



# REPORT

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards—*Payment of Wages*** (AM2016/8)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 13 MARCH 2020

[1] A Statement was issued on 5 March 2020<sup>1</sup> (the March 2020 Statement) dealing with applications by Ai Group, ABI and NatRoad to insert the payment of wages model term into the following 17 modern awards:

- *Aged Care Award 2010*
- *Black Coal Mining Industry Award 2010*
- *Building and Construction General On-site Award 2010*
- *Business Equipment Award 2010*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Electrical, Electronic and Communications Contracting Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Meat Industry Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Road Transport and Distribution Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*
- *Seafood Processing Award 2010*
- *Supported Employment Services Award 2010*

[2] The March 2020 Statement set out the submissions that have been received in relation to the application (at [3] and [4]) and noted at [5] that *no* reply submissions had been filed in respect of the applications to vary the following awards:

- *Aged Care Award 2010*
- *Meat Industry Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Road Transport and Distribution Award 2010*

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<sup>1</sup> [\[2020\] FWC 1205](#)

- *Road Transport (Long Distance Operations) Award 2010*
- *Seafood Processing Award 2010*
- *Supported Employment Services Award 2010*

[3] A Mention was held on 12 March 2020. The purpose of the Mention was to:

- confirm that the list of submissions set out at [3] and [4] in the March 2020 Statement was accurate;
- determine whether any party wished to make any further submissions or adduce any further evidence; and
- determine whether an oral hearing was required in respect of any of the matters that are the subject of an application to vary.

[4] The following parties attended the Mention:

- CFMMEU (Manufacturing)
- CFMMEU (Construction and General Division)
- CFMMEU (Mining and Energy Division)
- VACC
- HIA
- MBA
- NATROAD
- MTA SA
- Ai Group
- CEPU
- AMWU
- NSW BC
- AWU

[5] A copy of the transcript of the Mention is [here](#).

[6] All parties confirmed that the list of submissions was accurate and most parties indicated that they did not wish to make any further submissions or adduce any further evidence.

[7] The AWU, on behalf of the AMIEU, submitted that the application to vary the *Meat Industry Award 2020* was opposed. The AMIEU subsequently confirmed its opposition in [correspondence](#), stating that:

‘the AMIEU remains opposed to the model clause being inserted into the Meat Industry Award 2010 as that award already properly deals with those issues, as submitted by Mr S Crawford on behalf of the Union at today’s hearing.’

[8] Ai Group and ABI sought an opportunity to reply to the submissions opposing their claims.

[9] Ai Group and ABI are to file their reply submissions by **4pm on Friday 27 March 2020**.

[10] All submissions and correspondence are to be sent to [Chambers.Ross.J@fwc.gov.au](mailto:Chambers.Ross.J@fwc.gov.au) in Word format.

[11] While no party sought an oral hearing at this stage, a number of parties wished to reserve their position in relation to whether they wished to cross-examine any of the witnesses in respect of their evidence.

[12] Any party seeking an oral hearing in respect of these applications to vary must file a request by no later than **4pm on Friday 7 April 2020**. Absent such a request, all applications to vary will be dealt with on the papers.

[13] Two further matters were discussed at the Mention. As advised in correspondence dated 10 March 2020 from Mr Chesterman, the Motor Trades Organisations<sup>2</sup> are seeking to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (the Vehicle Award) to insert a modified form of the model term.

[14] Submissions in relation to the insertion of the model payments on termination into the Vehicle Award were received from the following parties:

- [Ai Group](#)
- [AMWU](#)
- Motor Trades Organisations ([MTO](#))

[15] These submissions are summarised at **Attachment A**.

[16] At the Mention on 12 March 2020, the Motor Trades Organisations and the AMWU indicated that they did not wish to make any further submissions or adduce any further evidence in support of their respective positions; nor did they seek an oral hearing. Both parties were content for the contested issues to be determined on the papers.

[17] I note that there are other organisations with an interest in the Vehicle Award, including Ai Group and the Shop, Distributive and Allied Employees Association and issue the following directions:

1. If any other interested party wishes to make a submission in respect to the proposed insertion of the model payment on termination into the Vehicle Award, they should file a submission by no later than **4pm on Friday 27 March 2020**.
2. If a party wishes to reply to any submissions filed pursuant to Direction 1, they should file that reply submission by no later than **4pm on Friday 7 April 2020**.
3. Any party seeking an oral hearing in respect of the Vehicle Award payment of wages matter must file a request by no later than **4pm on Friday 7 April 2020**. Absent such a request, the issues in dispute will be determined on the papers.
4. The Ai Group, the AMWU and the Motor Trades Organisations are asked to review the summary of their submissions at Attachment A and advise the Commission if they have any additions or corrections to make to the summary by no later than **4pm on Friday 27 March 2020**.
5. All submissions to be sent to [Chambers.Ross.J@fwc.gov.au](mailto:Chambers.Ross.J@fwc.gov.au) in Word format.

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<sup>2</sup> Victorian Automobile Chamber of Commerce; Motor Traders Association of NSW; Motor Traders Association of SA and Motor Traders Association of WA

[18] The final matter concerns a point raised by the HIA during the Mention.

[19] HIA highlighted that a payment of wages claim relating to the *Building and Construction Award 2010* (Onsite Award) remains on foot.

[20] HIA's outstanding claim relates to the frequency of the payment of wages under clause 31 of the Onsite Award, as initiated by HIA on 2 December 2016, and further detailed in HIA submissions to the Commission dated [16 December 2016](#), [2 February 2017](#) and in correspondence dated [28 September 2018](#).

[21] In its Decision of 26 September 2018,<sup>3</sup> the Construction Group of Awards Full Bench noted (at [467]) that a number of claims relating to payment of wages under the Onsite Award are before the Payment of Wages Full Bench for determination.

[22] In a Statement of 6 February 2019,<sup>4</sup> relating to substantive issues the Commission noted:

[6] The HIA filed a submission on 16 January 2019<sup>4</sup> drawing the Commission's attention to an outstanding claim in relation to payment of wages in the Building and Construction Onsite Award 2010. The claim in question forms part of the payment of wages common issue. Common issue matters were not originally included in the provisional timetable, however in light of this submission any dates for 2019 for the payment of wages common issue will be added to the timetable

[23] On this basis HIA understands that this claim is to be considered by the Payment of Wages Full Bench in AM2016/8. HIA's understanding is correct.

[24] HIA has queried the timetabling of its claim and is awaiting further directions in relation to the matter.

[25] I agree that some clarity is required as to the process for determining the claim. HIA is directed to confer with the other parties with an interest in the On-Site Award with a view to reaching an agreed position on the way forward. Draft directions are to be filed by **4pm Friday 20 March 2020**. In the event that the parties are unable to agree and there is a dispute about the form of the directions, the nature of such a dispute should be identified and I will then issue final directions.

PRESIDENT

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<sup>3</sup> [\[2018\] FWC 6019](#) at [467]

<sup>4</sup> [\[2019\] FWC 717](#)

## ATTACHMENT A – summary of submissions

[1] The MTO oppose the insertion of the model term in the Vehicle Award and submitted that the following award-specific amendments should be made (notes in the proposed modified model term have not been reproduced as no changes are proposed to the notes):

### **‘X. Payment on termination of employment**

(a) The employer must pay an employee no later than 7 days after the day on which the employee’s employment terminates:

(i) the employee’s wages under this award for any complete or incomplete pay period **worked by an employee** up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this award and the NES **but excluding commission payments that may become applicable at a later date for a person employed to perform vehicle sales related duties.**

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

**(c) An employer may deduct from monies due to an employee under paragraph (a) such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.**

**(d) such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.’**

[2] The MTO submitted that the above amendments have been discussed with the AMWU and the Shop, Distributive and Allied Employees Association (SDA) and that there is broad agreement on these changes. No submission was received from the SDA.

[3] The AMWU also proposed award specific amendments to the model term as follows (notes have not been reproduced as no changes are proposed to the notes):

### **‘X. Payment on termination of employment**

(a) The employer must pay an employee no later than **2 business** days after the day on which the employee’s employment terminates:

(i) the employee’s wages under this award for any complete or incomplete pay period up to the end of the day of the termination; and

(ii) all other amounts that are due to the employee under this award and the NES.

**(b) Where a person principally employed to perform vehicle sales related duties is entitled to commission payments at a later date than the date of termination, those payments will be payable within 7 days of becoming applicable.**

**(c) Where an employee abandons his or her employment or the employee’s employment is terminated without notice for serious and wilful misconduct the**

employer may pay the employee the wages and other amounts due set out in paragraph (a) within 7 business days of the termination.

(d) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

(e) An employer may deduct from monies due to an employee such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.’

[4] The AMWU submitted that the model term should be amended to provide payment within 2 business days after the day on which the employment terminates. This amendment is opposed by the MTO.<sup>5</sup>

[5] In a submission dated 21 September 2018, Ai Group advised that it was engaged in discussions with the AMWU about the proposed variation but that these discussions had not been finalised.

[6] A conference was scheduled be held on 8 August 2019 to determine the extent of the agreement between the parties, the issues in dispute and the process for determining any outstanding issues. The conference was cancelled as a number of key individuals were unable to attend<sup>6</sup> and the Commission advised that parties will be notified of the new listing date.

[7] In its submission dated 24 September 2019, the MTO noted that they have engaged in discussions with the AMWU and the Ai Group and that Ai Group no longer opposes MTO’s proposed amendments to the model term.<sup>7</sup>

[8] In its submission dated 24 September 2019, the MTO submitted that it largely supports the inclusion of the model term but that there is justification for seeking certain variations to the model term, based on the requirements and provisions of the current Vehicle Award (which reflect the circumstances that prevail in the automotive industry).<sup>8</sup> The MTO advised that they had engaged in discussions with the AMWU and the Ai Group, and reported that these discussions had resulted in an agreed position with Ai Group.<sup>9</sup>

[9] In its written submissions of 7 September 2018, the MTO sought an amendment to clause X(a)(i) of the model term as follows:<sup>10</sup>

‘the employee’s wages under this award for any complete or incomplete pay period worked by on employee up to the end of the day of termination’

[10] On the basis that no other party has sought a similar change to this subclause, the MTO no longer press this amendment.<sup>11</sup>

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<sup>5</sup> MTO [submission](#), 7 September 2018 at p.4.

<sup>6</sup> AMWU [correspondence](#), 8 August 2019.

<sup>7</sup> MTO [submission](#), 24 September 2019 at para 6.

<sup>8</sup> Ibid at para 12.

<sup>9</sup> Ibid at para 6.

<sup>10</sup> MTO [submission](#), 7 September 2018

<sup>11</sup> MTO [submission](#), 24 September 2019 at para 9.

[11] The MTO propose the following amendments to the final version of the model term as set out in [2] of the *July 2019 decision*:<sup>12</sup>

**‘X. Payment on termination of employment**

(a) The employer must pay an employee no later than 7 days after the day on which the employee’s employment terminates:

(i) the employee’s wages under this award for any complete or incomplete pay period up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this award and the NES **but excluding commission payments under clause 44.9 of the award where such payments may become payable at a later date in relation to a person employed to perform vehicle sales related duties.**

**(iii) The commission payment referred to in clause 44.9 (vi) is to be made payable within 14 days of the delivery of the vehicle**

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

**(c) An employer may deduct from monies due to an employee under paragraph (a) such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.**

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee’s employment unless the employer has given the employee the required minimum period of notice or “has paid” to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee’s employment terminates or shortly after.’

[12] The MTO’s proposed amendment to clause X(a)(ii) excludes commission payments from amounts to be paid to an employee on termination in relation to employees engaged in vehicle sales duties. In support for its position, the MTO submitted that the requirement to pay accrued wages and all other amounts due to the employee within a 7-day period under the Vehicle Award will present difficulties in relation to the payment of commission payments for

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<sup>12</sup> Ibid at para 14.

persons engaged in vehicle sales related duties.<sup>13</sup> The MTO note that commission payments may not crystallise for two or three months after the employee's employment has in fact terminated as commissions are paid on the delivery of the vehicle to a customer.<sup>14</sup> The MTO also notes that in some cases vehicles have to be ordered as the dealership may not have the stock readily available and a vehicle may need to be imported from overseas, which can create considerable delays in the delivery of the vehicle and consequently the sale of the vehicle may not be finalised at the time of termination.<sup>15</sup>

**[13]** The MTO also raised a concern that there is some ambiguity in clause 44.9(vi) of the Vehicle Award as to when commission payments are to be paid to an ex-employee when the delivery of the vehicle occurs within three months of the termination of their employment.<sup>16</sup> MTO's proposed new clause X(a)(iii) attempts to provide clarity by stipulating a 14-day period of payment that is consistent with the period of payment in existing provisions of the Vehicle Award in clause 44.9(vii).<sup>17</sup> The MTO submitted that there have been no issues raised by any party in the past in relation to the 14-day period of payment and consequently there is no reason to amend this.<sup>18</sup>

**[14]** The MTO also sought to retain the current clause 24.4(b) of the Vehicle Award which appears as clause X(c) of their amended model clause.<sup>19</sup> The MTO acknowledged that clause X(b) of the model clause allows employers to make deductions from monies due to an employee on termination for such amounts authorised by this award or the *Fair Work Act 2009* (Cth) (the Act).<sup>20</sup>

**[15]** The proposed clause X(c) allows for the deduction of any residual monies owed by an employee to an employer at the point of the employee's termination of employment. The MTO submits that motor trade businesses frequently grant requests for personal loans from their employees, book automotive parts and expenses on monthly accounts and even purchase second hand vehicles or other goods, usually at trade or internal prices.<sup>21</sup> Employers are said to accede to such requests where they have the capacity to carry short term debt and that employees save on interest otherwise incurred. These arrangements are said to build mutual respect, staff retention and job satisfaction.<sup>22</sup> The MTO note that this practice is relatively common and unique to the industry. On this basis it is submitted that the proposed new clause X(c) should be approved as part of the model term in this award.<sup>23</sup>

**[16]** The MTO also submit that the proposed subclause is consistent with s. 324(1)(a) of the Act on the basis that the deduction is authorised in writing by the employee and is principally for the employee's benefit.<sup>24</sup>

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<sup>13</sup> Ibid at para 15(i)(a).

<sup>14</sup> Ibid at para 15(i)(c).

<sup>15</sup> Ibid at para 15(i)(c).

<sup>16</sup> Ibid at para 15(ii)(a).

<sup>17</sup> Ibid at para 15(ii)(b).

<sup>18</sup> Ibid at para 15(ii)(c).

<sup>19</sup> Ibid at para 15(iii)(a).

<sup>20</sup> Ibid at para 15(iii)(b).

<sup>21</sup> Ibid at para 15(iii)(d).

<sup>22</sup> Ibid at para 15(iii)(e).

<sup>23</sup> Ibid at para 15(iii)(f).

<sup>24</sup> Ibid at para 15(iii)(g).

[17] In its submission of 25 September 2019, the AMWU argue that it would be appropriate to make a number of amendments to the model term to keep the provision in line with the current conditions contained in clause 24.4 of the Vehicle Award (which are said to be consistent with common practice within the automotive industry).<sup>25</sup> The AMWU sought to rely on the proposed amendments to the model clause as set out in its submission dated 7 September 2019.

[18] The AMWU's proposed amendment to clause X(a) requires that the employer pay the employee within 2 business days of termination, rather than within '7 days after the day on which the employee's employment terminates' as is required under the model term.<sup>26</sup> In support for its position, the AMWU submitted that this amendment is consistent with the current payment of wages on termination clause within the Vehicle Award<sup>27</sup> as well as reflecting current practice. The AMWU noted that it was not aware of any evidence presented to the contrary and that<sup>28</sup> without a cogent and evidence-based reason for departing from the well-functioning status quo arrangements under the Vehicle Award, the AMWU submits that these employees should not suffer a detriment.<sup>29</sup>

[19] Additionally, the AMWU submit that the current practice of payment within 2 business days has caused no issues for employers, and is suitably qualified by the exceptions set out in clause X(c) which grants employers up to 7 days in circumstances where they may not be prepared to pay employees within the 2 business day time frame.<sup>30</sup> Further, the current conditions under the Vehicle Award are more advantageous than the model term, particularly for employees whose employment is terminated and who may face the adverse consequences of unemployment. These employees currently have the benefit of being paid expeditiously.<sup>31</sup>

[20] The AMWU submitted that it broadly supports the MTO's position to amend the model clause to address the the issue of commission payments for persons engaged in vehicle sales related duties, which may become payable after termination under clause 44.9(vi) of the Vehicle Award. However, the AMWU submitted that this amendment should be made in different terms to those proposed by the MTO.<sup>32</sup>

[21] The AMWU raised many of the same issues flagged by the MTO in its submission, including that the requirement to pay accrued wages and all other amounts due by the time proposed by the model clause will present difficulties in relation to the payment of commission payments for persons engaged in vehicle sales. Accordingly, the AMWU submitted that commission payments due under clause 44.9(vi) of the Vehicle Award should be excepted from the rule that payment is to be made within 2 days of termination<sup>33</sup> but that any clause that deals with an exception for commission payments for a vehicle salesperson whose employment is terminated prior to the delivery of a vehicle, should still specify a timeframe within which such a commission must be paid (that is, from the date of delivery of the vehicle, where it is delivered within three months of the termination). The AMWU's position is that the timeframe should

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<sup>25</sup> AMWU [submission](#), 25 September 2019 at para 9.

<sup>26</sup> Ibid at para 11.

<sup>27</sup> See clause 24.4(a) of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*

<sup>28</sup> AMWU [submission](#), 25 September 2019 at para 12.

<sup>29</sup> Ibid at para 14.

<sup>30</sup> Ibid at para 13.

<sup>31</sup> Ibid at para 14.

<sup>32</sup> Ibid at paras 15-16.

<sup>33</sup> Ibid at para 20.

reflect the 7-day timeframe provided for in all other exceptions, and which is also consistent with the model term.<sup>34</sup>

[22] The AMWU notes that while clause 44.9(vi) of the Vehicle Award provides that commissions are payable within 14 days of termination for vehicles already delivered at the time of termination but submits that the 14-day timeframe is inappropriate in the context of a commission payment that becomes due within 3-months after termination. It is argued that the 14-day timeframe is inappropriate because the vehicle for which a commission is payable may not be delivered for a period of up to 3-months after termination, well beyond the period of 14-days after termination that is contemplated by clause 44.9(vi). On this basis, the AMWU submit that commission payments, once they become due after the date of termination, should be payable within a 7-day period.<sup>35</sup>

[23] The AMWU's proposed new clause X(c) provides an exception to the requirement to pay wages within 2 days of termination in circumstances where an employee abandons their employment or the employee's employment is terminated without notice for serious and wilful misconduct. In such cases, the employer has up to 7 days to pay the employee their entitlements under proposed X(c).<sup>36</sup>

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<sup>34</sup> Ibid at paras 21-22.

<sup>35</sup> Ibid at paras 23-24.

<sup>36</sup> Ibid at para 25.