Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission – The Commission's Provisional Views

Payment of Wages (AM2016/8)

9 February 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/8 – PAYMENT OF WAGES

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1. INTRODUCTION

1. Various matters associated with the payment of wages have been referred to a separately constituted Full Bench of the Fair Work Commission (**Commission**). On 5 December 2016, the Full Bench issued a decision[1] in relation to those matters (**December 2016 Decision**).

2. At paragraph [198] of the aforementioned decision, interested parties were directed to file submissions in relation to the following issues:

    - The provisional 'payment of wages and other amounts' model term proposed by the Commission at paragraph [34] of the December 2016 Decision, including its treatment of accrual of payments.

    - The Commission's provisional view "that there would be benefit in either replacing the existing provision for payment in all modern awards with the 'payment of wages and other amounts' model term (once finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements"[2].

    - The provisional 'payment on termination of employment' model term proposed by the Commission at paragraph [117] of the December 2016 Decision, including its treatment of accrual of payments.

3. This submission is filed by the Australian Industry Group (**Ai Group**) in reply to those filed by:

    - Mark Irving and Andrew Stewart;

    - The Australian Council of Trade Unions (**ACTU**);

    - The Australian Manufacturing Workers Union (**AMWU**);

    - The CFMEU – Construction and General Division (**CFMEU – C&G**);

[1] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463.

[2] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [198].

- The CFMEU – Mining and Energy Division (**CFMEU – M&E**);
- The Textile, Clothing and Footwear Union of Australia (**TCFUA**);
- The Shop, Distributive and Allied Employees' Association (**SDA**);
- The CFMEU – Forestry, Furnishing, Building Products and Manufacturing Division (**CFMEU – FFPD**);
- Australian Business Industrial and the NSW Business Chamber (**ABI**);
- Master Builders Australia (**MBA**); and
- The National Road Transport Association (**NatRoad**).

4. This submission should be read in conjunction with our earlier submission of 23 December 2016.

2. PAYMENT OF WAGES AND OTHER AMOUNTS

5. We here propose to deal with submissions made by other interested parties regarding the provisional 'payment of wages and other amounts' model term proposed by the Commission at paragraph [34] of the December 2016 Decision, including its treatment of accrual of payments.

Clause X.1(a) – The requirement to pay within 7 days

6. Clause X.1(a) of the proposed model term requires that an employer must pay an employee the employee's wages and all other amounts due under the award and NES for the pay period "no later than 7 days" after the end of the each pay period.

7. The ACTU submits that the introduction of an obligation to pay an employee's wages and other amounts due within 7 days "may occasion some hardship on

employees where the current interval between the conclusion of the pay period and the pay date is a shorter period, at least during the transition period".[3]

8. The ACTU has not identified the number of awards that require payment within less than 7 days, the specific awards that in fact contain such a provision, the number of days within which those awards require payment or the nature of the alleged hardship that "may" be caused. It is trite to observe that there is no material before the Commission that might establish that such hardship would in fact be occasioned.

9. We acknowledge that there may be some consequence for an employee at the point in time at which the first pay day falls after the model term takes effect. That is, there may under some awards be an alteration to the number of days after the conclusion of a pay period that an employee must be paid. If the Commission considers that such a change would render the clause incapable of providing a fair and relevant minimum safety net (a matter that we do not concede), having regard to the various considerations listed at s.134(1), we concur with the proposition put by the ACTU; that the issue should be dealt with in the context of specific awards in relation to which the issue in fact arises. This includes, for instance, the submissions of the TCFUA.[4]

Clause X.1(a) – A reference to the *Acts Interpretation Act 1901 (Cth)*

10. The Commission's decision requests that parties give consideration to whether the model term should include a provision to the same effect of s.36(2) of the *Acts Interpretation Act 1901* or whether it should include a note drawing attention to the statutory provision.[5] It is Ai Group's position that the model term should include a clause that makes clear that the obligation arising under clause X.1(a) does not apply where the relevant day falls on a weekend or a public

[3] ACTU submission dated 21 December 2016 at page 3.

[4] TCFUA submission dated 23 December 2016 at paragraphs 3.5 – 3.6.

[5] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [44].

holiday. Rather, the model term should provide employers with the ability to make the relevant payment at a later point in time.[6]

11. The ACTU has raised a potential complexity arising from the force of s.40A of the *Fair Work Act 2009*.[7]

12. The matter raised only serves to further highlight the potential difficulties that may arise from the introduction of a note referring to the *Acts Interpretation Act 1901* and the possibility of subsequent confusion and disputation as to impact (if any) of s.40A of the *Fair Work Act 2009*.

13. We note that subject to the ACTU's concern regarding the implications of s.40A of the *Fair Work Act 2009*, it does not oppose the insertion of a provision dealing with weekends and public holidays as per paragraph [44] of the Commission's decision.

14. ABI supports the proposition that a note referring to s.36(2) of the *Acts Interpretation Act 1901 (Cth)* should be inserted in the model term.[8] We respectfully disagree and refer the Commission to paragraphs 35 – 36 of our submission dated 23 December 2016 in this regard.

Clause X.1(b)(iii) – The reference to clause X.1(e)

15. Clause X.1(b)(iii) states that subject to clause X.1(e), an employee's pay period may be monthly. The ACTU submits that clause X.1(b)(iii) should be amended such that it also operates subject to clause X.1(f).[9]

16. We do not consider that the amendment proposed is necessary. The provision makes sufficiently clear that a monthly pay cycle may only be implemented with the consent of the majority of employees. An additional cross-reference to the following subclause, which serves to place a restriction on the manner in which

[6] Ai Group submission dated 23 December 2016 at paragraphs 34 – 37.

[7] ACTU submission dated 21 December 2016 at page 3.

[8] ABI submission dated 6 January 2017 at paragraphs 2.7 – 2.8.

[9] ACTU submission dated 21 December 2016 at page 4.

monthly pay cycles are administered, is unnecessary and would render the relevant clause unduly lengthy and potentially confusing.

Clause X.1(f)– The proposed exclusion of casual employees and other issues associated with monthly pay

17. The ACTU has asserted that casual employees, particularly in some industries, have variable hours and has suggested that, consequently, casual employees should be excluded from award provisions permitting monthly pay.[10]

18. The submissions of Mark Irving and Andrew Stewart identify various other difficulties with clause X.1(f).[11]

19. Given the range of difficulties identified, the Full Bench should simply delete clause X.1(f) from the proposed model clause. The problems outweigh the potential benefit associated with the inclusion of such a provision.

20. Regardless, the only justification for the term identified in the Full Bench's December decision appears to be an intention to ensure compliance with s.323(1)(c), a provision that will apply by its own force regardless of award terms.[12] Section 323(1) is a civil remedy provision and this alone should provide sufficient motivation to comply with the provision. Moreover, there is no proper basis for concluding that there is any problem of widespread non-compliance with s.323(1)(c). Nor is it clear why it is necessary that the particular approach to the implementation of monthly pay reflected in x.1(f) should be mandated.

21. We acknowledge that the *Clerks – Private Sector Award 2010* contains an equivalent provision to clause x.1(f). Nonetheless, there are other major awards, such as the *Manufacturing and Associated Industries and Occupations Award 2010*, that permit monthly pay but do not include such a restrictive provision.

[10] ibid

[11] At pages 7 and 8.

[12] [2016] FWCFB 8463 at 41

22. Removing clause X.1(f) would afford parties the capacity to implement or maintain arrangements that reflect their individual circumstances. This should include permitting monthly payment in arrears.

23. Clause X.1(f) represents an unnecessary level of prescription that ought to be avoided.

Clause X.1(c) – The time at which written notification is to be provided

24. The provisional model clause requires that the employer must notify each employee in writing of their pay day and pay period. It does not prescribe, in a temporal sense, when this notification is to be provided.

25. The TCFUA submits that "further clarification as to when the obligation is triggered" may be required. It also raises ancillary concerns as to whether the obligation applies where an employer changes the employee's pay day or pay period and whether written notice of such a change must be kept as an employee record.[13]

26. The CFMEU – FFPD raises a similar issue and suggests that the clause should state that the requisite notification as to be provided "prior to the commencement of the pay period". It submits that the proposed change "would have benefits particularly where employers unilaterally change pay periods or pay days".[14]

27. Firstly, to the extent that the unions refer to changes to an employee's pay day, that is a matter expressly dealt with by the proposed clause X.1(d) and therefore does not warrant further consideration in relation to clause X.1(c).

28. Secondly, we reiterate our opposition to the requirement imposed by the proposed clause X.1(b) for the reasons set out at paragraphs 22 – 33 of our submission dated 23 December 2016. For the reasons there set out, clause X.1(b) should not be included in the model term.

[13] TCFUA submission dated 23 December 2016 at paragraph 3.10.

[14] CFMEU – FFPD submission dated 21 December 2016 at paragraphs 26 - 27.

Clause X.1(d) – The ability to change an employee's pay day or pay period

29. The proposed clause X.1(d) enables an employer to change an employee's pay day or pay period after giving four weeks of written notice to the employee.

30. The TCFUA submits that "unilateral changes to an employee's pay period or pay day could have significant consequences for that employee's budgeting and financial management".[15]

31. The CFMEU – FFPD expresses a similar concern and submits that any changes to pay periods and pay days should require agreement between the employer and the majority of employees or the affected individual employee. In the alternate, the union submits that the proposed clause should be amended to require additional 'safeguards'.[16]

32. The CFMEU – C&G submits that the proposed clause has the "potential to operate disadvantageously to employees, particularly low paid who are reliant on consistent payment of wages." It also argues that any ability to change pay days should be subject to agreement between an employer and the majority of employees in the enterprise.[17]

33. It is our primary contention that an award should not mandate that a pay day or pay period be set. The reasons for our position are articulated at paragraphs 22 – 27 of our submission dated 23 December 2016.

34. Of those awards that presently require that a pay day be set, many do not limit the employer's ability to alter the pay day or pay period. This includes the *Dry Cleaning and Laundry Industry Award 2010*, in which the TCFUA purports to have an interest. There is no material before the Commission to suggest that the absence of such award regulation has given rise to the any of the hypothetical difficulties identified by the aforementioned unions. We note also that the concern is one that has been raised only by the aforementioned unions

[15] TCFUA submissions dated 23 December 2016 at paragraph 3.12.

[16] CFMEU – FFPD submission dated 21 December 2016 at paragraphs 28 – 30.

[17] CFMEU – C&G submission at paragraph 6.

that have an interest in a total of six of the 122 modern awards that may be varied as a consequence of these proceedings.

35. In any event, the concerns raised by the unions regarding the potential impact that such a clause may have on an employee's ability to manage their finances are squarely addressed by the requirement that four weeks of notice is to be provided by the employer of any such change. This provides an employee with ample time to make any necessary arrangements.

36. The proposal to insert a requirement for agreement with relevant employees or an obligation to first consult with them is opposed by Ai Group. There are no apparent cogent reasons for the introduction of such additional hurdles. Rather, it is essential that an employer be granted the discretion to alter the pay day, which may become necessary for a range of reasons. For instance, the relevant payroll personnel may be a part-time employee whose days of work are altered such that the employee no longer works on the day of the week upon which pay day falls. Alternatively, it may be necessary to change the pay day or pay period because of an alteration to the time at which other payments to be made by a business fall due. There is certainly no basis for finding that employers will (or have been) exploiting the ability to alter pay days or pay periods for some unnecessary or illegitimate purpose.

37. Indeed in many circumstances, the imposition of a four week notice period may be unduly restrictive and impractical. Take for instance circumstances in which a small business employs only one payroll personnel and that employee is unexpectedly absent from work due to an illness or injury on the pre-determined pay day. The proposed clause does not make any provision for such circumstances. Rather, an employer unable to make alternative arrangements to ensure payment on that date would be in breach of the award, irrespective of the circumstances. We do not consider that such a provision can appropriately form part of a 'fair' safety net of minimum terms and conditions.

38. We note that the concern we have raised may be remedied by limiting the application of the proposed clause X.1(d) to an employee's *regular* pay day or pay period. We note that the Commission's decision suggests that this was the

intention of the Full Bench, consistent with the consent position reached between Ai Group, the SDA and other interested parties regarding the *General Retail Industry Award 2010,* the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010*: (emphasis added)

> **[42]** Under the *General Retail Industry Award 2010* and the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010* as proposed to be varied, an employer may change a regular pay day after four weeks' notice. Under the *General Retail Industry Award 2010*, but not the variations proposed to the other two awards, such notice must be given in writing. It may have been intended that variation of a pay day under these award terms encompass variation of the length of pay periods. Paragraph x.1(d) of the provisional model term makes it clear that an employer can change both an employee's regular pay day and the employee's pay period after giving four weeks' written notice to the employee.[18]

39. The proposed clause X.1(d) does not, with respect, reflect the passage here cited.

40. Accordingly, it is our position that:

- The model clause should not require that a pay day or pay period be set (or, proceed on the basis that a pay day or pay period will necessarily be set);
- If the Commission nonetheless determines that such a requirement will be introduced:
    - the model clause should permit greater flexibility to an employer seeking to vary the pay day or pay period;
    - the model clause should not require agreement between an employer and its employees to alter the pay day or pay period; and
    - the model clause should not require consultation by an employer with its employees to alter the pay day or pay period.

[18] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [42].

Clauses X.1(b)(iii) and X.1(e) – The ability to change to a monthly pay period

41. Clause X.1(b) of the model term deals with pay periods. It provides that an employee's pay period may be one week or two weeks, as determined by the employer. The employer's discretion in this regard is unfettered. In addition, subject to clause X.1(e), an employee's pay period may be one month.

42. Clause X.1(e) places a restriction on an employer's ability to change from a one week or two week period to a monthly pay period. That is, such a change can only be made by agreement with affected employees.

43. The SDA opposes the introduction of a monthly pay cycle where there is no existing provision for this on various bases, including:

> Low paid workers live from pay cycle to pay cycle and extending the pay cycle from weekly or fortnightly to monthly is likely to be financially unmanageable for most and could create financial insecurity and harm.[19]

44. The TCFUA submits that "there is no merit based justification for the inclusion of longer pay periods, including up to a month for award dependent low paid workers". It argues that the current provisions contained in the awards in which it has an interest require a weekly pay period, which is "reflective and the generally accepted characteristics of the industry as being low paid and award dependent".[20] It also submits that the requirement to reach agreement with affected employees "would be a totally ineffective safeguard for low paid workers".[21]

45. We do not consider that an extension to the duration of a pay period will in and of itself exacerbate any difficulties faced by "low paid" workers. The effect of extending an employee's pay period is that the time at which that employee is paid will be altered; self-evidently it does not impact upon their rate of pay. We accept that it may necessarily require an employee to revise or rearrange the manner in which their finances are managed. There is no material to suggest,

[19] SDA correspondence dated 22 December 2016.

[20] TCFUA submission dated 23 December 2016 at paragraph 3.9.

[21] TCFUA submission dated 23 December 2016 at paragraph 3.16.

however, that the proposed award variation would be "financially unmanageable for most [employees]" or that the requirement to reach agreement "would be a totally ineffective safeguard". Indeed the awards in which the TCFUA has an interest include several facilitative provisions that enable an employer to depart from certain award strictures with the agreement of their employees. There is no evidence that such award clauses have been exploited or that the requirement to reach agreement has been ineffective in protecting the rights of the relevant employees.

46. It is also relevant to note that the characteristics to which the SDA and TCFUA refer are not features of the workforce covered by many modern awards. Several awards cover highly qualified, skilled and professional employees who are not "low paid".

47. We do not consider that there are any cogent reasons for abstaining from the implementation of monthly pay cycles across the modern awards system.

Clause X.2 – Payment by cheque

48. Clause X.2 of the provisional model clause would permit an employer to pay the relevant amounts due by EFT, cash or cheque. The method of payment to be implemented would be determined by the employer.

49. The ACTU submits that "it would be beneficial to consider the extent to which payment by cheque remains prevalent in any particular industry".[22] The TCFUA "opposes a model term which allows for payment of wages and other amounts owed to employees by cheque". It notes that the *Textile, Clothing, Footwear and Associated Industries Award 2010* and the *Dry Cleaning and Laundry Industry Award 2010* require that payment be made by EFT or cash only.[23]

50. We consider that it is appropriate that the model term enable an employer to pay its employees by cheque. Whilst we accept that the very vast majority of employers now utilise EFT for such transactions, it cannot be assumed that a

[22] ACTU submission dated 21 December 2016 at page 4.

[23] TCFUA submission dated 23 December 2016 at paragraph 3.19.

provision that permits payment by cheque is (or would be) otiose. For instance, a small business may choose to pay its employees by cheque or, at the very least, may seek the option to do so in circumstances where it temporarily does not have access to the necessary technology in order to make a payment by EFT. This may arise where, for instance, due to technological reasons beyond the employer's control it cannot access the webpage necessary to make the requisite payments.

51. Further, the material before the Commission does not establish that where an award presently allows for payment by cheque, such a provision is not being utilised by any employers covered by the award. To remove access to such an option would disturb existing arrangements absent any material that might establish that such a change is necessary or that payment by cheque is causing any difficulty or unfairness to employees covered by those awards.

52. We note that s.323(2)(b) of the Act permits the payment of wages by cheque; which reflects Parliament's assessment that payment by such a method is appropriate.

53. For these reasons, we submit that clause X.2 should allow payment by cheque. We consider that the inclusion of such a clause is necessary and appropriate in all modern awards.

54. Should the Commission decide against us, we submit that those awards that presently permit payment by cheque should, at the very least, continue to do so.

3. PAYMENT ON TERMINATION OF EMPLOYMENT

55. We here propose to address the provisional 'payment on termination of employment' model term proposed by the Commission at paragraph [117] of the December 2016 Decision, including its treatment of accrual of payments.

Clause X.1(a) – Long service leave

56. The CFMEU FFPD identifies that certain long service schemes applicable in particular States may require the payment of long service leave entitlements at a different timeframe to that contemplated by the model clause. They appear to suggest that this is a factor that would support the Full Bench not amending awards to permit termination payment within 7 days.

57. Awards cannot include terms that deal with long service leave entitlements.[24] They cannot override existing obligations relating to long service leave.

58. Nonetheless, the possibility that some employers may need to make the payment of long service leave entitlements at a separate date to other termination payments does not warrant the Commission refraining from affording employers a greater level of flexibility in relation to termination payments. Many employees will not have any entitlement to long service leave upon termination of their employment. Regardless, there are other reasons beyond the administrative difficulties associated with two pay runs. For example, an employer may need to obtain advice relating to the calculation of redundancy pay, as already acknowledged by the Full Bench.[25]

Note 2 – Section 120 of the Act

59. The ACTU has opposed the implementation of a standard requirement to make termination payments within 7 days. This position is, in part, based on a proposition that s.119 currently requires that redundancy pay be provided to an employee at the time of the termination of their employment. The ACTU goes so far as to submit that a provision implementing a "7-day rule" would be read down by force of s.56.[26]

60. Ai Group disagrees with the ACTU's interpretation of s.119 and its assertions regarding the operation of s.56 in this context.

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[24] Section155

[25] [2016] FWCFB 84

[26] ACTU Submission dated 21 December 2016 pages 5 and 6.

61. The proposed award terms do not exclude s.119 and are not in any other way inconsistent with either s.119 or the broader legislative framework governing employee entitlements to redundancy pay pursuant to the NES. Our submission in this regard rests upon a differing contention regarding the effect of s.119(a) to that advanced by the ACTU.

62. Section 119 does not impose any requirement upon an employer as to the time at which such payment must be made.

63. Section 119(1) creates an entitlement to redundancy pay (and by inference an obligation upon an employer to pay it). That is, it relates to the accrual of the entitlement. Section 119(2) merely defines the amount of redundancy pay.

64. An employer that pays an employee their redundancy pay on the day following the termination of their employment, in the next pay cycle or indeed after proceedings associated with a s.120 application has been completed would meet the obligation flowing from s.119.

65. The Full Bench has identified a potential regulatory gap relating to the time frame within which certain termination payments are to be made. Relevantly, it has indicated that it is not clear that s.323 encompasses redundancy pay (s.119(1)[27]:

> **[73]** As also noted above, s.323 only applies to 'amounts payable to the employee in relation to the performance of work', and the precise scope of this expression is unclear. Relevantly for present purposes, it is not clear whether it encompasses all amounts accrued under an award or the NES upon termination, such as redundancy pay (s.119(1)). There does not appear to be anything else in the FW Act that addresses the timing of termination payments generally. Consequently, if s.323 does not encompass all termination payments, there would seem to be a legislative gap – that is, no time frame is specified within which certain termination payments are to be made.

66. Our contentions in relation to the operation of the provision is consistent with Full Bench's identification of a 'regulatory gap' in relation to the timing of NES entitlements that are connected with the termination of an individual's employment.[28] The existence of a regulatory gap is not a proper basis to read

[27] [2016] FWCFB 8463

[28] [2016] FWCFB 8463 at 73

into a legislative provision a meaning that is clearly not provided for under the terms of the statute.

67. Ai Group's contentions are supported by a consideration of other provisions of subdivision B – Redundancy Pay. Relevantly, s.120 enables an employer to make an application to the Commission to reduce the amount of redundancy pay that an employee is entitled to under the NES. As the ACTU points out, an application under s.120 may only be made if an employee is entitled to be paid an amount of redundancy pay by the employer because of s.119. If the ACTU's interpretation of the obligation flowing from s.119 is accurate, s.120 would not only be "problematic", as characterised by the ACTU, it would have virtually no practical utility. Why would the legislation operate to reduce the amount of redundancy pay that must be paid in circumstances where it has already been paid? Clearly the legislation should be interpreted in a manner that avoids a patently unintended and absurd result.

68. Ai Group's proposed interpretation of s.119 would be entirely consistent with the operation of section 120.

69. If our contentions regarding the construction of s.119 are wrong, the Commission may nonetheless include a term in modern awards altering the application of s.119, pursuant to s.121, which provides;

> "(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment."

70. It would be open to the Full Bench to directly alter the application of section 119 in order to ensure that it is consistent with any model term governing termination payments. This could potentially be achieved by including a term in awards specifying that s.119 does not apply until at least 7 days from the date of termination to the employee's employment or if an employer has made an application under s.119 which has not been determined by the Commission.

71. At the very least, any new award provision ought not impose an obligation that would be breached in circumstances where an employer pursuant to a s.120 application has been made.

72. In support of our position we refer the Full Bench to paragraphs 58 to 66 of our 23 December 2016 submission. At paragraph 66 we proposed an alternate clause. Such a clause should be slightly amended so that it aligns with the requirements of s.120.

73. The ACTU has also argued that, as a matter of merit, it cannot be said that the immediate liability to pay redundancy on termination visits any particular hardship on an employer.[29] There are various reasons why this submission should not be accepted. Relevantly, it cannot be assumed that employers are never compelled to implement redundancies at relatively short notice. There are many instances in which an employer's operational requirements can change unexpectedly.

74. It can equally be asserted that a 7 day wait for redundancy pay will not visit any unreasonable hardship upon employees. It is not a particularly lengthy timeframe.

75. The Full Bench has already acknowledged an employer's potential need for additional time to calculate redundancy pay.[30]

76. The CFMEU has opposed a reference to s.120 being included in the model term.[31]

77. The purpose of s.120 is to enable employers, in certain circumstances, to avoid the operation of s.119 or, at least, to reduce the obligation that is imposed upon them. The legislature has deemed it appropriate for the safety net to afford employers some relief. Moreover, s.120 plays an important role in encouraging employers to obtain acceptable alternate employees in circumstances of redundancy. It is appropriate that the operation of s.120 be promoted.

[29] ACTU submissions dated 21 December 2016 at page 6.

[30] [2016] FWCFB 8464 at 90

[31] At paragraphs 20-21