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**Fair Work Commission: 4 yearly review of modern awards**

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

**AUSTRALIAN BUSINESS INDUSTRIAL**

**and -**

**THE NSW BUSINESS CHAMBER LTD**

**21 AUGUST 2019**

## 1. INTRODUCTION

- 1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) and relate to an application to vary 12 modern awards in respect of payment of wages upon termination.
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth).
- 1.3 These submissions are filed in accordance with the directions issued by the Full Bench in these proceedings in the decision<sup>1</sup> published on 26 July 2019 (**26 July 2019 Decision**) which invited parties to file submissions and any evidence in relation to this variation by 4.00pm 21 August 2019.

## 2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.
- 2.2 More recently, the legislative framework applicable to the 4 Yearly Review was considered in *4 yearly review of modern awards – plain language re-drafting – standard clauses* [2018] FWCFB 4177 issued on 18 July 2018 and usefully summarised in *4 yearly review of modern awards – Alpine Resorts Award* [2018] FWCFB 4984 (**Alpine Resorts Decision**).
- 2.3 In the Alpine Resorts Decision, the Full Bench summarised the general main propositions as follows (footnotes removed):

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<sup>1</sup> [2019] FWCFB 5146

*“General principles*

**[52]** The principles applicable to the conduct of the 4-yearly review have been stated comprehensively in a number of Full Bench decisions, most recently in the *4 yearly review of modern awards – plain language re-drafting – standard clauses* decision issued on 18 July 2018. The main propositions may be summarised as follows:

- section 156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards;
- “review” has its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”;
- the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;
- in particular the modern awards objective in s 134 applies to the review;
- the modern awards objective is very broadly expressed, and is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the matters in ss.134(1)(a)–(h);
- fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;
- the obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;
- no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;
- it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;
- the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;
- in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;
- what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;
- the matters which may be taken into account are not confined to the s 134 considerations;
- section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;

- what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;
- where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.”

### 3. THE FAIR WORK COMMISSION’S MODEL TERM

3.1 In a decision issued on 17 July 2018<sup>2</sup> (**17 July 2018 Decision**), the Full Bench finalised the payment of wages on termination of employment model term (the **Model Term**) and expressed the provisional view that the 86 modern awards which were silent in respect of the time period within which termination payments are to be made, should be varied to include the model term.

3.2 The Model Term proposed is as follows:

#### **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.

(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.

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

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<sup>2</sup> [2018] FWCFB 3566

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.

- 3.3 On 21 August 2018, the Commission issued a Statement (**21 August 2018 Statement**)<sup>3</sup> dealing with the insertion of the Model Term into certain modern awards listed.
- 3.4 In the 21 August 2018 Statement, the Commission directed that any party wishing to insert the Model Term into one or more of the awards where it is not currently silent on termination, must file an application by 21 September 2018.
- 3.5 On 21 September 2018, ABI and NSWBC filed a Form F1 application to insert the Model Term into 12 awards (**ABI and NSWBC Proposed Variations**).

#### **4. ABI AND NSWBC PROPOSED VARIATIONS**

- 4.1 As ABI and NSWBC indicated in their Form F1 Application filed on 21 September 2018<sup>4</sup>, that they wish to insert the Commission's Model Term into 12 awards which already contain provisions that expressly impose an exact time frame to deal with the payment of monies owing on termination of employment.
- 4.2 Draft determinations were filed with the ABI and NSWBC Proposed Variations and have been published on the Commission's website.<sup>5</sup>
- 4.3 ABI and NSWBC seek a variation to the following modern awards to insert the Model term:

(a) *Aged Care Award 2010*

(b) *Business Equipment Award 2010*

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<sup>3</sup> [2018] FWC 4935

<sup>4</sup> ABI and NSWBC [Form F1 Application](#) filed on 21 September 2018

<sup>5</sup> These can be accessed in Attachments A-L of the ABI and NSWBC [Form F1 Application](#) filed on 21 September 2018.

- (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; and*
- (l) *Manufacturing and Associated Industries and Occupations Award 2010*

(Collectively, **the Proposed Awards**).

4.4 ABI and NSWBC seek to insert the model clause into the Proposed Awards as they are impractical and inconsistent with the modern awards objective. This is for the following five reasons:

- (a) The growth in EFT transactions has changed the way employees receive termination payments.
- (b) The provisions in the Proposed Awards currently apply to all terminations, including those which arise summarily - which is inherent unexpected, given the nature of the dismissal.
- (c) Employers can have difficulty promptly obtaining wage information necessary to process payments instantly.
- (d) Employers sometimes need time to make funds available for payment.
- (e) Processing termination manually in order to comply with current award provisions imposes a time and administrative cost on employers.

4.5 As stated in the 26 July 2019 Decision at [32], each of these variations are opposed by either the HSU, CEPU, AMWU, CFMMEU, etc. (collectively, the **Unions**).

## 5. SUMMARY OF EXISTING PROVISIONS

5.1 The 12 Awards that are subject of the ABI/NSWBC claim the Model Term, timeframes vary from award to award. The timeframe specified current for the awards is as follows:

<b>Modern Award</b>	<b>Days after termination within which payment must be made</b>
<i>Aged Care Award 2010</i>	<b>Clause 17.3</b> “payment of all wages and other moneys owing to an employee will be made to the employee by no later than the last day of formal notice period.”
<i>Business Equipment Award 2010</i>	<b>Clause 25.4</b> “payment must be made “on the day of termination or forwarded by post on the next working day.”
<i>Supported Employment Services Award 2010</i>	<b>Clause 18.4</b> “Where an employee is discharged from employment the employee will be paid immediately for all wages, overtime, pro rata payment for annual leave, annual leave loading or any remuneration due.”
<i>Dry Cleaning and Laundry Industry Award 2010</i>	<b>Clause 19.3</b> “payment of all wages and other moneys owing to an employee will be made to the employee by no later than the last day of formal notice period.”
<i>Plumbing and Fire Sprinklers Award 2010</i>	<b>Clause 27.4:</b> “monies due to the employee must be paid at the time of termination”
<i>Meat Industry Award 2010</i>	<b>Clause 29.2</b> “any wages due to an employee will be paid on the day of such termination, or at the employee’s option, forwarded to them on the next working day”
<i>Passenger Vehicle Transportation Award 2010</i>	<b>Clause 19.3</b> “the employer must pay to an employee who leaves or is dismissed all moneys due to the employee within two working days”
<i>Road Transport and Distribution Award 2010</i>	<b>Clause 20.3</b> “the employer must pay to an employee who leaves or is dismissed all moneys due to the employee forthwith”
<i>Road Transport (Long Distance Operations) Award 2010</i>	<b>Clause 18.3</b> “the employer must pay to an employee who leaves or is dismissed all money due to the employee immediately”

<i>Food, Beverage and Tobacco Manufacturing Award 2010</i>	<b>Clause 28.3</b> “an employee must be paid on the day of termination or forwarded to the employee on the next working day”
<i>Graphic Arts, Printing and Publishing Award 2010</i>	<b>Clause 28.5</b> “On termination of employment, all monies due to an employee must be paid on the day of termination. When an employee is dismissed without notice all monies are to be forwarded to the employee by post or electronic funds transfer by the end of next business day following the termination”
<i>Manufacturing and Associated Industries and Occupations Award 2010</i>	<b>Clause 34.3</b> “on termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day”

**6. IMPRACTICALITY OF EXISTING AWARD PROVISIONS WITH RESPECT TO DAYS AFTER TERMINATION WITHIN WHICH PAYMENT MUST BE MADE**

6.1 It is submitted by ABI and NSWBC that the existing provisions in the Awards which require payments to be processed either:

- (a) immediately; or
- (b) on the day of termination; or
- (c) at the end of the formal notice period; or
- (d) the next working day; or
- (e) “forthwith”

are impractical and inconsistent with the modern awards objective.

6.2 This is for the five reasons outlined below:

**A *The growth in EFT transactions has changed the way employees receive termination payments***

6.3 ABI and NSWBC articulated in submissions filed in the 20 September 2016<sup>6</sup> (**20 September 2016 submissions**) that there has been an increase in employees

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<sup>6</sup> ABI and NSWBC [Submissions](#) filed on 20 September 2016

being paid by way of electronic funds transfer (**EFT**) as opposed to cash or cheques.

6.4 In light of the statistics and report filed in the 20 September 2016 submissions<sup>7</sup> and from its own experience, the Commission is able to infer that there has been an overall increase in the reliance on EFT transactions as a means of processing wage payments by employers. That is, the Commission is able to infer that, over the past two decades, there has been a marked increase in EFT payroll payments and a marked decrease in the usage of cheques by employers as a means of paying employee wages.

6.5 Unlike when employees were once paid for in cash or by cheque and needed to physically pick up their wages and would have to wait around to receive their payments, electronic funds transfer means that employees can receive their entitlements with minimal effort (other than having a bank account) and there is no detriment to employees receiving their payments when the correct payment can be made as soon as practicable, within 7 days.

***B The provisions apply to all terminations, including those which arise summarily***

6.6 In some cases, employers may have the benefit of substantive notice in relation to the termination of an employee's employment. This is particularly the case with long serving employees, who can be entitled to between 4-5 weeks' notice of termination under the National Employment Standards.

6.7 However, this is not the case for a variety of common scenarios. For instance:

- (a) in cases of serious misconduct, employees are not entitled to notice of termination and can lawfully be terminated summarily; and

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<sup>7</sup> ABI and NSWBC [Submissions](#) filed on 20 September 2016 at 5.3 and Attachment

(b) in cases of resignation or termination with notice, it is also not uncommon for employees to be 'paid out' their notice periods in lieu - regardless of whether the employee has resigned or is being terminated at the initiative of their employer.

6.8 In the types of scenarios identified at paragraph (b) above, the timing of the decision to terminate the employment of an employee will be critical to determining whether an employer is physically able to process a payment on the day of termination.

6.9 Where payroll departments are provided with minimal timeframes within which to process a termination payment, award provisions requiring termination payments to be made on the day of termination may be impossible to comply with.

6.10 If an award provision is impossible to comply with (as can be the case with those awards requiring payment on the day of termination), such a provision is inconsistent with the establishment of a "fair and relevant minimum safety net", as required by section 134(1) of the *Fair Work Act 2009* (Cth) (**FW Act**). This is because an award provision is unlikely to be relevant to today's society if it cannot be complied with.

**C** **Employers can have difficulty promptly obtaining wage information necessary to process payments immediately**

6.11 When employers process termination payments, payroll departments obviously require up-to-date information regarding hours worked by the employee prior to the termination.

6.12 Payroll also requires accurate leave accrual data. Processing payments without this type of critical information would likely expose an employer to problematic underpayment and overpayment scenarios. Overpayments might be particularly

difficult to recover in circumstances where the employee is no longer employed by the employer.

6.13 Accurate time keeping records relating to hours of work are not necessarily readily at hand for payroll officers. Rather, payroll departments often require employee hours to be entered into a timekeeping system and approved by the relevant supervisors before payments can be processed.

6.14 The difficulty in immediately obtaining accurate timekeeping records reinforces the notion that the existing award provisions regarding termination payments are inconsistent with the establishment of a “fair and relevant minimum safety net”, for the reasons previously outlined at 5.7 above.

***D Employers sometimes need time to make funds available for payment***

6.15 It should not automatically be assumed that employers have substantial cash-flow available to make termination payments on immediate notice.

6.16 Businesses of all sizes may need to transfer funds from other accounts in order to process a termination payment. This is particularly the case where a long serving employee is due substantial termination entitlements such as long service leave.

6.17 The cash-flow problem associated with making payments immediately and without prior notice reinforces the notion that the existing award provisions regarding termination payments are inconsistent with the establishment of a “fair and relevant minimum safety net”, for the reasons previously outlined at 5.7 above.

***E Processing termination payments manually in order to comply with award provisions takes time and administrative cost on employers***

6.18 There is also an administrative cost associated with making termination payments outside of an employer’s ordinary pay cycle.

6.19 This is because the processing of a termination payment outside of an ordinary pay cycle requires a manual transaction to take place. A specific officer would need to collate the relevant timesheet records for the employee in question and then process a specific transaction for the relevant employee. This takes time which is additional to the time spent on automatic pay runs that proceed through an ordinary pay cycle.

6.20 The additional time associated with manually processing termination payments, in order to ensure award compliance, results in an inefficient work process - which is inconsistent with section 134(1)(d) of the FW Act (which seeks to promote the efficient and productive performance of work).

## **7. PREVIOUS FULL BENCH CONSIDERATIONS**

7.1 The Full Bench in these proceedings have already made various considerations and expressed many provisional views in respect of these issues.

### **October 12 2016 Full Bench Statement**

7.2 In a Statement published on 14 October 2016<sup>8</sup>, at [18] and [19], the Full Bench expressed the following provisional views with respect to 'payment on termination' provisions in modern awards:

- (a) there is some utility in a common payment on termination provision across all 122 modern awards; and
- (b) each modern award should provide for the payment of wages and other amounts owing on termination of employment, to ensure that employers and employees are aware of their obligations and entitlements.

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<sup>8</sup> [2016] FWCFB 7455

## 1 December 2016 Full Bench Decision

7.3 This provisional view was affirmed in a Full Bench Decision on 1 December 2016 which summarised as follows:

“[70] These considerations led us to express some provisional views in respect of this issue, in a Statement 28 published on 14 October 2016. The provisional views may be summarised as follows:

1. Each modern award should provide for the payment of wages and other amounts owing to an employee on termination of employment, to ensure that employers and employees are aware of their obligations and entitlements.
2. There is some utility in a common ‘payment on termination’ provision across all 122 modern awards.
3. The default term for the payment of wages and other amounts due on termination of employment should be:

Payment on termination of employment

The employer must pay all amounts that are due to an employee under this award and the NES when the employee’s employment ends:

- (a) within 7 days after the employee’s last day of employment; or
- (b) on the next normal pay day.

4. There does not appear to be a sound rationale for retaining the current provisions that require payment of wages on termination within a short period after termination (such as one or two days, or ‘forthwith’) and the existing provisions in respect of payments on termination should be replaced by the default term.”

7.4 The Full Bench in that Decision went on to state that not only is there utility in a standardised payment on termination provision across all 122 modern awards but from their understanding, it is not clear that there is any justification for award specific terms regarding this clause:

“[32] It is not readily apparent that the differences between the various modern award payment of wages provisions in terms of frequency of payment, pay days, payment in arrears, the types of payments they are expressed to regulate and other differences in the

wording of provisions, in fact reflect different characteristics of the enterprises covered by the various awards.

[33] It is our provisional view that all modern awards should include a term providing for the method and frequency of payment as well as placing a limit on payment in arrears. We also consider that there is utility in establishing a model 'payment of wages and other amounts' award term."

7.5 ABI and NSWBC along with various other employer parties originally submitted during 2016 submissions that termination payments should be made according to an employee's ordinary pay cycle. ABI and NSWBC lodged an argument in 2016 that payments that are required as the Awards do are both impractical and administratively costly.

7.6 Although the Full Bench disagreed that termination payments should be made according to an employee's ordinary pay cycle and instead created the Model Term, the Full Bench in its reasoning did find that the impracticality argument has merit and that it is not fair to employers that payment should be required either at the time of termination or within a few days after.

7.7 The Full Bench stated as follows:

[90] The impracticability arguments point to the inherent difficulty in providing termination payments at, or shortly after, the time of termination. We accept that this would be so in some instances, particularly in cases of summary dismissal and where an employee resigns their employment without giving notice. In such cases it may plainly take some time to calculate accrued leave payments. In cases of redundancy the applicable taxation arrangements may depend upon the particular circumstances and employers (particularly small businesses) may have to obtain advice externally before processing termination payments. We also accept that on the available data, the majority of terminations are not initiated by the employer so that the timing of the termination of employment is not within the employer's control.

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[93] But we also accept that there is considerable force in the ‘impracticability’ argument advanced by ABI and Ai Group. It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter.

7.8 The Full Bench decided that the Model Term decided by the Full Bench would strike an “appropriate balance between the various considerations” and reasoned that:

[100] Such a provision ensures that employees receive their termination payments in a timely way while providing employers with sufficient time to calculate and pay the sums due. Such a term would address the ‘impracticability’ arguments advanced on behalf of the employers. We accept that we may impose some ‘time costs’ associated with obtaining information about the hours worked in the prior pay period and may require ‘out of cycle’ EFT transactions in some instances, but the costs involved are unlikely to be substantial.

## **8. CONCLUSION**

8.1 For these reasons outlined above, ABI and NSWBC submit that the Proposed Awards are impractical and inconsistent with the modern awards objective.

8.2 For this reason, the Commission should make the determinations proposed by ABI and NSWBC, which would have the effect of ensuring a common payment on termination across the modern award system which balances when employees readily receive their termination payments while providing employers with adequate time to make the payment.

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