern Awards - Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23] and [60]

- 2.6 These propositions appear to be supported by the ACTU in its own submissions, which identify that “*commonality and equity ought not be entirely equated*”.³
- 2.7 For these reasons, it is respectfully submitted that caution should be adopted before industry specific terms are replaced with a model term and that it is important that the impact of the model term is considered on an award-by-award basis.
- 2.8 By way of example, there are 34 awards that presently unconditionally permit the payment of wages to employees on a monthly basis. These awards are listed at Schedule 1 to these submissions.
- 2.9 ABI and NSWBC are not aware of any concerns that have arisen in any of these industries that would necessitate the imposition of new conditions with respect to employees being paid monthly. Certainly, no evidence has been filed that implies that the existing payment arrangements (which permit monthly pay) are giving rise to adverse outcomes for employees.
- 2.10 On the contrary, in some of these industries, there are specific arrangements in place within the modern award that complement the mechanism of monthly payments. The *Real Estate Industry Award 2010* provides a good example. This Award permits employers to pay employees on a commission-only basis. The commission payments payable under the Award are in part determined by the employer’s gross sales commission from its business. The determination of both the employer’s gross sales commission and an employee’s personal sales commission is a calculation that might best be conducted on a monthly basis - given the fluctuations that might arise in house sales from week to week. It is therefore submitted that, in this Award, there should not be any fetters imposed on an employer’s ability to pay employees monthly.
- 2.11 Similar considerations might arise in other awards, when considered on an individual basis.

3. THE REGULATION OF OVER-AWARD PAYMENTS

- 3.1 Given that the modern awards objective is focused upon the creation of a “*fair and relevant minimum safety net of terms and conditions*”⁴, it is respectfully submitted that modern awards should only regulate the frequency of payments arising from the minimum safety net itself.
- 3.2 That is, over-award payments need not (and should not) be subject to the model term regarding payment of wages. This is because over-award payments do not form part of the minimum safety net.
- 3.3 The current drafting of clause X.1(a)(i) identifies that the model term is regulating the payment of employee wages but does not expressly indicate that the wages being regulated are solely those wages arising from the award.
- 3.4 It is open for a party to interpret clause X.1(a)(i) as regulating all wage payments made to employees.
- 3.5 In order to address this issue, it is submitted that clause X.1(a)(i) should instead read as follows:

“(a) The employer must pay each employee no later than 7 days after the end of each pay period all amounts that are due to the employee under this Award or the NES.”

³ ACTU Submissions dated 21 December 2016 (**ACTU Submissions**)

⁴ See section 134(1) of the FW Act

4. THE DIFFICULTIES ASSOCIATED WITH COMPELLING AN EMPLOYER TO NOMINATE A SPECIFIC PAY DATE IN WRITING

- 4.1 Clause X.1(a) of the model term (which is not specifically opposed by ABI/NSWBC) ensures that all employees will receive their wage payment within 7 days of the expiration of their pay period.
- 4.2 This ensures that payments to employees are made contemporaneously to the work performed and accords with industry practice.
- 4.3 Given the introduction of this clause into the model term, ABI and NSWBC submit that it is unnecessary for an additional provision to be inserted into the model term which requires an employer to specify the employee's pay date in advance and in writing.
- 4.4 Provided that an employee receives their pay within 7 days of their pay period, there should not be any substantive prejudice caused to the employee if the day on which the payment is made alters on occasion. This is particularly the case given that, in practice:
- (a) many employers do sometimes make payments in advance of a notional pay date; and
 - (b) employers sometimes may not be able to process payments on the same day of each week because of unforeseen absences, malfunction of payroll systems or operational constraints that affect the business from time to time.
- 4.5 ABI and NSWBC further submit that the obligation to notify the pay date in writing is an obligation which might give rise to innocent non-compliance by small businesses, who commonly engage employees with little formality and without entering into a documented contract of employment.
- 4.6 It would be regrettable if the introduction of the model term saw small businesses which pay on a regular basis (and in compliance with the periods specified by their award) exposed to civil penalties penalised on account of a failure to comply with a technical documentation requirement imposed by the Award.
- 4.7 Given the already extensive record keeping requirements imposed by the *Fair Work Act 2009* and *Fair Work Regulations 2009*, it is submitted that imposing further obligations on employers to record an employee's pay date in writing is inconsistent with section 134(1)(f) of the modern awards objective, as it unnecessarily increases the regulatory burden on employers.

5. SPECIFIC MATTERS RAISED BY OTHER PARTIES

Discretion conferred on employers to pay weekly or fortnightly

- 5.1 Paragraphs 28-29 of the CFMEU (Forestry, Furnishing, Building Products and Manufacturing Division) submissions dated 21 December 2016 oppose the provisions of the model term which permit an employer to vary the payment frequency between fortnightly and weekly on notice. The CFMEU instead contends that changes to a pay frequency should only be possible with consent of the employees concerned or a majority of the relevant workforce.
- 5.2 It is submitted that such an approach is unnecessary and inappropriately restrictive. The reality is that, if 4 weeks' notice is given of any change, an employee will have at least two (and up to four) pay cycles to adjust to any new payment regime. This should provide ample time to change any direct debit arrangements or other periodic payments made by an employee.
- 5.3 Given that both weekly and fortnightly payment cycles ensure prompt payment of employees following the performance of the relevant work, there is no valid reason

necessitating the obtainment of employee consent before varying payment cycles. Adopting the approach suggested by the CFMEU is accordingly inconsistent with section 134(1)(f) of the modern awards objective, as it unnecessarily increases the regulatory burden on employers.

Prohibit monthly payments to casual employees

- 5.4 The ACTU Submissions assert that employers should not be permitted to pay casual employees on a monthly basis, given that it may be difficult to pay casual employees two weeks of their pay in advance where the casuals have variable hours.
- 5.5 In response, NSWBC and ABI submit as follows:
- (a) Firstly, it is ABI and NSWBC's preference that employers continue to be permitted to pay employees monthly in arrears - where such an arrangement is presently permitted by the award safety net. This approach commends itself because:
 - (i) no evidence has been filed in the proceedings identifying problems associated with monthly payments to date; and
 - (ii) paying employees monthly in arrears ensures that employers do not have to undertake the task of needing to estimate an employee's hours in advance of the performance of the relevant work.
 - (b) Secondly, even if the model term ultimately does require monthly payments to be made two weeks in advance and two weeks in arrears, this does make the task of paying casuals impossible. Employers can rely on rosters and traditional work patterns to estimate casual workloads. The fact that a casual employee may be absent on a particular day for an unforeseen reason does not differ substantially from an absence of a permanent staff member who may need to take unpaid leave for some reason without notice. Again, there is no evidence before the Commission in these proceedings which suggests that problems have arisen with casuals being paid monthly in the years since modern awards were introduced.

Remove ability for employers to pay by cheque

- 5.6 Both the ACTU and TCFUA submit that employers should no longer be able to pay employees by cheque⁵ on the basis that cheque payments are "*obsolete*", can be dishonoured and take time to clear.
- 5.7 Whilst it is acknowledged that the majority of employers now pay employees by way of electronic funds transfer, there remains a portion of employers still paying employees by cheque. Indeed, the Australian Payments Clearing Association Report, *Towards the Digital Economy: Milestones Report April 2016*⁶, demonstrates that there are still over 100 million cheques exchanged in Australia per year. Although the Report does not identify the number of cheques that are being exchanged for the purposes of making wage payments, it remains likely that cheque wage payments continue to be exchanged in certain industries.
- 5.8 It cannot therefore be said that cheque payments are obsolete. They remain relevant for some employers. Indeed, for some employers they can be easier to utilise than other forms of payment systems because:
- (a) writing out a cheque is an activity that can be conducted in minimal time;

⁵ ACTU Submissions, page 4; TCFUA submissions dated 23 December 2016, page 6

⁶ Filed with the initial ABI/NSWBC Submissions on 20 September 2016

- (b) cheque payments do not require connections to the internet or internet banking services (unlike EFT) - which is a particularly helpful benefit in regional or remote areas; and
 - (c) cheque payments are easier to trace than purely cash payments.
- 5.9 Furthermore, section 323 of the *Fair Work Act 2009*, which sets the legislative requirements for the method and frequency of wage payments, specifically contemplates cheque payments as an acceptable method of wage payment.
- 5.10 Given that cheque payments remain relevant to some employers, and that no evidence has been filed to demonstrate any problems arising from employers paying employees by way of cheques, it is submitted that cheque payments should be retained as a legitimate form of payment in the model term. This helps to ensure that the safety remains “*fair and relevant*” for all employers and employees.

| 2 February 2017

Schedule 1

Air Pilots Award 2010

Alpine Resorts Award 2010

Aircraft Cabin Crew Award 2010

Aboriginal Legal Rights Movement Award 2016

Architects Award 2010

Broadcasting and Recorded Entertainment Award 2010 (monthly only where the employer is currently paying monthly in which case that system may continue)

Black Coal Mining Industry Award 2010

Business Equipment Award 2010

Commercial Sales Award 2010

Educational Services (Schools) General Staff Award 2010

Educational Services (Teachers) Award 2010

GrainCorp Country Operations Award 2015

Hydrocarbons Field Geologists Award 2010

Hydrocarbons Industry (Upstream) Award 2010

Journalists Published Media Award 2010

Labour Market Assistance Industry Award 2010

Maritime Offshore Oil and Gas Award 2010

Medical Practitioners Award 2010

Mining Industry Award 2010

Miscellaneous Award 2010

Nursery Award 2010

Oil Refining and Manufacturing Award 2010

Professional Employees Award 2010

Racing Clubs Events Award 2010

Rail Industry Award 2010

Real Estate Industry Award 2010

Reserve Bank of Australia Award 2016

Salt Industry Award 2010

Seagoing Industry Award 2010

Stevedoring Industry Award 2010

Victorian Government Schools - Early Childhood - Award 2016

Victorian Government Schools Award 2016

Victorian Local Government (Early Childhood Education Employees) Award 2016

Wool Storage, Sampling and Testing Award 2010