

***4 yearly review of modern awards***

*Payment of Wages*

**SUBMISSIONS OF THE ACTU**

1. These submissions are made pursuant to the Directions of the Full Bench on 19 September 2017. They are to be read in place of our submission of 21 December 2016. We continue to rely on our Reply submissions of 14 February 2017, although we may not do so in future to the extent that the employer submissions to which those submissions reply are no longer relied on or are superseded.

**(A) The proceedings**

2. These proceedings arise in the course of the 4 yearly review of modern awards required by section 156 of the *Fair Work Act* 2009 (“the Act”). They are being dealt with as a “common issue” matter in this review. Unlike many of the common issue proceedings in which the ACTU has been significant contributor, these proceedings are not confined to dealing with a “common claim” by any party (or combination of parties) to vary a multitude of modern awards to address a particular issue.
3. Rather, the origin of these proceedings are disparate claims. Whilst one “common claim” was advanced in relation to payment on termination where employees are paid by electronic funds transfer<sup>1</sup>, it is fair to state broadly that the issues that remain for determination are in large measure issues that the Commission has identified in a multitude of awards as requiring attention. We make no complaint about the Commission identifying those issues and proposing how they should be addressed.
4. To the extent that it is not otherwise apparent from the statements we have made on the record, the ACTU accepts that all modern awards should:
  - a. Specify the duration of pay periods;
  - b. Specify how wages accrue;

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<sup>1</sup> See [2016] FSCFB 4519

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- c. Specify that employees are to be paid at a particular time after the conclusion of a pay period;
  - d. Specify the methods of payment that are permissible;
  - e. Specify if and how any of the above matters may be altered;
  - f. Make distinct provisions regarding payment on termination, dealing with when such payments must be made.
5. We cannot envisage the Commission reaching a conclusion that an award which was silent on any or all of these issues provided a “fair and relevant safety net”. Issues as fundamental as how and when a person is to be paid for their labour should not be left at large in modern awards.
  6. It is necessary that these issues be addressed.

## **(B) Model terms – General Observations**

7. The Commission provided two “provisional model terms” in its decision of 1 December 2016<sup>2</sup> (“the Decision”), one dealing with “Payment of Wages and Other Amounts”, the other dealing with “Payment on Termination of Employment”.
8. We freely admit that we have found it difficult to respond to the provisional model terms in the absence of some certainty regarding what would follow the finalisation of those model terms. Some of our affiliates’ members have more to lose than they have to gain from the wholesale adoption of the provisional model terms contained in the decision, whereas for others the opposite is the case. Our contribution to these proceedings is necessarily and unapologetically one in which we seek to advance the interests of those we and our affiliates represent. We believe that the approach we contend for protects those interests in a manner that is soundly based in principle.
9. At its crudest, our request is that Full Bench not attempt to fix something that isn’t broken. Such an approach is consistent with the approach taken by the Commission in other matters in the Review, with the approval of the Full Court of the Federal Court.
10. In the *Penalty Rates* decision<sup>3</sup>, a Full Bench determined that, *in the context of a four yearly review of modern awards*, it had no basis to vary an award at all, let alone consider the

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<sup>2</sup> [2016] FWCFB 8463

relative merits of competing proposals before it to vary those awards, unless it had first reached a decision that the award as it stood did not meet the modern awards objective. It made the following comment in rejecting a submission from our affiliates that the precondition was instead that there had been a material change in circumstances since the last review:

“Contrary to the Unions’ contention the Commission’s task in the Review is to make a finding as to whether a particular modern award achieves the modern objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138)...”<sup>4</sup> (emphasis added)

11. In our view, this makes clear that a finding that a modern award does not achieve the modern awards objective is a mandatory precondition that must be satisfied before the Commission can exercise the discretionary power under section 156 to make a determination to vary a modern award in the course of a Review.

12. The *Penalty Rates* decision was considered by the Full Court of the Federal Court following an application for prerogative relief by our affiliates. One of the grounds in that application was that the Commission had misconstrued its powers by varying particular awards in the Review without having satisfied itself that, since the last review, there had been a material change in circumstances. In rejecting that ground, the Full Court relevantly said:

“It is thus a matter for the FWC to determine the weight to be given to the value of stability in the particular review it is conducting, along with the weight to be given to all other matters it must take into account, cognisant of its duty (which itself involves an evaluative assessment of potentially competing considerations) to ensure that modern awards, together with the National Employment Standards, provide the required fair and relevant minimum safety net....”

“...The applicants’ contention would constrain the capacity of the FWC to maintain an award’s compliance with the modern awards objective. That could only be done if a material change of circumstance was first established. It should not be readily presumed that Parliament intended to impose constraints upon the achievement of an objective that it has mandated. 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 to account”<sup>5</sup> (emphasis added)

13. In considering other grounds upon which the application for prerogative relief was sought, the Court approved of the Commissions approach of deciding to vary the relevant awards because of its finding that in a particular respect the awards did not satisfy the modern awards objective:

“The FWC did not merely decide whether existing rates were suitable for contemporary circumstances and then vary the rate by reference to the s 134(1)(a)-(h) matters. By reference to

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<sup>3</sup> [2017] FWCFB 1001

<sup>4</sup> [2017] FWCFB 1001 at [141]

<sup>5</sup> *SDEA v. Ai Group & Ors* [2017] FCAFC 161 at [33]-[34]

a wide range of matters it considered were relevant, the FWC concluded that the existing Sunday rates did not ensure the provision of a fair and relevant safety net taking into account the s 134(1)(a)-(h) matters. This is what the FWC was required to do.<sup>6</sup> (emphasis added)

14. The clear implication from the above is that the Commission, in this proceeding, is required to find that each modern award does not meet the modern awards objective in a particular respect, before it can exercise its power under section 156(2) of the Act to vary those awards. Additionally, each modern award must be reviewed in its own right<sup>7</sup> and any variation must itself be confined to doing what it necessary to meet the modern awards objective, noting that there may be no one set of provisions which can be said to provide a fair and relevant safety net of terms and conditions.<sup>8</sup> These requirements erect some obstacles to the wholesale adoption of model terms.
15. The merit arguments in favour of the proposed model terms have not, at this point, been subject to a complete 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 and other amounts” model 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. Whilst there is nothing exceptional about making provisional observations about the generalised merit of model terms, ultimately the focus must be on the awards themselves and whether or not those awards meet the modern awards objective as it is those awards (rather than particular proposals to vary them) which must be reviewed.
16. We concur that clarity is very important and that persons covered by awards should be 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/or non-compliance, then this ought to be rectified. However, the mere realization that there is an absence of common terms across the award system is not, in our view, a sufficient 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 broad based industrial standards that have developed as such (e.g. casual loading, minimum rates of pay based on work value, minimum number of

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<sup>6</sup> *Ibid.* at [61]

<sup>7</sup> s. 156(5) of the Act.

<sup>8</sup> [2014] FWCFB 1788 at [34]-[36].

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”<sup>9</sup>

17. We believe that an award by award process, examining the existing terms, 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 the Decision of how this might be achieved (in relation to payment of wages) are helpful examples of what the outcomes of such a processes could be. In addition, and separately to arriving at a position on what the model terms should be, parties should be free to advance merit based cases to depart from those model terms on particular issues related to the payment of wages and other amounts and payment on termination.
18. In the remainder of this submission, we comment on the model terms provided by the Commission and offer alternatives. However, it is not our position that either the Commission’s model terms or those that we have provided as alternatives are necessarily suitable for a particular modern award. Rather, our intent has to been to arrive at model terms that are highly modular, in order that parts of those model terms can be adopted and/or adapted into modern awards at a future point in these proceedings once each award has been reviewed in its own right to establish what, if any, issues need to be addressed in those awards in order to ensure they meet the modern awards objective.

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<sup>9</sup> [2014] FWCFB 1788 at [34]

### **(C) Model Term on Payment of Wages and other amounts**

19. The Decision makes clear that the provisional model term on payment of wages and other amounts was developed to address the following matters identified by the Commission:

- a. Most modern awards do not provide that wages should be paid within a specified period after the pay period<sup>10</sup>;
- b. 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.<sup>11</sup> Frequency of payment involves two issues: the period in respect of which an employee's pay is to be calculated and when payment in respect of pay period is to be made to an employee.<sup>12</sup>
- c. It should be clear that wage payments accrue under the award by the end of each pay period.<sup>13</sup>
- d. There would benefit in either replacing the existing provision for payment with a model term, or a version of the model term appropriately adapted to existing award payment arrangements.<sup>14</sup>

20. In our view, as discussed in paragraphs 9-18 above (and pertinent to sub-paragraph (d) above), the appropriate course is to develop a model term and adapt or translate that model term to existing payment arrangements. In this way, the outcome of this proceeding is responsive to the problems identified: it balances the need to deal with the concepts expressed in the model term and the issues identified by the Commission with the preservation of award terms that have not been found to be deficient. That approach would see a model term inserted in only in 7 Awards, because those awards are the only awards which are silent on all of the issues that the Commission has identified as needing attention. Those Awards are listed in Schedule 1 to this submission.

21. The ACTU has, with the assistance of our affiliates, attempted to map out various circumstances that must inform the development of a model term that responds to the issues identified in the Decision. This has led us to develop a model term that is different to that proposed in the Decision in that it contains a number of "optional clauses" designed to

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<sup>10</sup> Decision at [15]

<sup>11</sup> Decision at [33]

<sup>12</sup> Decision at [39]

<sup>13</sup> Decision at [132]-[133], [38]

<sup>14</sup> Decision at [47]

deal with those circumstances. Our proposed model term also differs in other ways to the model term proposed by the Commission. Our proposed model term is included as Schedule 2 to this submission. The remainder of this section of submission explains the basis for those differences.

### *Clause X.1 of the ACTU model term*

22. Clause X.1 is about accrual. It deals with that issue differently to clause X.1(a)(i) and (ii) of the model term proposed by the Commission. Noting that the Commission has sought views regarding the treatment of the accrual issue, the differences stem from:

- a. A different view regarding how section 323 of the Act intersects with the notion of accrual of wages;
- b. A desire to continue to permit payment in advance in some circumstances (subject to some merit issues);
- c. A desire to maintain conformity with annual leave related clauses found in some awards;
- d. A desire to maintain conformity with pay averaging, piecework and annualised salary provisions found in some awards.
- e. A desire to ensure the clause interacts clearly with terms concerning payment on termination.

### Section 323 of the Act

23. The Full Bench has noted that section 323 of the Act relevantly provides that employees must be paid “amounts payable to the employee in relation to the performance of work...at least monthly”.

24. The requirement to pay “at least monthly” on its face imposes a strict outer limit on the frequency of and interval between payments. This is confirmed by the explanatory memorandum, which relevantly provides:

“Subclause 323(1) does not provide an exception from the requirement for at least monthly payment to deal with the situation where payment of wages falls due on a public holiday. In

such a case, the employer would need to ensure that appropriate arrangements are put in place so that employees are paid before the public holiday.”<sup>15</sup>

25. Construing the reference to “monthly” in this way is entirely consistent with the treatment of expressions to a “month” as provided for in the *Acts Interpretation Act 1901*:

### **2G Months**

- (1) In any Act, *month* means a period:
- (a) starting at the start of any day of one of the calendar months;  
and
  - (b) ending:
    - (i) immediately before the start of the corresponding day of the next calendar month; or
    - (ii) if there is no such day—at the end of the next calendar month.

Example 1: A month starting on 15 December in a year ends immediately before 15 January in the next year.

Example 2: A month starting on 31 August in a year ends at the end of September in that year (because September is the calendar month coming after August and does not have 31 days).

- (2) In any Act, a reference to a period of 2 or more months is a reference to a period:
- (a) starting at the start of a day of one of the calendar months (the *starting month*); and
  - (b) ending:
    - (i) immediately before the start of the corresponding day of the calendar month that is that number of calendar months after the starting month; or
    - (ii) if there is no such day—at the end of the calendar month that is that number of calendar months after the starting month.

Example 1: A reference to 6 months starting on 15 December in a year is a reference to a period starting on that day and ending immediately before 15 June in the next year.

Example 2: A reference to 6 months starting on 31 October in a year is a reference to a period starting on that day and ending at the end of April in the next year (because April is the calendar month coming sixth after October and does not have 31 days).

26. It follows that an employee last paid on the 15<sup>th</sup> of January must be paid again on 15 February because the “month” in which they were paid comes to an end on 14 February: the interval between payments can be no longer than one “month”. A complexity arises regarding the expression “amounts payable to the employee” in section 323 and its interaction with the accrual of wages and other amounts.

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<sup>15</sup> At [1281]



27. The Decision adopted the reasoning in *Casey Grammar School* that section 323 “operates on an existing legal obligation to pay” and “does not create the underlying legal obligation to pay that renders an amount as ‘an amount payable to an employee’”. However, the decision went on to make some observations which we submit, with respect, might be considered to conflate the issue of when a payment *accrues* and when it is *payable*:

“Section 323 deals with the method by which (e.g. cash, cheque or EFT) and frequency with which (at least monthly) employers must pay employees amounts *payable* to them in relation to the performance of work. The effect of s. 323(1)(c) appears to be that *such amounts* must be paid no later than one month after accrual.

As noted in *Casey Grammar School*, s.323 operates on an existing obligation to pay by imposing further obligations on the employer in relation to the time, frequency and methods of such payments. Section 323 does not specify when an amount ‘payable...in relation to the performance of work’ becomes *payable*, or in other words, *accrues*”<sup>16</sup> (emphasis added)

28. In our submission, a payment should not be assumed to be payable on the date it accrues: the date upon which a debt arises is not necessarily co-incident with the date upon which the obligation to pay that debt arises<sup>17</sup>. The terms of section 323, in our view, contemplate such a distinction and sit comfortably with an award provision providing such a distinction. Our proposed model term provides that distinction, by providing that “wages accrue on a day to day basis, but are not payable until pay day”.

29. The point is an important one because the conflation of the notion of when a right to payment accrues and when it is payable is what led the Full Bench to propose that where payment is to be made monthly, it must be paid two weeks in arrears and two weeks in advance<sup>18</sup>. We do not concur that such a provision is necessary. Provided an award explicitly states when amounts that are accrued become payable, and that the intervals between when amounts are payable is no greater than a month, the timing requirement in section 323(1)(c) is met – it does not matter that the date the amounts become payable is 7 days later than the conclusion of the pay period in which they accrue. Further, adopting this view, the limitations that awards impose on payment in arrears are to be determined on merit considerations alone rather than the terms of section 323.

#### Payment in advance

30. As Irving and Stewart identify at pages 8-9 of their submission, wages paid in advance may not, strictly speaking, be wages that are accrued during a pay period, because the work attracting the payment has not been performed. Whilst Irving and Stewart make that

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<sup>16</sup> At [26]-[27]

<sup>17</sup> See generally *Videocon Global Ltd & Anor v. Goldman Sachs International* [2016] EWCA Civ 130, at[53]-[58]

<sup>18</sup> At para [41] of the Decision.

observation in suggesting changes to clause X.1(f) of the Commission’s proposed model term (the need for which is obviated if our submissions at paragraphs 28-29 above are accepted), the same is true of any payment in advance arrangement. In our analysis, it is simply not possible to discern from the terms of most awards whether there is a preference for, or prohibition on, payment in advance or arrears<sup>19</sup>. In that connection, a reference to wages “for a pay period”, and the Commission’s intention “..to ensure that wage payments accrue under the award by the end of each pay period”<sup>20</sup> may be not be the optimal elements to include in a provision that may ultimately apply in a range of workplaces including in some where payment in advance is the norm.

31. In contrast, our proposed model term explicitly states that wages and other amounts “may be paid in advance or arrears in accordance with this term” (a reference which we anticipate would be tailored accordingly – refer Note 19). The reference to “in accordance with” relevantly picks up the Table referred to in clause X.3(a), which broadly provides for payment in arrears (wages accrued) and payment in advance (wages not accrued), with some limitations which we explain more fully in our discussion of clause X.2 of the ACTU model term below.

#### Conformity with annual leave clauses

32. The following awards contain non-standard annual leave clauses, which provide for annual leave, or annual leave loading, to be paid out in advance of an employee proceeding on their annual leave:

- a. *Building and Construction General On Site;*
- b. *Hydrocarbons Industry (Upstream);*
- c. *Joinery and Building Trades;*
- d. *Mobile Crane Hiring;*
- e. *Nurses;*

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<sup>19</sup> The following awards disclose or imply payment only in arrears: *Air Pilots Award, Aircraft Cabin Crew, Airline Operations-Ground Staff, Broadcasting and Recorded Entertainment, Educational Services (Post Secondary Education), Educational Services (Schools) General Staff, Educational Services (Teachers), Higher Education Industry (Academic Staff), Higher Education Industry (General Staff), Horse and Greyhound Training, Horticulture, Hydrocarbons Field Geologists, Live Performance, Market and Social Research, Pharmaceutical Industry, Restaurant Industry, Road Transport (Long Distance Operations), Road Transport and Distribution, Timber Industry, Transport (Cash in Transit), Waste Management.*

<sup>20</sup> Decision at [133]

- f. *Pharmaceutical Industry;*
- g. *Premixed Concrete;*
- h. *Quarrying;*
- i. *Racing Industry Ground Maintenance;*
- j. *Storage Services and Wholesale;*
- k. *Timber Industry; and*
- l. *Travelling Shows.*

33. Payment for a period of annual leave which commences after the completion of a particular pay period is not, in our view, a matter that is consistent with the expressions used in clause X.1(a) of the model term proposed by the Commission. Our proposal is that the model term include optional phrases to ensure consistency where the issue arises, as marked in X.1(b) of our proposed model term.

Pay averaging, annualised salary and piecework

34. Payment in advance is not the only area where the connection between the work performed during a pay period and the payment that is made may be more complex than simply accruing wages for the work actually performed. We appreciate that Commission's proposed model term was likely devised to operate in the most common circumstances. Some nuancing is required to ensure the clause does not complicate normal award sanctioned payment practices but still addresses the issues identified.

35. In our analysis:

- a. the following award permit some employees to be paid via piecework (subject to other conditions):
  - i. *Building and Constriction General On Site*
  - ii. *Horticulture;*
  - iii. *Pastoral;*
  - iv. *Silviculture;*
  - v. *Timber Industry; and*
  - vi. *Wool Storage, Sampling and Testing.*

b. the following awards permit pay averaging over a roster cycle:

- i. *Aluminium Industry;*
- ii. *Black Coal Mining Industry;*
- iii. *Business Equipment;*
- iv. *Children's Services;*
- v. *Coal Export Terminals;*
- vi. *Concrete Products;*
- vii. *Contract Call Centres;*
- viii. *Dry Cleaning and Laundry Industry;*
- ix. *Electrical Power Industry;*
- x. *Electrical, Electronic and Communications Contracting;*
- xi. *Fire Fighting Industry;*
- xii. *Fitness Industry;*
- xiii. *Food, Beverage and Tobacco Manufacturing;*
- xiv. *Funeral Industry;*
- xv. *Gas Industry;*
- xvi. *Graphic Arts, Printing and Publishing;*
- xvii. *Hospitality Industry (General);*
- xviii. *Hydrocarbons Field Geologists;*
- xix. *Hydrocarbons Industry (Upstream);*
- xx. *Journalists Published Media;*
- xxi. *Labour Market Assistance Industry;*
- xxii. *Legal Services;*
- xxiii. *Local Government Industry;*
- xxiv. *Mannequins and Models;*

- xxv. *Manufacturing and Associated Industries and Occupations;*
- xxvi. *Marine Tourism and Charter Vessels;*
- xxvii. *Marine Towage;*
- xxviii. *Market and Social Research;*
- xxix. *Meat Industry;*
- xxx. *Mining Industry;*
- xxxi. *Nursery;*
- xxxii. *Nurses;*
- xxxiii. *Oil Refining and Manufacturing;*
- xxxiv. *Passenger Vehicle Transportation;*
- xxxv. *Pharmaceutical Industry;*
- xxxvi. *Port Authorities;*
- xxxvii. *Poultry Processing;*
- xxxviii. *Premixed Concrete;*
- xxxix. *Quarrying;*
- xl. *Racing Industry Ground Maintenance;*
- xli. *Real Estate Industry;*
- xl. *Restaurant Industry;*
- xl. *Road Transport (Long Distance Operations);*
- xliv. *Road Transport and Distribution;*
- xl. *Salt Industry;*
- xlvi. *Seafood Processing;*
- xl. *Security Services Industry;*
- xl. *Sporting Organisations;*
- xl. *Storage Services and Wholesale;*

- I. *Sugar Industry;*
  - li. *Surveying;*
  - lii. *Telecommunications Services;*
  - liii. *Textile, Clothing, Footwear and Associated Industries;*
  - liv. *Timber Industry;*
  - lv. *Transport (Cash in Transit);*
  - lvi. *Travelling Shows;*
  - lvii. *Vehicle Manufacturing, Repair, Services and Retail;*
  - lviii. *Waste Management; and*
  - lix. *Wool Storage, Sampling and Testing.*
- c. the following awards contain annualised salary clauses:
- i. *Banking, Finance and Insurance;*
  - ii. *Educational Services (Teachers);*
  - iii. *Hydrocarbons Industry (Upstream);*
  - iv. *Legal Services;*
  - v. *Local Government Industry;*
  - vi. *Marine Towage;*
  - vii. *Maritime Offshore Oil and Gas;*
  - viii. *Market and Social Research;*
  - ix. *Mining Industry;*
  - x. *Oil Refining and Manufacturing;*
  - xi. *Restaurant Industry;*
  - xii. *Salt Industry;*
  - xiii. *Supported Employment Services Award;*
  - xiv. *Telecommunications Services; and*

xv. *Wool Storage, Sampling and Testing.*

36. We have provided optional sub-clauses within clause X.1 to ensure that the clause is capable of proper operation in those various circumstances. The intended operation for pieceworkers is that the applicable piecework payment each day is what accrues to workers for the work performed that day. The intended operation where pay averaging arrangements apply is that the daily proportion of the average of the period is accrued each day, irrespective of the number of hours worked (if any) on that day. The intended operation under annualised salary provisions is that the annualised salary is effectively divided by 365 to produce a daily salary which accrues each day, irrespective of the work performed (if any) on that day.
37. We have made no attempt to ensure that our proposed model clause operates compatibly with any pay averaging or annualised salary arrangements that are not specified in an award. There are inherent compliance risks in implementing such arrangements. In our view, there is simply no way to anticipate and deal with those matters unless some party is willing to come forward and articulate with some precision what the existing practices actually are, which they may be disinclined to do for obvious reasons. The question of whether such arrangements, to the extent any are disclosed, *should* be accommodated then arises. We cannot currently envisage a circumstance where we or our affiliates would be accommodating of a position that amounted to “Please vary the awards to make our unlawful practices lawful, because regulatory burden, simplicity and cost”.

Interaction with payment on termination

38. For reasons discussed in section (D) of this submission, we advocate for a model term on payment on termination provides for payment other than on the regular pay cycle. Clause X.1(a) of the ACTU model term is intended to accommodate that difference and bring it to the reader’s attention.

*Clause X.2 of the ACTU model term*

39. Clause X.2 of the ACTU model term corresponds to clauses X.1 (b)-(f) of the Commission’s proposed model term.
40. Consistent with the approach we advance in paragraphs 9-18 above, we envisage that question of whether particular pay periods listed in the ACTU model term would translate

into any award would be subject to the pay periods already permitted in the relevant award and any argument on the merits as to whether they should change. Similarly, no assumption should be made that pay periods should be able to be changed unilaterally on notice where unless there is some demonstrated need for that flexibility which is judged pursuant to the modern awards objective to be so compelling that it overrides the very obvious difficulties such an approach might visit upon employees.

41. The differences between the ACTU model term and the model term proposed by the Commission are as follows:

- a. The ACTU model term does not permit casual employees to be paid monthly
- b. The ACTU model term does not deal with changes to the pay day
- c. The “grandfathering” arrangement concerning monthly pay limits its application to monthly payment arrangements that were compliant with the Award at the relevant time; and
- d. The ACTU model term does not deal with payment in partly in advance and partly in arrears for employees paid monthly.

#### Casual employees and monthly payment

42. In submissions dated 23 August 2017, United Voice has advanced a position seeking that monthly payment not be permitted in the *Restaurant Industry Award*, the *Children’s Services Award* and the *Supported Employment Services Award*. We respectfully adopt paragraphs 5-12 and 41-52 of those submissions in support of our position that the model term for payment of wages and other amounts not permit casual employees to be paid monthly.

43. To those submissions, we add that in other proceedings in this Review, the Commission has relevantly accepted that a significant proportion of casual employees may be working less hours than they would wish to<sup>21</sup> and that they are disproportionately award reliant, earn less on average than permanent employees (whether analysed by weekly or hourly earnings), and are most concentrated in low paid occupations<sup>22</sup>. Further, the Commission in that matter referred to material that showed that whilst it is undoubtedly correct that a high

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<sup>21</sup> [2017] FWCFB 3541

<sup>22</sup> *Ibid.* at [369]



proportion of young workers and dependent students are casual workers<sup>23</sup>, a sizeable proportion of them (26%) are not only seeking to sustain themselves on the income from those hours, but also have dependents<sup>24</sup>. In our submission, if the Commission accepts that persons on lower and variable incomes and with no guaranteed regular hours of work are subjected to particular hardship by longer pay intervals, it should intervene to ensure their safety net is fair is relevant, taking into account in particular relative living standards and the needs of the low paid.

#### Changes to the pay day

44. The Commission's proposed model term provides that the employer may (with some restriction) change both an employee's pay period and pay day by the giving of 4 weeks notice. The ACTU model term permits the changing of pay periods (with some restriction) upon the giving of notice. It does not permit the changing of the pay day, other than by majority agreement (which is dealt with clause X.3 of the ACTU model term).
45. The Decision indicates that only 27 Awards currently set an outer limit for the date upon which wages must be paid: 11 by reference to the conclusion of the pay period and 16 by reference to a day of the week<sup>25</sup>. Only one award provides for a set pay day<sup>26</sup>. The legal position, as far as the remainder of awards are concerned, is that by and large employers are currently possessed of a high degree of flexibility to change pay days. With no limit on successive changes to pay days, this is tantamount to giving an employer an interest free loan, with no corresponding benefit to the employee. However, we suspect the practical experience is far different – the flexibility that apparently exists is rarely if ever exercised (and if it isn't, it would be disingenuous to argue on the merits for this to change).
46. As far as the employer interests are concerned, there seems to be no unified position as to whether irregular payroll arrangements are benefit or a burden to them<sup>27</sup>. Employees are however disadvantaged as they face financial commitments that are regular, in the form of bills for utilities and other services, rent and mortgage payments and other costs of daily living. Notice is not an effective mechanism to obviate those risks because there are no guarantees that employees' creditors (banks, power companies, landlords) will accept a change in the terms of payment arrangements, which often in any event involve direct

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<sup>23</sup> *Ibid.* at [115(3), [128(3) and [128(5)]: 71% of 15-19 year olds engaged casually, 38% of 20-24 year olds engaged casually, 19% of Casual employees are dependent students.

<sup>24</sup> *Ibid.* at [131].

<sup>25</sup> Decision at [15]-[17]

<sup>26</sup> *Animal Care and Veterinary Sciences Award.*

<sup>27</sup> See Ai Group Submissions 23/12/16 at [26]-[27] and the submission of payroll matters 8/12/16 at page 2.

debts. Late payment of debts may ultimately lead to poor credit ratings, which can have wide ranging impacts. In our view, employee agreement is superior to notice as a safeguard against these impacts.

47. Employee agreement is dealt with at clause X.3(c) of the ACTU model term. Majority agreement is proposed. This safeguard provides incentives for the employer to come arrangements with the workforce that are mutually acceptable when seeking to alter pay days.

#### Grandfathering monthly pay

48. The Commission's proposed model term seeks to preserve monthly pay for certain categories of employees described in clause X.1(e). Whilst we do not object to such an arrangement in a model term, we concur with submissions of Irving and Stewart<sup>28</sup> that it would be more appropriate to explicitly limit the arrangement to circumstances where the employees who are captured are only those whose monthly payment arrangements were in accordance with the award. The ACTU model term at X.1(d) reflects this.

#### Monthly pay in advance and in arrears

49. The Commission's proposed model term at clause x.1(f) provides a limitation on monthly pay, to the effect that two weeks is to be paid in advance and two weeks is to be paid in arrears.
50. We believe the limitation on payment in arrears is unnecessary on the basis of the analysis at paragraphs 28-29 above.

### *Clause X.3 of the ACTU model term*

51. Clause X.3 of the ACTU model term has no direct parallel in the Commission's model term. It deals with issues identified in the decision as well as others. The issues are:
- a. Providing an exception for payment on termination;
  - b. Compatibility with existing timely payment arrangements for casuals;
  - c. Providing a fixed pay day, alterable by majority agreement;
  - d. Dealing with the weekends and public holidays issue;

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<sup>28</sup> At page 9 of their submission

- e. Providing clarity about what amounts are paid, and when, for particular payment arrangements; and
- f. Exempting casual employees from payment in advance.

#### Exception for payment on termination

52. For reasons discussed in section (D) of this submission, we advocate for a model term on payment on termination that provides for payment other than on the regular pay cycle. Clause X.1(a) of the ACTU model term is intended to accommodate that difference and bring it to the reader's attention.

#### Timely payment arrangements for casuals

53. A small number of awards currently provide casual employees a right to request or insist upon payment at the conclusion of each engagement<sup>29</sup>. These arrangements have not been the subject of any complaint to the Commission or commentary in the Decision and ought to be retained. An optional clause has therefore been included to continue to accommodate those arrangements.

#### Fixed pay day, alterable by majority agreement

54. We refer to and repeat paragraphs 44-47 above.

#### Weekend and public holidays issue

55. Although the ACTU model term provides for a fixed day, like the Commission's proposed model term it permits the pay day to be up to 7 days after the conclusion of a pay period. We believe this provides sufficient latitude to bring forward (rather than delay) pay days to address the weekend and public holidays issue. In any event, there are limits to delaying pay days where employees are paid monthly.

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<sup>29</sup> See *Children's Services Award* at 10.5(d), *Restaurant Industry Award* at 13.3, *Sporting Organisations Award* at 13.3

56. The decision at paragraph [44] discusses the position where payment is required to be made on a *particular day*, and that day happens to be a weekend or a public holiday. We accept that the *Acts Interpretation Act* provides that in those circumstances, payment on the following day is acceptable. However, there are two provisos to this. Firstly, it is open to the Commission to decide that payment should be made earlier. Secondly, the interpretative rules about references to a day are different to those that refer to a month: It would be impermissible, given section 323 of the Act, to extend the interval between payments for employees paid monthly beyond one month. So much is evident from the discussion at paragraphs 23-26 above.

57. An employee who is paid weekly or fortnightly will not encounter circumstances in which their usual pay day falls on a weekend as pay days for those cycles fall on weekdays. An employee paid monthly may encounter circumstances where their usual pay day falls on weekend, because their pay day must be set by reference to a date, rather than a day. An employee paid weekly, fortnightly or monthly may encounter circumstances where their usual pay day falls on a public holiday. Our proposal creates a preference for bringing forward pay days where these circumstances arise, and mandates it in circumstances where delaying pay days could lead to non-compliance.

Clarity about what amounts are paid, and when, for particular payment arrangements.

58. The ACTU model term provides a table that ensures that, whether payment is by advance or in arrears, the employee and the employer know what amounts are payable for the pay cycle. This provision works together with clause X.1 of the ACTU model term which provides how wages accrue but leaves the issue of what is payable and when to be determined by clause X.3.

59. The table in clause X.3 of the ACTU in particular ensures arrangements are compliant when a permanent employee picks up some additional work during a pay cycle, but is otherwise paid in advance. The employee receives their payment for the additional hours on their next pay day. In addition, the part payment in advance model ensures compatibility with NES entitlements to personal leave<sup>30</sup> and annual leave<sup>31</sup> by allowing crediting of leave after the ordinary hours are worked, rather than in anticipation of the hours being worked.

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<sup>30</sup> s. 96(2) of the Act

<sup>31</sup> s. 87(2) of the Act

#### Exempting casual employees from payment in advance

60. A lack of any guarantee of working hours was recently described by the Commission as a “fundamental characteristic of casual employment”<sup>32</sup>. The Commission also found that whilst it is true that casual employees may be engaged over long periods of time and may work reasonably regular or predictable shifts, the reality is that characteristics of a casual employee’s working arrangements will not be predictable at the point of engagement.<sup>33</sup>

61. In our submission, it is not fair or relevant to require payment in advance in those circumstances. If there is to be a meaningful connection, along the lines of what has hitherto been assumed, between accrual of wages during a pay period and payment for a pay period, paying casuals in advance would create compliance risks and could diminish the offering of additional shifts at short notice. Whilst it is true that the “part payment in advance” model adopted in the ACTU model term for permanent employees is capable, in a legal sense, of ensuring payment arrangements are compliant, the practical risk is that it will skew the rostering practices of employers toward not notifying casual workers of the hours available to them than later than they otherwise could, as a contrivance in order to delay payment to the next pay cycle. Such a risk does not arise with permanent employees generally speaking as their usual hours are required to be notified with some certainty well in advance.

#### *Clause X.4 of the ACTU model term*

62. Clause X.4 of the ACTU model term almost entirely adopts clause X.2 of the Commission’s model term. The only difference is inconsequential and in the introductory words (“payment under clause x.1(a) must be made..” vs. “Payment must be made..”).

#### **(D) Model term on Payment on Termination**

63. We understand from paragraphs [120]-[121] of the Decision that the Commission has reached concluded views that:

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<sup>32</sup> [2017] FWCFB 3541 at [351].

<sup>33</sup> *Ibid.* at [364]

- a. each award should deal with payment of wages and other amounts owing to the employee on termination of employment and the timeframe within which such payment must be made; and
  - b. There will be model term developed to address this and there will be a process for considering which awards will get the model term and which might depart from it.
64. We see the benefits in having clarity about the timing of termination payments and the amounts that must be paid both under the Award and the NES when employment is terminated. A model term could be considered for insertion in awards that are currently silent on these issues. In relation to the 36 awards that do deal with these issues (albeit to varying extents), the existing clauses should be varied if necessary 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, and we have not conducted one. However, even in the absence of such an assessment it is apparent that there are limits on what a term, or model term, directed to the relevant issues could achieve. We have nonetheless devised an alternative model term that could be utilised in part or in full where the relevant gaps exist. This is included as Schedule 3.
65. It is timely to recall that the substantial reason for the Bench considering the notion of a payment on termination model term were employer complaints concerning the impracticality of making payments coincident with a termination or very soon thereafter, and complaints about the costs associated with making “out of cycle” EFT transactions.
66. If the model clause retains the format of seeking a delay of up to 7 days between termination and payment, it cannot address those complaints by providing a “one size fits all” approach in relation to termination payments that both requires all payments to be made at the same time and also avoids the necessity of such “out of cycle” payments. This manifests in the following ways:
- a. The requirements in State legislation, referred to by the CFMEU(FFPD) in its submissions of 21 December 2016<sup>34</sup> require effectively instantaneous payments of long service leave balances on termination. If employers do not wish to make all NES and Award related payments at the same time as this payment, then the outer limits of the 7 day default period cannot be utilised for employees to whom that State legislation applies.

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<sup>34</sup> At [11]

- b. Where payment is to be given in lieu of notice of termination, the clear requirement under section 117(2) of the Act is that the payment be made at or prior to the termination. An employer seeking to make a payment in lieu who considers it impractical to make other NES and award related payments at that time will necessarily be making more than one payment, at different times.
- c. Redundancy pay under section 119(1) of the Act similarly requires a payment to be made at or before the time of termination. Whilst the proposed model term attempts to bring about a circumstance in which in section 120 of the Act can operate comfortably with it, this in itself is an acknowledgement that not all termination payments can necessarily be made on the same date and within the 7 day period proposed in the decision (given the outcome in any section 120 application is by no means certain). Further, an application under section 120 of the Act is without jurisdiction unless an employee is already “...*entitled to be paid* an amount of redundancy pay by the employer because of section 119”<sup>35</sup> (emphasis added). Such an entitlement, by the terms of section 119(1), arises only “*if the employee’s employment is terminated*” (emphasis added).

67. Given the above, and the reasons given at [101]-[115] of the decision, it is unsurprising that the model term proceeds on the basis that it is necessary to treat different types of payment differently. But, in our submission, that it is a function of it not requiring instantaneous payment. It would not be necessary to treat different payments differently if the clause required that payments be made at the point of termination, or so close to it that the practical incentive to pursue technical non-compliance with other obligations is reduced to nil. We do not accept that this occasions hardship on employers because, as above, some such obligations already exist and – further – technological developments have ensured that it is easier and quicker to transfer funds than previously. Our proposed model term at clause Y.1 attempts to give effect to this, while providing a guide to complete compliance for those who are minded to read the Notes it includes.

68. The decision recognises at [90] that the “impracticality” argument primarily arises from resignations and from summary dismissal. In the latter case, the obligation to pay severance and redundancy pay does not arise<sup>36</sup>, although long service leave obligations may. In all other employer initiative cases, the employer is control of the timing of the termination

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<sup>35</sup> s. 120(1)(a)

<sup>36</sup> S.123(1)(b)

decision and can make that decision having regard to its obligations. Terminations at the initiative of the employer that are not required to be accompanied by instantaneous payment 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<sup>37</sup>. Our proposed model term seeks to give effect to this.

#### Additional matters regarding a 7 day delay

69. We support the substantial reasons already advanced by our affiliates as to why a default 7 day waiting period 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*<sup>38</sup> 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<sup>39</sup>.

#### Additional matters regarding section 120 of the Act

70. We recognise that the construction we advance of sections 117, 119 and 120 may be regarded as inconvenient for employers, but a safety net for working people often is. If the time to make notice and redundancy payments was not in fact the termination date, it is difficult to discern how a typical employee (or at least an employee who was not employed under the provisions of the Awards not listed in Attachment B of the decision) could competently plead a contravention or seek an order for interest, having regard to the requirement in section 547(3) of the Act to take into account “the day the relevant cause of action arose”. In any event, it cannot be said that an immediate liability to pay redundancy pay on termination visits any particular hardship on an employer as the timing of the redundancy “decision” that is the necessary pre-requisite to such termination is matter within its own control and is typically carefully considered.

71. Whilst the jurisdictional pre-requisites for an application under section 120 of the Act need not be resolved in this proceeding, we point out that the section does not become unworkable if our construction is accepted. The result of a section 120 application is to vary

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<sup>37</sup> Note also, for example, the current minimum standard in Singapore is 3 days where payment is at the initiative of the employer and 7 days where the employee initiates the termination and has not given notice: *Statutes of the Republic of Singapore (Chapter 91): Employment Act 1968* (SG) s.22-23.

<sup>38</sup> [2014] FWCFB 1788

<sup>39</sup> *Ibid.* at [24]



or confirm the employee's entitlement to redundancy pay. On its face, section 120 does no more than empower the Commission to determine and declare what the entitlement of a particular employee is. An employer who makes a section 120 application and has not made a payment before doing so is technically in breach of the Act until such time that the Commission makes an order in its favour, at which time section 120(3) effectively provides that the determination of redundancy pay in that order stands in place of the entitlement otherwise provided by section 119. As most awards do not explicitly provide for redundancy pay, the position does not change if a payment clause in awards requires payments of "NES entitlements" at the point of termination or shortly thereafter. Where such an order is made, without the payment required under section 119 having first been paid, the practical question which arises is when should the entitlement be paid? It obviously cannot be paid upon termination, because the termination itself was a jurisdictional pre-requisite for the application. However, accepting that conferral of powers by statute carries with it such powers are necessary for, incidental to or consequential upon the exercise of that power<sup>40</sup>, the Commission may include a date for payment in its order. The acceptance of such incidental powers however does not in our view extend to a power to delay the requirement to make payment until after the Commission makes a decision on the application, as referred to in Note 2 of the model term except perhaps if such a delay was effected by an interim order (decided on conventional principles) that reduced the payment to nil subject to further order of the Commission.

72. In our view, if a Note to a model term is to traverse the prospect of an employer seeking a reduction in redundancy pay, it may be of greater utility to draw attention to the capacity to have the Commission deal with a dispute about the NES – and do so pre-emptively, in circumstances where the employer is considering making a section 120 application. Alternately, this option might be discussed in annotated explanatory documents of the type contemplated by the Full Bench at [25]-[36] of [2014] FWCFB 9412.

Australian Council of Trade Unions

30/10/17

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<sup>40</sup> See for example *TWU v. AIRC* [2008] FCAFC 26 at [37]

## **SCHEDULE 1**

Architects Award

Aboriginal Legal Rights Movement Award

Book Industry Award

Medical Practitioners Award

Professional Employees Award

Rail Industry Award

Stevedoring Industry Award

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## SCHEDULE 2

### X. Payment of wages and other amounts

#### X.1 Accrual of wages

- (a) Wages accrue on a day to day basis, but are not payable until pay day except where clause [Y] otherwise provides.

[optional sub clauses]

- “(b) Wages may accrue on the basis of:

(i) actual time worked;

(ii) an average over a roster cycle worked under this award;

(ii) the applicable piecework payment; or

(i) on the basis of the proportional value of day's work allowed for in an annual salary paid in accordance with clause X”.

- (b) Wages and other amounts may be paid in advance or arrears in accordance with this clause [optionally:” and clause X (reference annual leave clause)/however annual leave loading must be paid in advance in accordance with clause X etc”].

#### X.2 Pay Period

- (a) An employee's pay period may be:

(i) one week;

(ii) two weeks; or

(ii) for an employee who is not a casual employee and subject to paragraph (d), one month.

- (b) The employer must notify each employee in writing of their pay day and pay period.

- (c) Subject to paragraph (d), the employer may change an employee's pay period after giving 4 weeks' notice in writing to the employee.

- (d) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly in accordance with this award prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.

#### X.3 Pay Day

- (a) Except as provided in clause [reference payment on termination clause], wages and other under the award and the NES are payable on the pay day in accordance with the table below.

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**Comment [TC1]:** Reference to payment on termination clause

**Comment [TC2]:** Where there is a rostering system with averaged hours in the award

**Comment [TC3]:** Where there are piecework provisions in the award

**Comment [TC4]:** Where there is an annualised salary clause in the award

**Comment [TC5]:** Strike out one or the other where it is explicit or implicit in the existing award that one or the other applies

**Comment [TC6]:** Some awards require or permit leave loading, or annual leave, to be paid in advance in certain circumstances

**Comment [TC7]:** Include only where monthly payment is already available in the existing clause.

[optional clause]:

- (b) *The pay day for a casual employee is at the conclusion of each engagement. However, a casual employee may agree to instead be paid on the usual pay day as below.*
- (b) The pay day must be fixed and on a day that is no later than 7 days after the end of each pay period. However, if the usual the pay day falls on a public holiday, the pay day for a particular pay period may be changed to be:
- (i) The last working day occurring before the usual pay day, if the employees are not paid monthly; or
  - (ii) The first day that is not a public holiday after the usual pay day, where this agreed with the majority of employees in the workplace
- (c) The employer may change the pay day by agreement with the majority of employees in the workplace.

**Comment [TC8]:** Some awards provide that casual employees must be, or have the option to be, paid at the conclusion of each engagement.

What must be paid to the employee on pay day		
Pay Period	Option 1: Payment in Arrears	Option 2: Part payment in advance (not available for casual employees)
<b>Weekly Pay Period</b>	The employee's wages accrued during the concluded pay period plus all other amounts that are due to the employee under the award and the NES for the concluded pay period.	One week's wages in advance for the next pay period Plus The balance of the wages accrued (if any) and all other amounts that became due to the employee under the award and the NES for the concluded pay period.
<b>Fortnightly Pay Period</b>	The employee's wages accrued during the concluded pay period plus all other amounts that are due to the employee under the award and the NES for the concluded pay period.	Two week's wages in advance for the next pay period Plus The balance of the wages accrued (if any) and all other amounts that became due to the employee under the award and the NES for the concluded pay period.
<b>Monthly Pay Period</b>	The employee's wages accrued during the concluded pay period Plus all other amounts that are due to the employee under the award and the NES for the concluded pay period.	One month's wages in advance for the next pay period Plus The balance of the wages accrued (if any) and all other amounts that became due to the employee under the award and the NES for the concluded pay period.

**Comment [TC9]:** Exclude Option 1 or Option 2 where it is clear from the Award that one of those options is not already available.

**Comment [TC10]:** Include only where this option is already available in the existing clause.

#### X.4 Method of payment

- (a) Payment 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 3**

#### **Y Payment on termination of employment**

**Y.1** Where the termination is at the initiative of the employer, the employer must pay the employee:

- (a) the employee's accrued wages for any complete or incomplete pay period up to the day on which the employee's employment terminates; and
- (b) all other amounts that are due to the employee under the award and the NES

No later than 3 days after the day on which the employee's employment terminates, unless earlier payment is required by law.

*Note 1: Section 117(2) of the Act deals with payment in lieu of Notice and requires earlier payment.*

*Note 2: Laws other than the Act, for example some laws governing long service leave entitlements, may require earlier payment.*

*Note 3: If the Commission grants an application under section 120 of the Act, it may determine a different date for payment of any redundancy entitlement. A dispute about how section 120 might apply to a particular redundancy situation may be dealt with under clause [Z] of this award.*

**Comment [TC11]:** Reference to Dispute Resolution clause

**Y.2** Where the termination is at the initiative of the employee, and the employee has given notice in accordance with this Award, the employer must pay the employee:

- (a) the employee's accrued wages for any complete or incomplete pay period up to the day on which the employee's employment terminates; and
- (b) all other amounts that are due to the employee under the award and the NES

No later than 3 days after the day on which the employee's employment terminates, unless earlier payment is required by law.

*Note: Laws other than the Act, for example some laws governing long service leave entitlements, may require earlier payment.*

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**Y.3** Where the termination is at the initiative of the employee, and the employee has not given notice in accordance with this Award, the employer must pay the employee:

- (a) the employee's accrued wages for any complete or incomplete pay period up to the day on which the employee's employment terminates; and
- (b) all other amounts that are due to the employee under the award and the NES

No later than 7 days after the day on which the employee's employment terminates, unless earlier payment is required by law.

*Note: Laws other than the Act, for example some laws governing long service leave entitlements, may require earlier payment.*