IN THE FAIR WORK COMMISSION

AM2016/8

4 yearly review of modern awards
Payment of Wages

SUBMISSIONS OF THE ACTU IN REPLY

1. These submissions are made pursuant to the Directions of the Full Bench on 19 September 2017. They principally and briefly reply to particular matters raised in the submissions of the Australian Industry Group of 7 November 2017 ("Ai Group Submissions") and Australian Business Industrial and the NSW Business Chamber on 31 October 2017 ("ABI Submissions").

Model Term on Payment of Wages and Other Amounts

1. The Ai Group Submissions and the ABI Submissions support a joint employer position on the payment of wages and other amounts and offer comment on how that positon differs from the provisional model term developed by the Full Bench in its decision of 1 December 2016[1] ("the Decision"). The joint employer position also differs from that advanced in our submissions.

2. Key features of the employer's preferred position are that:

    a. There is no mandated regular pay day[2], rather payment may be made at any time in the 7 days following the pay period, or longer if the 7th day happens to fall on a public holiday and/or weekend[3];

    b. There need not be any relationship between the payment made on that day and the work performed in the concluded pay period[4];

    c. Monthly pay should be available for all employees by default.

[1] [2016] FWCFB 8463
[2] ABI submissions at para 2.12, Ai Group Submissions at para 22.
[3] Ai Group Submissions at para 32 (first occurring).
[4] Ai Group submissions at para 29-35.

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Pay day, weekends and public holidays

3. The joint employer position omits what appears at clause x.1(c) of the provisional model term developed by the Full Bench (and is repeated at clause X.2(b) of the ACTU model term). Whilst this is described partly on the basis of removing a "technical documentation requirement"[5], the provision the employers have removed is in fact the only element of the Commission's provisional model term that gives effect to a regular pay day. The absence of a regular pay day is said to be justified by the absence of any prejudice to an employee and retaining a "sensible degree of flexibility for employers"[6].

4. We reject the argument that a complete lack of certainty as to when in a 7 day period (or potentially 10 day period in the case of a long weekend, should other elements of the proposal be accepted) an employee will be paid occasions no prejudice to them. The inability to commit to purchasing decisions for a week or more at time is clearly disruptive and prejudicial. The flexibility argument (e.g. "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"[7]) is an expression of the idea that somebody else should bear the consequences of an employer's failure to pay their employees on time. Such a notion is completely incompatible with any notion of a fair and relevant safety net. A modern awards review should not and cannot deliver the employer interests a "capacity to pay" defence against statutory remedies or penalties in late payment proceedings. Interestingly, neither the Ai Group submissions or the ABI submissions address the corresponding benefit to employers of holding the wages of their employees "in hand" deliberately for several days. Nor do they acknowledge that the requirement for a fixed pay day was effectively concluded by the observations of the Full Bench at paragraph [46] of the Decision:

> "The modern awards objective includes 'the need to ensure a simple, easy to understand, stable and sustainable modern award system'. Providing clarity to employees about when and for what period they will be paid and providing clarity to employers as to their obligations to make such payments, is consistent with this objective."

5. To the extent that it is genuinely put in the Ai Group Submissions and the ABI Submissions that the requirement to *notify* employees of their pay day is burdensome, it is notable that no

[5] ABI Submissions at paragraph 2.14
[6] Ai Group Submissions at paragraphs 22-23, ABI Submissions at paragraph 2.12.
[7] ABI Submissions at paragraph 2.12(b)

objection is taken to notification of the pay cycle. The objection rather appears to be to the requirement to notify in *writing*. Clearly, aside from transitional considerations, the obvious time at which to make such a notification is at the commencement of employment. An update to standard commencement or induction packs or letters – done once and in writing – is in fact less burdensome and risk prone than verbally notifying employees of their pay cycle. Whilst it is logical that if there is no regular pay day, there ought not be a requirement to notify of the regular pay day that does not exist, the regulatory burden associated with notification of the pay day is insignificant.

6. In terms of public holidays, the employer proposal provides for the 7 day proposal to be extended to 8 days. Ai Group take the matter further, by suggesting that the 7 days could also be extended until after the weekend where the 7th day falls on a weekend, or indeed where the 8th day falls on a weekend owing to the 7th day (e.g. Good Friday) falling on a public holiday. As we sought to demonstrate in paragraphs 23-29 and 55-57 of our submissions, arrangements for delaying pay days involve merit considerations as well as consideration of section 323 and the accrual issue. Neither of the Ai Group Submissions or the ABI Submissions deal with those complex issues in any satisfactory way. For example, there does not seem to be any appreciation that extending a pay interval beyond one month in order to accommodate a public holiday would involve a contravention of section 323.

7. It has become apparent to us that there is a drafting error in our proposed clause X.3(b). The proviso "if the employees are not paid monthly" which forms part of sub-paragraph (i) of our proposed clause X.3(b) should in fact have been applied to sub-paragraph (ii) thereof. In addition, the clause could be adapted to deal with weekends in a similar way (which would only arise where employees are paid monthly), where weekends were in fact non-working days.

Relationship between payment and work performed in a pay period

8. Paragraphs 29 (second occurring) to 49 of the Ai Group Submissions arguably seek to re-agitate a merit issue that has already been determined. Whilst we concur with the Ai Group's observation at paragraph 34 of their submissions that some awards appear to operate on the basis that there is no limitation on payment in arrears, the case for change has already been made out. Paragraphs [33], [37]-[38], [46] and [124]-[135] of the Decision clearly disclose both an awareness by the Full Bench that existing award payment of wages provisions might not provide a link between an employee's service during a particular pay period and that

employee's payment for that pay period, as well as a desire that this be rectified in order to meet the modern awards objective. The approach of the Full Bench is entirely consistent with that set out by the Full Court of the Federal Court in its review of the *Penalty Rates* decision:

> "A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought into account"[8]

9. The "wages for work" bargain cannot be so vague that the employer has complete flexibility as to when it pays for the service which has been performed by its employees. If nothing else, the limitation on the intervals between payments provided by section 323 becomes somewhat irrelevant if there is an absence of any prescription in the safety net about what should be paid at those intervals. Without that prescription, the safety net cannot be relevant or fair – there can scarcely be a better example of where prescription is *necessary*. A safety net that guarantees no more than that employees will be paid *eventually* (at a time of the employer's choosing) is no safety net at all. It is true, as we point out in paragraphs 28-29 of our submissions, that section 323 does not on its own ensure that payment made at the intervals it prescribes is referable to work performed in any pay period – however that does not mean the safety net should stay silent on the crucial issues of how wages accrue and when they are payable. Our proposed model term fills this essential gap.

10. It will be apparent from our submissions and our proposed model term that we have gone to considerable lengths to ensure that options are available to suit a variety of payment arrangements that are currently found in awards, while also specifically submitting that the end result should be determined through an award by award process wherein specific elements of the model clause may be adopted or adapted to address the modern awards objective as applied to a particular award. ABI's submissions at paragraphs 4.2-4.5 seem accepting of that general approach in order to accommodate award based payment arrangements that may differ from the norm. However, the Ai Group's repeated references to wanting to preserve "contractual" arrangements that do not provide a link between service during a pay period and payment for that pay period have consistently lacked any concrete examples that have enabled either the Commission or ourselves to respond to their asserted concerns. This state of affairs has continued for nearly 12 months. Simply asking the Commission not to do deal with the issue because it "may" disrupt undisclosed arrangements that "may currently be compliant" is highly unsatisfactory, particularly when it is equally true

[8] *SDEA c, Ai Group & Ors* [2017] FCAFC 161 at [34].

that many such arrangements may not be compliant[9]. It is certainly insufficient to displace the views expressed in the Decision referred to at paragraph 8 above.

11. The joint employer proposal and the Ai Group Submissions in support of it seem wilfully defiant of the Full Bench's expressed intention to deal with the accrual issue in the manner indicated in paragraph [133] of the Decision. By contrast, we have positively and constructively engaged with the accrual issue and attempted to craft provisions that ensure that wages are accrued progressively during a pay period and are payable on the pay day following that pay period, while also offering tailoring options to suit a variety of circumstances. The ultimate "ask" in the Ai Group material is for the Commission to do nothing, or alternately, do nothing for the entirety of the existing award covered workforce. There is no contest on the material as to which approach is to be preferred in addressing the issues identified in the Decision.

Monthly payment

12. Paragraphs 2.23-2.27 of the ABI submissions address the issue of part payment in advance that arises as a condition for monthly payment in the model term provided at paragraph [34] of the Decision. They also assert, in effect, that it is not necessary to mandate part payment in advance where employees are paid monthly. Whilst we concur with that outcome, we do so for different reasons. Paragraphs 28-29 of our submissions argue that a requirement for part payment in advance is not necessary to achieve compliance with section 323 and that awards should prescribe when wages are accrued and when they are payable. ABI seem to approach the issue on the basis that part payment in advance is lacking in merit. We do not have a merit based objection to part payment in advance and as such we included it as an option in our proposed model term for all payment intervals, except for casual employees. Paragraphs 2.24-2.25 of the ABI submissions notably concede that it might not be possible to estimate the actual earnings of casual employee in advance, a point we advanced at paragraphs 60-61 of our submission.

13. Paragraphs 2.17-2.22 of the ABI submissions argue that monthly pay should be retained where it is currently permitted in a particular Award. Paragraphs 28-30 of the Ai Group submission adopt that position as an alternative to their primary position that all awards should allow for

[9] See for example *Linkhill v Director FWBII* [2015] FCAFC 99 at [39]-[67], [94]-[100]; *Lynch v. Buckley Sawmills* [1984] FCA 306 and in particular the discussion therein concerning payments made in successive weeks.

monthly payment. Ultimately, the modern awards objective needs to be applied to the payment arrangements in each of the awards. In our view, awards that are completely silent on the issue of frequency of payment[10] are in a different category to those which prescribe a frequency of payment that includes monthly payment[11]. In the former case, consistent with the views expressed at paragraph [31] of the Decision, the awards ought to be approached on the basis that there is a need to stipulate an appropriate frequency of payment. In the latter case, the awards may be approached on the basis that the stipulated frequencies of payment are appropriate subject to any contention to the contrary. In both cases, the disadvantages for employees of monthly pay periods, as referred to in our submissions and those of United Voice and our other affiliates, may be considered.

Payment on Termination

14. The submissions of the Ai Group are silent on this issue.

15. The submissions of ABI raise no issues that have not already been comprehensively been dealt with by us.

Australian Council of Trade Unions

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[10] Being those listed at Schedule 1 of our submission plus the *Miscellaneous Award* and the *Racing Clubs Events Award*.

[11] The Awards listed at Schedule 2 of the ABI Submission, save for those in that list that are referred to in Note 8 above and save for the *Black Coal Mining Award,* which at clause 16.4 prohibits monthly pay unless it is agreed.