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**Sent:** Sunday, 19 April 2020 9:57 AM  
**To:** AMOD <[AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)>  
**Cc:** Chambers - Ross J <[Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au)>  
**Subject:** AM2016/8 - Payment of Wages - Submissions in reply

Dear Sir/Madam

I refer to the above proceedings and the directions by Justice Ross for the filing of evidence and submissions in reply in these proceedings by 17 April 2020.

Unfortunately, due to ongoing urgent activities associated with the COVID-19 pandemic, ABI and NSWBC were not in a position to file their submissions on 17 April 2020. ABI & NSWBC appreciate that the timeframe for filing their materials in reply had already been the subject of an extension. ABI & NSWBC accordingly apologise for the delay in the filing of the materials.

We respectfully request that the **attached** submissions be accepted for the purposes of filing and consideration in the proceedings.

Should you have any queries, please do not hesitate to contact me on the details below.

Yours faithfully

**Luis Izzo**

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## IN THE FAIR WORK COMMISSION

AM2016/8

### 4 YEARLY REVIEW OF MODERN AWARDS

#### PAYMENT OF WAGES

#### SUBMISSIONS IN REPLY FOR NSWBC AND ABI

##### 1. INTRODUCTION

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) and relate to applications by these organisations to insert a model term (**the Model Term**) into **13** awards in respect of payment of wages upon termination of employment.

1.2 Although ABI and NSWBC filed submissions on 21 August 2019 seeking the insertion of a Model Term into 12 modern awards, on 26 August 2019, ABI and NSWBC filed an additional submission seeking that the Model Term also be inserted into the *Waste Management Award 2010*.

1.3 The 13 awards which are accordingly the subject of the ABI and NSWBC applications (and these submissions in reply) are as follows:

- (a) *Aged Care Award 2010*
- (b) *Business Equipment Award 2010*
- (c) *Supported Employment Services Award 2010*
- (d) *Dry Cleaning and Laundry Industry Award 2010*
- (e) *Plumbing and Fire Sprinklers Award 2010*
- (f) *Meat Industry Award 2010*
- (g) *Passenger Vehicle Transportation Award 2010*
- (h) *Road Transport and Distribution Award 2010*
- (i) *Road Transport (Long Distance Operations) Award 2010*
- (j) *Food, Beverage and Tobacco Manufacturing Award 2010*

- (k) *Graphic Arts, Printing and Publishing Award 2010*
- (l) *Manufacturing and Associated Industries and Occupations Award 2010*
- (m) *Waste Management Award 2010.*

1.4 The following submissions have been filed in response to the ABI and NSWBC applications:

- (a) submissions filed by the Construction, Forestry Maritime Mining and Energy Union Construction and General Division dated 25 September 2019  
**(CFMMEU Submissions C&D);**
- (b) submissions filed by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union dated 25 September 2019;
- (c) submissions filed by the Australian Manufacturing Workers Union dated 25 September 2019; and
- (d) submissions filed by the Construction, Forestry Maritime Mining and Energy Union Manufacturing Division dated 30 September 2019.

## **2. COLLECTIVE REPLY TO THE UNION SUBMISSIONS**

2.1 Broadly speaking, the submissions filed by the various unions advance two key contentions:

- (a) employer organisations have failed to advance any evidence to support the proposed variations; and
- (b) the arrival of new payment technologies means that the making of payments on termination on the day of termination or very soon after is both possible and practical.

2.2 These Reply Submissions address the above two contentions separately below.

### 3. ALLEGED LACK OF EVIDENCE

- 3.1 In response to the first contention, it is incorrect to assert that no evidence has been filed by the employer organisations. In their materials filed on 20 September 2016 (then re-filed on 18 October 2016), ABI and NSWBC filed evidence demonstrating the dramatic decline in the use of cheque payments and a corresponding increase in the use of electronic funds transfer (**EFT**) as a means of making payments.
- 3.2 The shift in the Australian economy from cash/cheque payment arrangements to EFT payments is a matter that lies at the heart of these proceedings. It is a matter that is supported by the evidence filed and which the Commission should have regard to.
- 3.3 Furthermore, to the extent that evidence has not been filed in relation to other matters that are the subject of the submissions, some of these matters are self-evident.
- 3.4 By way of example:
- (a) The notion that employers may not have received all timesheets pertaining to all working hours in the week or weeks preceding the termination of an employee is an automatic and inevitable consequence associated with an employee's departure. This has been addressed in ABI and NSWBC's previous submissions<sup>1</sup>. Briefly the self-evident nature of this issue is supported by the fact that:
- (i) employers obviously have processes in place to collect working hours data on a periodic basis in order to process payroll;
  - (ii) where an employee departs from their employment, the departure interrupts this normal reporting arrangement; and
  - (iii) in some cases, it will simply be impossible to know the hours an employee has worked on the day of termination. For instance:

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<sup>1</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20168-sub-abi-200916-amended.pdf>;  
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20168-sub-abinswbc-210819.pdf>

- A one cannot know an employee's working hours for their last day of work until that day has actually been worked; and
- B in the case of summary terminations, the unexpected nature of these types of terminations makes it unlikely that employees will have entered the appropriate time recording information required in all cases.
- (b) The notion that time may be involved in collating an employee's final working hours and processing their accruals for the purposes of calculating payment is also not able to be contested. It is notorious that employers engage payroll specialists for the purposes of calculating such payments. It must inevitably follow that time and cost can be associated with processing payments, particularly when they might arise outside of the ordinary cycle of an employer's payment practices.
- (c) Thirdly, it should be self-evident that some level of time and consideration is required when considering how to tax various termination payments. Termination payments can be subject to a variety of differing tax treatments, including:
- (i) tax free treatment for Eligible Termination Payments if part of the payment relates to before 1 July 1983;<sup>2</sup>
  - (ii) tax free treatment for parts of redundancy payments and early retirements;<sup>3</sup>
  - (iii) concessional tax treatment for Eligible Termination Payments that relate to after 1 July 1983;<sup>4</sup>

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<sup>2</sup> [https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?page=5#Tax\\_free\\_component\\_of\\_ETPs](https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?page=5#Tax_free_component_of_ETPs)

<sup>3</sup> [https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?page=4#Redundancy\\_and\\_early\\_retirement](https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?page=4#Redundancy_and_early_retirement)

<sup>4</sup> [https://www.ato.gov.au/Rates/Schedule-11---Tax-table-for-employment-termination-payments/?page=4#Working\\_out\\_the\\_withholding\\_amount](https://www.ato.gov.au/Rates/Schedule-11---Tax-table-for-employment-termination-payments/?page=4#Working_out_the_withholding_amount)

- (iv) applying caps to Eligible Termination Payments, beyond which concessional tax treatment ceases to apply;<sup>5</sup>
- (v) applying caps to redundancy and retirement payments, beyond which concessional tax treatment ceases to apply;<sup>6</sup> and
- (vi) normal marginal tax treatment for other termination payments, including accrued leave.<sup>7</sup>

All of these matters need to be navigated by payroll officers as part of the calculation of a termination payment. Indeed, the ATO publishes a checklist which outlines the variety of activities required of a payroll officer on termination of an employee's employment. The checklist, available at <https://www.ato.gov.au/business/your-workers/employee---checklist/#Employeeleaves> demonstrates that a number of activities do need to be completed in order to process the relevant payments.

- 3.5 The culmination of these matters makes it self-evident that, upon ceasing an employee's employment, an employer cannot simply 'snap its finger' and immediately process a payment.
- 3.6 A fair and reasonable time needs to be afforded to the employer to arrange its affairs to process the relevant payment.
- 3.7 What is fair and reasonable in every specific context will obviously differ. However, the Commission's task is to set a minimum safety net that is fair and reasonable for all persons affected by award regulation in the relevant industries, having regard to the modern awards objective. This necessarily involves some element of aggregation in each industry regulated by the relevant award.

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<sup>5</sup> <https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?anchor=Employmentterminationpaymentcaps#Employmentterminationpaymentcaps>

<sup>6</sup> <https://www.ato.gov.au/Individuals/Working/Working-as-an-employee/Leaving-your-job/Redundancy-payments/>

<sup>7</sup> <https://www.ato.gov.au/Business/Your-workers/In-detail/Taxation-of-termination-payments/?anchor=Accruedleave#Accruedleave>

3.8 The position of ABI and NSWBC is that affording a payment timeframe of 7 days after termination appropriately balances (at an industry-wide level) the type of self-evident matters outlined above with the legitimate employee need and expectation to be paid for their work promptly.

#### **4. ARRIVAL OF NEW TECHNOLOGIES**

4.1 A number of unions assert that the arrival of new payment technologies means that employers should now be able to process payments almost instantaneously.

4.2 This type of argument is encapsulated in the CFMMEU Submissions C&D at [42], which rely on the following matters to oppose the proposed variations:

- (a) timesheets can be filled in on smart phones and approved almost instantaneously;
- (b) employers have up to date leave accruals;
- (c) taxation and redundancy amounts can be calculated at a press of a button;
- (d) transactions can be done in “*almost real time*”; and
- (e) one off payments can be processed out of the normal pay cycle in a matter of minutes.

4.3 There can be no doubt that processing of payments can be streamlined through the use of technology.

4.4 However, these matters do not dispel or override the concerns raised at section 3 above.

#### **Timesheets**

4.5 This is particularly the case in relation to collating information pertaining to hours of work before processing an employee’s termination payment.

4.6 No evidence has been filed by the unions to demonstrate that employers universally have automatic timesheet recording systems in place that rely on the seamless use of smart phones.

4.7 Indeed, the experience of ABI and NSWBC (as both an *employer* and a representative of other employers) is that the recording of time through automated smart phone software is available, but not commonplace. ABI and NSWBC themselves unfortunately do not utilise such software and continue to process pay for employees engaged by the hour through the use of paper format or word document timesheets. These still need to be completed, authorised by the relevant manager and then submitted to payroll for processing.

#### **Taxation amounts**

4.8 It is accepted that some software can automatically calculate tax once the appropriate categorisation for a payment is identified.

4.9 However, what has not been countenanced by the union submissions is that payroll officers still must identify the correct categorisation for particular payments, by reference to ATO or accountant advice, before processing the payment.

4.10 As has already been identified at section 3, there are a myriad of differing tax treatments that can apply to termination payments and payroll officers must ensure they have correctly categorised different components of payments before processing.

4.11 Stating that processing the taxation of a termination payment can simply be done at the "*press of a button*" manifestly understates the level of activity involved.

#### **Processing of payments in a matter of minutes**

4.12 It is accepted that there is very limited evidence of the typical processing time required to release funds from bank accounts and transfer them into the accounts of employees.



- 4.13 Three witness statements have been filed by the unions (the statements of Warren Soos, Hemal Patel and Mark Watson) which indicate that those three employees appear to have relatively instantaneous access to the funds of their employers. This evidence goes only so far as to confirm the individual experience of the three relevant employees.
- 4.14 ABI and NSWBC do not accept that this is necessarily universally the experience of all employers.

**Filed on behalf of ABI and NSWBC by Australian Business Lawyers & Advisors**

**19 April 2020**