

**From:** Luis Izzo [<mailto:Luis.Izzo@ablawyers.com.au>]  
**Sent:** Monday, 13 November 2017 8:07 AM  
**To:** AMOD  
**Subject:** AM 2016/8 - 4 Yearly Review of Modern Awards - Payment of wages

Dear Sir/Madam

On 31 October 2017, ABI/NSWBC filed submissions in relation to the above proceedings.

Those submissions contained a Schedule (Schedule 1) which purported to set out a joint employer model clause. At the time of filing, the terms of the joint employer model clause had not been finalised – so the Schedule was left blank.

The joint employer model clause has now been finalised and so we re-attach, for the purposes of filing, our submissions dated 31 October 2017. The submissions now contain the joint employer model clause at Schedule 1 (but are otherwise unchanged).

Should you have any queries in relation to this correspondence, please do not hesitate to contact me.

Yours faithfully

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## **4 YEARLY REVIEW OF MODERN AWARDS**

### **PAYMENT OF WAGES (AM2016/8)**

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

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## A. INTRODUCTION

### 1. BACKGROUND

- 1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the Statement and Directions issued in these proceedings on 19 September 2017.
- 1.2 These submissions address each of the matters raised in the 19 September 2017 Statement, namely:
- (a) The provisional ‘payment of wages and other amounts’ model term (**Provisional Payment of Wages Term**) set out at paragraph [34] of the Full Bench decision dated 1 December 2016 ([2016] FWCFB 8463) (**Decision**);
  - (b) The provisional ‘payment on termination of employment’ model term at paragraph [117] of the Decision; and
  - (c) The issue related to the accrual of payments referred to at paragraphs [19] to [22] of the Statement of the Full Bench issued on 19 May 2017.

### 2. PROVISIONAL PAYMENT OF WAGES AND TERM

- 2.1 ABI, NSWBC and Ai Group intend to propose, as part of these proceedings, an alternate model term to be used by the Commission instead of the Provisional Wages Term.
- 2.2 A copy of this alternate model term will be attached at Schedule 1 to these submissions (**Joint Employer Payment of Wages Term**), once the Ai Group submissions are filed on 3 November 2017.
- 2.3 In support of taking this approach, ABI and NSWBC outline separately below a number of concerns regarding the Provisional Payment of Wages Term and identify how the Joint Employer Payment of Wages Term addresses these concerns.

#### **Regulation of award payments only**

- 2.4 Given that the modern awards objective is focused upon the creation of a “*fair and relevant minimum safety net of terms and conditions*”<sup>1</sup>, it is respectfully submitted that modern awards should only regulate the frequency of payments arising from the minimum safety net itself.
- 2.5 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.
- 2.6 The current drafting of clause X.1(a)(i) of the Provisional Payment of Wages Term 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.
- 2.7 It is open for a party to interpret clause X.1(a)(i) as regulating all wage payments made to employees.
- 2.8 In order to address this issue, the Joint Employer Payment of Wages Term instead reads 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 and the NES for the pay period.”*

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<sup>1</sup> See section 134(1) of the FW Act

**The difficulties associated with compelling an employer to nominate a specific pay date in writing**

- 2.9 Clause X.1(a) of the Provisional Payment of Wages 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.
- 2.10 This ensures that payments to employees are made contemporaneously to the work performed and accords with industry practice.
- 2.11 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.
- 2.12 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.
- 2.13 ABI and NSWBC further submit that the obligation to notify the pay date in writing is an obligation which might give rise to inadvertent non-compliance by small businesses, who commonly engage employees with little formality and without entering into a documented contract of employment.
- 2.14 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.
- 2.15 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.
- 2.16 For the above reasons, the Joint Employer Payment of Wages Term does not provide any obligation to nominate a pay date in advance in writing.

**Limitation on monthly payments**

- 2.17 The extent to which the Provisional Payment of Wages Term permits monthly payments could be subject to some differences of interpretation.
- 2.18 ABI/NSWBC understand the Term to be limiting monthly payments to only those circumstances where:
- (a) employees have provided agreement; or
  - (b) employees were paid monthly before the commencement of the clause.
- 2.19 This would, in effect, prevent new employees being paid monthly.
- 2.20 There are 27 modern awards which presently contain no limitations on monthly payments being made. These awards are outlined in Schedule 2.

- 2.21 ABI and NSWBC submit that employers in these industries should continue to be permitted to pay employees monthly where such an arrangement is presently permitted by the award safety net. This approach commends itself because no evidence has been filed in the proceedings identifying problems associated with monthly payments to date.
- 2.22 The Joint Employer Payment of Wages Term contemplates employers being permitted to pay employees monthly unless the employees are already paid weekly or fortnightly, in which case agreement is required to alter the pay period.

**Requirement to pay monthly payments two weeks in advance and 2 weeks in arrears**

- 2.23 The Provisional Payment of Wages Term requires employees on monthly pay cycles to be paid 2 weeks in advance and 2 weeks in arrears.
- 2.24 This approach requires employers to estimate an employee's hours in advance of the performance of the relevant work. Whilst this might be an easy task for some permanent staff with regular rosters, it is a less simple task for:
- (a) casual employees; and
  - (b) permanent staff who regularly work overtime.
- 2.25 In both cases, it might not be possible to estimate the actual earnings that will accrue in a relevant pay period.
- 2.26 There is no evidence before the Commission in these proceedings which suggests that problems have arisen with staff being paid monthly in arrears in the years since modern awards were introduced.
- 2.27 For the above reasons, the Joint Employer Payment of Wages Term does not prohibit monthly payments in arrears.

**3. PAYMENT OF WAGES ON TERMINATION**

- 3.1 ABI and NSWBC maintain, as per their earlier submissions, that termination payments should be made in accordance with each employee's normal pay cycle.
- 3.2 While the Full Bench has expressed its current view that a period of up to a month is too long and *"does not satisfy the requirement for a fair and relevant minimum safety net"*, ABI and NSWBC submit that employees subject to monthly or fortnightly payment arrangements are aware of, and accustomed to, when they are going to be paid. In these circumstances there is no prejudice caused to the employee, nor any additional 'wait' associated with this process compared to any other pay cycle.
- 3.3 When considered together with the *"impracticality"* and *"administrative cost"* arguments summarised by the Full Bench in the Decision, ABI and NSWBC submit that the wording of the Full Bench's provisional default term published in its Statement of 14 October 2016 (that is, payment within 7 days after the employee's last day or employment or the next normal pay day) is appropriate for the purposes of the Model Termination Payment Term.

**Balance of provisional model term**

- 3.4 Subject to appropriate amendments to reflect ABI and NSWBC's position outlined in paragraphs 3.1 to 3.3 above, ABI and NSWBC do not oppose the balance of the provisional term regarding termination payments.

**4. ACCRUAL OF WAGES**

- 4.1 In many industries, employees are paid each pay period for the wages related to work performed during the pay period. This is likely to be the most common experience for a

number of employees. In these cases, payments are ordinarily determined by hours, days or weeks worked.

- 4.2 However, this is not the case for all employees. By way of example, employees can be paid by reference to:
- (a) distance travelled (*Road Transport (Long Distance Operations) Award 2010*);
  - (b) sales performed (*Real Estate Industry Award 2010*); and
  - (c) payment by results (*Textile, Clothing, Footwear and Associated Industries Award 2010*).
- 4.3 This means that a wage payment might fall due in a different pay period to the pay period in which the work is performed. This is particularly the case in the real estate industry, where the Award permits the employer/employee to enter into an agreement regarding when payments will fall due (see clause 17.2).
- 4.4 Additionally awards provide for the averaging of hours of work over a number of different periods which can range anywhere from 1 week to 8 weeks or more. Under these arrangements, whilst employees might receive a constant sum of pay each week, their hours will fluctuate, with payments being made at time periods that do not necessarily correlate to the pay period in which the work is performed.
- 4.5 Given the variety of approaches taken in relation to this issue, it is of considerable importance that any term pertaining to the accrual of wages be inserted into awards with specific reference to the other provisions contained in the relevant award.
- 4.6 Should the Commission be moved to include a provision in award explaining when wages accrue, then as a standard/common position, ABI and NSWBC consider it prudent to adopt an accrual process whereby an entitlement to wages accrues on an hourly basis. This approach would ensure that the accrual of wages:
- (a) accommodates the position of casual employees, whose engagements are expressed by many awards to be “*by the hour*”<sup>2</sup>; and
  - (b) can also be applied to permanent part-time or full time employees.

**FILED ON BEHALF OF NSWBC/ABI**

**31 OCTOBER 2017**

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<sup>2</sup> See, by way of example only, clause 10.4 of the Educational Services (*Post-Secondary Education*) Award 2010

## **SCHEDULE 1**

### **JOINT EMPLOYER MODEL CLAUSE**

#### **x.1 Pay periods**

(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 and the NES for the pay period.

(b) An employee's pay period may be:

- (i) one week;
- (ii) two weeks; or
- (iii) subject to paragraph (d), one month.

(c) The employer must notify each employee of their pay period.

(d) Where an employee is paid weekly or every two weeks, an employer may only change from a one week or two week pay period to a one month pay period by individual agreement with affected employees or by agreement with a majority of the affected employees covered by this award.

(e) Where a payment falls due on a public holiday, the payment may be made on the next day that is not a public holiday.

(f) Clause X.1(a) operates subject to the provisions of this award dealing with averaging of hours of work, averaging of pay and annualised salaries.

(g) Clause X.1(a) takes effect (insert date 6 months from commencement of the order).

#### **x.2 Method of payment**

Payments under clause x.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee, or by cash or cheque

**Schedule 2 - Modern Awards that presently provide an unfettered ability to make monthly wage payments**

Air Pilots Award 2010

Alpine Resorts Award 2010

Aircraft Cabin Crew Award 2010

Architects Award 2010

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

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

Salt Industry Award 2010

Seagoing Industry Award 2010

Stevedoring Industry Award 2010

Wool Storage, Sampling and Testing Award 2010