IN THE FAIR WORK COMMISSION

AM2016/8

2014 Review of Modern Awards – Payment of wages common issue

SUBMISSIONS OF THE ACTU

1. These submissions are made in response to the call for submissions at items 1-4 of paragraph [198] of the Full Bench Decision in [2016] FWCFB 8463 ("the Decision").

2. We are broadly supportive of the Commission developing model clauses for the payment of wages, accrual of payments and payments on termination.

3. We are, in addition, broadly supportive of the proposed terms that the Commission has developed for the model provisions. We offer some minor comments on the wording of the model clauses in sections 2 and 3 below.

(1) General Considerations

4. The merit arguments in favour of the proposed model terms have not, at this point, been subject to a fulsome and contextual evaluation as against existing terms in each of the modern awards that may be varied in the current proceedings. In relation to the payment of wages term set out at paragraph [34] of the Decision, some provisional merit is said at paragraphs [45]-[47] to lie both in the absence of a justification being apparent for the fact that existing awards contain different terms and, secondly, in the desirability of clarity.

5. We concur that clarity is very important and that persons covered by awards should able to clearly understand their rights and obligations upon reading an award. If there is any suggestion that existing terms have led or are likely to lead such persons into error and non-compliance, then this ought to be rectified. However, the absence of common terms across the award system is not, in our view, a strong reason in itself for change in all circumstances (and we do not take the Commission to be suggesting otherwise). Commonality may assist in achieving some practical systemic equity – a fair and relevant safety net – in relation to

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broad based industrial standards that have developed as such (e.g. casual loading, minimum rates of pay based on work value, minimum number of days of sick leave). But commonality and equity ought not be entirely equated: industry considerations may require different standards to be adopted based on circumstances that indicate a fair minimum in one sector does not translate to a fair minimum benefit in another. Commonality ought to be generally uncontroversial in relation to matters that are purely technical but even then there may be pragmatic reasons why not all elements of the common approach can be implemented, or implemented in an identical way. These barriers to a "one size fits all" approach are consonant with the Full Bench's observation early in the Review that:

> "there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective"[1]

6. We believe that an award by award process, examining how the concepts expressed in the model term (even if not the terms verbatim) compare to the existing terms and the relative impact on interested parties of any change is warranted, if not mandatory, in order to satisfy the Commission that a variation to each such award is necessary to meet the modern awards objective. Such an exercise may also reveal that particular variations are necessary to resolve an uncertainty or ambiguity or to correct an error. For that reason we support the view that a version of any model terms (once settled) appropriately adapted to any existing award payment arrangements should be explored for each award. The examples provided at paragraph [47] of how this might be achieved are helpful examples of what the outcomes of such a processes may be.

(2) Provisional model term concerning Payment of Wages and Other Amounts

<u>Concepts expressed in the clause</u>

7. We support the development of a model clause dealing with:
    - The duration of pay periods;
    - The time between the conclusion of the pay period and the when the amount is paid;
    - Payments due both under the Award and the NES

[1] [2014] FWCFB 1788 at [34]

- How the pay period may be varied; and
- The method by which payments may be made.

8. In addition, we accept that awards should deal with the issue as to when an entitlement to payment accrues. Whether the issue is dealt with in a model *payment of wages and other amounts* clause or in each clause dealing with the relevant entitlement is a matter upon which we express no concluded view. Paragraph [133] of the Decision seems to contemplate that the approach to this issue may vary depending on the content of each award and we concur. This is a matter which supports a process of adaptation of any model term to each award rather than the imposition of a fixed model term across all awards. With the exception of pieceworkers, it is our understanding that it is a popular payroll practice to round up hours worked to the nearest 15 minute interval, and this might provide a relevant benchmark for dealing with the issue of wage accrual, at least for awards which reveal no particular intention to establish an accrual interval.

Drafting of the clause

9. The proposed model term is drafted so as to deal with each concept discretely and this assists understanding. The minor suggestions we make as follows:
    - The 7 day prescription in clause x.1(a) may occasion some hardship on employees where the current interval between the conclusion of the pay period and the pay date is a shorter period, at least during the transition period. This may particularly be the case where workers have several employers but only perform a small number of hours for each, or are low paid. How this issue is managed is best discussed in the context of award specific tailoring.
    - A clause immediately after clause x.1(a) is the ideal location for a provision concerning weekends and public holidays, as is referred to in paragraph [44] of the Decision. Subject to one reservation, we support the inclusion of such a provision as it is likely to reduce the potential for disputation among persons who may be otherwise unaware of the effect of the statutory provisions mentioned in that paragraph. The one reservation we have is whether section 40A of the *Fair Work Act* in fact alters the position expressed in the Decision. Whilst section 36 of the version of the *Acts*

Interpretation Act that the section points to is not materially different, section 46 is different in that it is relevantly subject to the proviso "unless the contrary intention appears". It is not stated whether the relevant contrary intention is to be discerned from the enabling legislation or from the subject instrument to which it refers.

- Clause x.1(a)(i) could refer to the "the employee's wages that are due for the pay period" or "the employee's wages accrued during the pay period" or similar, particularly if existing wages clause are amended to specify when the entitlement to wages accrues.
- Clause x.1(b)(iii) could refer to both to paragraph (e) and (f) as provisos on the capacity to pay monthly (as well as any other award specific provisos). Even if not entirely necessary from a strict drafting point of view, it would encourage persons considering monthly payment to read all of the special conditions that are relevant to monthly payment.
- We respectfully endorse the proposals put forward by Irving and Stewart for the amendment of clauses x.1(e) and (f), for the reasons stated in their submission.
- It may be beneficial to consider exempting casual employees from the option of monthly payment. Many causal employees, particularly in some industries, have highly variable hours of work that would make payment in advance highly problematic. Removing the option of monthly payment might be the surest method of preventing non-compliance with section 323.
- In relation to clause x.2 it would be beneficial to consider the extent to which payment by cheque remains prevalent in any particular industry. Much of this proceeding has been conducted on the basis that electronic funds transfer is prevalent, if not preferred. Many businesses no longer accept cheques due to risk, cost, delay and inconvenience. It should not be assumed that it remains fair for employees to accept those same difficulties.

(3) Provisional model term concerning Payment of Termination of Employment

Concepts expressed in the clause

10. We support the development of a model clause dealing with:

- The timing of termination payments; and
- The amounts that must be paid both under the Award and the NES when employment is terminated.

11. We would support such a model clause being considered for insertion in awards which are currently silent on these issues. In relation to the 36 awards that do deal with these issues (albeit to varying extents), we would support the existing clauses being varied for clarity and to correct any errors or uncertainty. We concur with the comment at paragraph [87] of the Decision that a case by case assessment is required. Such an assessment has not as yet occurred.

Drafting of the clause

12. We support the amendment suggested by Irving and Stewart to clause x.1(a)(i). We also consider that the references to "the employee's last day of employment" could lead to errors and that an expression such as "the day on which the employee's employment terminates" is less likely to.

13. We oppose the establishment of a national standard 7 day waiting period for termination payments. We support the substantial reasons already advanced by our affiliates as to why this would occasion hardship and represent a derogation of entitlements for many workers and we join with them in questioning whether the material advanced by those seeking a change is sufficient to persuade the Commission of the *necessity* to implement a 7 day rule, having regard to the rules set down in the *Preliminary Issues* decision. The Commission ought to take it as a given that electronic funds transfer was not only in existence but also prevalent at the time the modern awards were made, being the time at which those awards are taken to have met the modern awards objective[2]. We add our voice to the view that it is beyond argument that a termination under section 117(2) is unlawful unless the employer has paid notice before the termination. We also add, in relation to redundancy pay under section 119, that the obligation to pay redundancy pay coincides with the termination of employment. If that were not the case, it is difficult to discern how a typical worker, employed under the provisions of the Awards not listed in Attachment B of the Decision could ever competently plead or successfully argue that section 119 had been contravened, or seek an order for interest having regard to the requirements of section 547(3) to take into

[2] *Ibid.* at [24]

account "the day the relevant cause of action arose". In any event, it cannot be said that an immediate liability to pay redundancy on termination visits any particular hardship on an employer as the timing of the redundancy "decision" that is the necessary perquisite to such termination is matter within its own control and is typically carefully considered.

14. If the Commission does however resolve to implement a 7 day rule, to the extent that Commission's reasoning implies a finding that the 7 day rule is a balanced provision where terminations occur *other than at the initiative of the employer*, the model clause could be re-drafted so that the rule applied only in those circumstances . At present, it would in our view apply to some terminations that were at the employer's initiative, including those where the termination occurs after the giving of notice and where employment is terminated on account of serious misconduct. It would not, in our view, apply to terminations where notice is paid or to terminations on the grounds of redundancy, as it would be read down by force of section 56. Terminations at the initiative of the employer that are not currently required to be instantaneous ought to be accompanied by prompt payment and for the last 6 years a period of 1-3 days for such payments has been deemed to meet the modern awards objective in several industries.

15. We agree that clause ought to be drafted so as to ensure as far as possible that it capable of operating compatibly with section 120 of the *Fair Work Act*. However, it is arguable that any application made under that section is without jurisdiction unless the employee is already "entitled to be paid an amount of redundancy pay by the employer because of section 119"[3]. Given that the entitlement to redundancy pay arises and, in our view, crystallises at the point of termination, section 120 is in its present form problematic in any event. Whilst this may be better considered an issue for another day, there may nevertheless be some utility in directing users to the capacity to have the Commission deal with a dispute about the operation of the NES, and do so pre-emptively, in circumstances where the employer is considering making a section 120 application – if not in the award then perhaps in annotated explanatory documents of the type contemplated by the Full Bench in [2014] FWCFB 9412[4].

[3] Section 120(1)(a)
[4] At [35]-[36]