Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission – The Commission's Provisional Views

Payment of Wages (AM2016/8)

7 November 2017

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/8 – PAYMENT OF WAGES

1. INTRODUCTION

1. Various matters associated with the payment of wages have been referred to a separately constituted Full Bench of the Fair Work Commission (**Commission**). On 1 December 2016, the Full Bench issued a decision[1] in relation to those matters (**December 2016 Decision**).

2. At paragraph [198] of the December 2016 Decision, interested parties were directed to file submissions in relation to the following issues:

    - The provisional 'payment of wages and other amounts' model term proposed by the Commission at paragraph [34] of the December 2016 Decision, including its treatment of accrual of payments.

    - The Commission's provisional view "that there would be benefit in either replacing the existing provision for payment in all modern awards with the 'payment of wages and other amounts' model term (once finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements".[2]

    - The provisional 'payment on termination of employment' model term proposed by the Commission at paragraph [117] of the December 2016 Decision, including its treatment of accrual of payments.

3. The Full Bench subsequently conducted a hearing on 23 March 2017 and issued a statement on 26 April 2017. A conference was convened on 4 May 2017 and a further statement was subsequently published on 26 May 2017. A further period was afforded to interested parties to have direct discussions. Ultimately, no agreed position was reached between the parties.

[1] 4 yearly review of modern awards – Payment of wages [2016] FWCFB 8463.

[2] 4 yearly review of modern awards – Payment of wages [2016] FWCFB 8463 at [198].

4. Ai Group has filed detailed submissions dated 23 December 2016 and 19 February 2017. Ai Group continues to rely on those submissions, except where otherwise indicated in this submission. This submission addresses matters associated with the proposed 'provisional payment of wages and other amounts model term'.

5. Ai Group, ABI and various other employer parties have held discussions regarding the development of a potential model clause. ABI and Ai Group now advance a proposed clause dealing with 'payment of wages and other amounts' which is set out at paragraph 14 of this submission and is herein referred to as the "**Joint Employer Model Clause**".

6. The clause proposed represents an attempt to advance a potential model clause that addresses key elements of the Full Bench's provisional view, but also alleviates or reduces various employer party concerns.

7. Ai Group contends that the Joint Employer Model Clause is to be preferred to the provisional payment of wages and other amounts model term (**Provisional Model Term**) included at paragraph 34 of Full Bench's December decision. Our support for it does not however reflect a definitive view that it should be inserted into all awards.

8. In the submission below we identify various ways in which the clause departs from the provisional model clause and the reasoning for the approach adopted. We do this by reference to key issues.

9. Although we will not here address in detail how a model term, if one is developed, might be translated into existing awards, we make the observation that many existing payment of wages clauses appear to be unjustifiably restrictive. A review of payment of wages should not simply entail the introduction of new regulation to address perceived gaps in the current regulatory framework, but also a reconsideration of the necessity to retain archaic and overly prescriptive elements of the current provisions, the existence of which may owe more to the views of the parties to relevant predecessor instruments than to their industrial merit, as contemplated within the context of

the current statutory regime and the modern awards objective. A consideration of such matters should inform the development of a model term.

10. If the Full Bench is to develop a model term it should be a clause which is simple and easy to understand. The development of a provision which is capable of being implemented across the system in a relatively consistent manner will assist the attainment of this objective. We do not suggest that uniformity is necessary. However, retention of industry specific quirks in existing payment of wages provisions that are not based on the characteristics of employers or employees in that, or other relevant considerations, should not be regarded as sacrosanct in this process

11. An approach should not be adopted which simply sees the removal of existing flexibilities, whilst retaining historical restrictions. For example, if a clause is to be developed which introduces an obligation to pay all amounts within a set period from the end of a pay period, existing award provisions that require that payment must be made by a day of the week or within a more restrictive time frame ought to be deleted.

12. As a final preliminary point, we observe that there may be a need for transitional arrangements accompanying any variation to existing award provisions relating to payment of wages. A change to such provisions may have a direct and practical impact upon both employers and employees. Parties should be given an opportunity to address the Full Bench in relation to these issues once there is greater certainty regarding the nature of any change to the safety net, but prior to the implementation of any actual changes to the system

2. PAYMENT OF WAGES AND OTHER AMOUNTS – THE JOINT EMPLOYER PROPOSED CLAUSE

13. The Provisional Model Term identified by the Commission is in the following terms:

X. Payment of wages and other amounts

x.1 Pay periods and pay days

(a) The employer must pay each employee no later than 7 days after the end of each pay period:

(i) the employee's wages for the pay period; and

(ii) all other amounts that are due to the employee under this award and the NES for the pay period.

(b) An employee's pay period may be:

(i) one week;

(ii) two weeks; or

(iii) subject to paragraph (e), one month.

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

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

(e) 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 prior to [*insert date of commencement of this clause*], the employer may continue to pay employees in that classification monthly without further agreement.

(f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.

x.2 Method of payment

Payments under clause x.1(a) 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.

14. The Joint Employer Model Clause represents a modified version of the Provisional term and is as follows:

JOINT EMPLOYER MODEL CLAUSE

x.1 Pay periods

(a) The employer must pay each employee no later than 7 days after the end of each pay period all amounts that are due to the employee under this award and the NES for the pay period.

(b) An employee's pay period may be:

(i) one week;

(ii) two weeks; or

(iii) subject to paragraph (d), one month.

(c) The employer must notify each employee of their pay period.

(d) Where an employee is paid weekly or every two weeks, an employer may only change from a one week or two week pay period to a one month pay period by individual agreement with affected employees or by agreement with a majority of the affected employees covered by this award.

(e) Where a payment falls due on a public holiday, the payment may be made on the next day that is not a public holiday.

(f) Clause X.1(a) operates subject to the provisions of this award dealing with averaging of hours of work, averaging of pay and annualised salaries.

(g) Clause X.1(a) takes effect (insert date 6 months from commencement of the order).

x.2 Method of payment

Payments under clause x.1(a) 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.

Removal of the proposed requirement to notify employees in writing of their pay day

15. The Joint Employer Model Clause removes the Provisional Model Term's prescriptive requirement to notify employees in writing of their pay day and instead adopts a simpler overarching requirement that relevant amounts be paid within a set time-frame.

16. Clause x.1(c) of the Provisional Model Term requires that each employee be notified in writing of their pay day and pay period. Clause X.1(d) enables an employer to change an employee's pay day (or pay period) with the giving of 4 weeks' written notice.

17. Ai Group has set out our concerns in relation to these provisions in paragraphs 22 to 33 of our December 2016 submissions. Related issues were also addressed in paragraphs 24 to 40 of our February 2017 submissions. We continue to rely upon that material.

18. In light of our earlier submissions, the Joint Employer Model term removes the obligation to notify an employee of their pay day by deleting x.1(c) of the model term. Clause X.1(c) has been similarly amended to remove references to a pay day.

19. The alternate wording for cl. X.1(a) that we now propose is:

> X.1(a) The employer must pay each employee no later than 7 days after the end of each pay period all amounts that are due to the employee under this award and the NES for the pay period.

20. Clause x.1(a) of the Joint Employer Model Clause provides employees with certainty as to the date by which they will be paid amounts that they have accrued. It also affords an employer the flexibility to pay employees at an earlier date.

21. The clause makes reference to amounts that "are due" to the employee. In this regard, the provision does not deal with the issue of *accrual* of entitlements. In section 3 of this submission, we identify why the Commission should be cautious about further regulating such matters. However, if the Full Bench maintains its provisional view that the clause should deal with the accrual of entitlements[3], the following words would retain the effect of this element of clause 1(a) whilst also limiting its application to safety net derived payments:

[3] [2016] FWCFB 8463 at 38

"X.1(a) The employer must pay each employee no later than 7 days after the end of each pay period:

(i) The employee's wages prescribed by this award for the pay period;

(ii) All other amounts that are due to the employee under this award and the NES for the pay period."

22. Given the Provisional Model Term permits the setting of a 'pay day' seven days after the end of each pay period, it is difficult to see how any greater hardship for employees could flow from our proposed approach. If the fundamental issue of ensuring employees are paid amounts due within a time-frame which is appropriately proximate to their accrual is addressed, it seems unnecessary to impose a further regulatory burden associated with the setting of a pay day, provided the payment is made within the boundaries of what is deemed acceptable by the Commission.

23. The proposed clause strikes a balance between retaining a sensible degree of flexibility for employers and not providing an unfettered right to alter the date by which an employee will be paid.

Restricting the provision to regulation of safety net payments

24. The wording of the Joint Employer Model Clause limits the clause's application to the regulation of amounts payable under the safety net. The reference to "the employee's wages for the pay period" in clause X.1(a)(i) of the Provisional Model Term is potentially broader in scope.

25. The justification for such a change is, in effect, set out in paragraphs 38 to 42 of our 23 December 2017 submission.

The proposed pay periods

26. The Joint Employer Model Term contemplates pay periods being either weekly, fortnightly or monthly.

27. We note that some awards currently permit other arrangements to be implemented, such as three weekly or four weekly pay periods. However, for simplicity we have not included such options. We have not undertaken any

inquiries as to how frequently such other arrangements may be utilised and accordingly simply observe that parties may, at later stage, argue for retention of the right to retain such arrangements. Alternatively, the Full Bench should give consideration to the following wording instead of clause X.1(b)(iii) of the Joint Employer Proposed Clause:

> "X.1(b)(iii) subject to paragraph (d), one month or a period not exceeding one month."

28. Many awards already permit monthly pay. The default position should be that such an option is available. Any greater restriction than this should only be included in a particular instrument if it is established that it is *necessary*, as contemplated by s.138.

29. At the very least, in instances where the current award already permits the use of monthly pay this should be retained. There is no reasonable justification for reducing existing flexibilities and no evidence to suggest monthly pay periods are causing a problem under the awards in which they are currently permissible.

30. The Provisional Model Term does not appear to limit the use of monthly pay periods except for introducing particular requirements in instances where an employer seeks to change from weekly or fortnightly pay periods to month pay. For the reasons we have previously articulated, a movement to monthly pay should be available through a facilitative provision based on either individual or majority agreement. The Joint Employer Model Term reflects this approach.

Public holidays and weekends

31. Clause X.1(e) of the Joint Employer Model Clause gives effect to our previous submission regarding how issues related to a payment falling due on a public holiday should be addressed.

32. Although it was not addressed in the Joint Employer Model Clause, the same approach could be adopted in relation to weekends. Such wording would be:

> X.1(e) Where a payment falls due on a Saturday, Sunday or public holiday, the payment may be made on the next day that is not a Saturday, Sunday or public holiday.

3. ISSUES ASSOCIATED WITH THE REGULATION OF PAYMENT IN ARREARS

28. The Provisional Model Term limits payment in arrears to a period of 7 days from the end of the pay period. It also ensures that wages accrue during the pay period.[4]

29. The Joint Employer Model Term retains the 7-day limitation. However, this should not be regarded as a call by Ai Group for further regulation of the extent to which a payment may be made in arrears. It is instead included in recognition of the possibility that the Full Bench may proceed with its provisional view that such matters warrant further regulation.

30. As identified in the Full Bench's December 2016 decision, while most modern awards prescribe frequency of payments (weekly, fortnightly, monthly, etc), this is not generally understood to regulate the extent to which payments may be made in arrears.[5]

31. It may be that s.323(c) of the Act requires that employers pay employees amounts that are payable in relation to the performance of work by no later than one month after their accrual.[6] However, even if this is so, the extent to which the legislative provision governs the issue of payment in arrears is still partly dependent upon the issue of how wages accrue under awards.

32. The Full Bench's December 2016 decision does not express a definitive view as to when an entitlement to payment of wages specified under an award accrues.

33. It appears to us that the manner in which various amounts referred to in awards accrue may depend upon the terms of individual awards. There may also be differences in this respect between individual types of entitlements within an award. It does not seem entirely clear that payment of wages provisions

[4] X.1(a)(i)

[5] Paragraph 31

[6] [2016] FWCFB 8463 at 26

governing the frequency with which wages are paid necessarily require that all amounts referable to that pay period must be paid within that pay period. Nor does it seem beyond argument that, at least in some instances, such provisions do not merely regulate the pattern of wage payments that may be adopted, rather than the accrual of the actual entitlement.

34. Moreover, at least some awards appear to operate on the basis that there is either no limitation on payment in arrears or they expressly provide for an ability to make payments in satisfaction of entitlements that may be referrable to a particular pay period at a time outside of that pay period. This includes, for example, provisions dealing with time-off-in-lieu of overtime such as that referred to in paragraph 128 of the December 2016 Decision as well as pay averaging provision in awards, such as that contained in clause 23.4 of the *Clerks – Private Sector Award 2010* and annualised salary provisions contained within various awards.

35. At the very least, the proposed reference to 7 days within the Provisional Model Term would restrict the capacity of employers to pay employees up to a month in arrears without risking contravention of s.323.

36. In short, given the above consideration we contend that the proposed regulation of the extent to which a payment in arears can be made gives rise to the following difficulties:

- Inconsistency with other award provisions that contemplate or provide for payments being made at a later point.

- Inconsistency with existing contractual arrangements and/or current practices adopted within industry. This would include, for example, situations where an employer and employee may have implemented annualised salary or pay averaging provisions that are not expressly contemplated by the relevant award.

37. Clause X.1(f) of the Joint Employer Model Clause constitutes an attempt to address the first issue. We proffer it for the assistance of the Commission but recognise that it would likely need to be tailored to the context of each award.

38. At paragraphs 16 to 21 of our December 2016 submissions we outlined our concerns in relation to the second point. Such concerns were elaborated upon during the 4 May 2017 Conference before the President. We refer the Bench to PN157 to PN213 of the transcript.

39. Ai Group acknowledges the Full Bench's observation at paragraph 132 that: *"The obligations and entitlements of employees in respect of wages and other amounts payable under modern awards (and when they become payable) should be expressed in clear and simple terms. The modern award system should be simple and easy to understand."*[7] However, such simplicity should not be sought at any cost. Moreover, in delivering such clarity through a variation to awards, the Commission should endeavour to moderate any adverse or unfair impact upon employers.

40. If there is to be a new limitation on payments in arrears introduced in circumstances where there may currently be a regulatory gap, the proposed clause would operate to prohibit practices that may currently be compliant with existing regulation. The Full Bench should consider whether disrupting current arrangements that may be in place across a raft of industries is fair or warranted. Ai Group does not seek to condone arrangements that may currently breach relevant regulation, however there is no evidence before the Commission to establish that the current arrangements governing payment of wages are causing problems in the context of most industries.

41. At the enterprise level, there is the potential for the clause to operate in a particularly unfair manner for employers that are covered by awards and have already implemented common law contractual arrangements with their employees which operate on the assumption that there is a capacity to set off the entitlement to a payment that may be referrable to one pay period with a

[7] [2016] FWCFB 8463

payment that is made in a subsequent pay period. If the Commission's proposal were implemented, an employer may be obliged during a particular week or fortnight to 'top up' an employee's wages in order to ensure compliance with the provision but not be able to make a corresponding deduction from amounts paid in subsequent weeks pursuant to their contractual arrangement. Accordingly, regulating the extent to which payment in arrears may be permissible, would simply deliver to such employees 'the best of both worlds' in such circumstances.

42. In the course of the May conference the President suggested that Individual Flexibility Arrangements (**IFAs**) or enterprise agreements may be alternate avenues for addressing such matters.[8]

43. We respectfully submit that it does not appear that the standard award flexibility clause contained within awards could be utilised to deliver the kind of flexibility that is currently available. The scope of matters that can be dealt with through an IFA is dealt with in clause 7.1 of the standard provision:

> **7.1** Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
>
> **(a)** arrangements for when work is performed;
>
> **(b)** overtime rates;
>
> **(c)** penalty rates;
>
> **(d)** allowances; and
>
> **(e)** leave loading.

44. The standard clause 7.1 contained within awards does not appear to permit the parties to vary the application of award terms dealing with payment of wages. At the very least, the award flexibility clause would not enable parties to alter the

[8] At PN197 and 206

application of the payment of wages provision in relation to amounts payable under the safety net, but not falling within paragraphs (b) to (e).

45. We similarly submit that the mere availability of enterprise agreements does not resolve this issue. By their very nature, the kinds of arrangements that we are concerned about will often be a product of agreement between an individual employee and their employer. They are not necessarily amenable to resolution through a mechanism based on collective agreement. Regardless, the mere availability of an enterprise agreement should not be justification for the introduction of new restrictions within the safety net. There can be no certainty that an individual employer will be able to implement an enterprise agreement; their workforce may not be supportive of it.

46. Given the above observations, the prudent course of action would be to only further regulate payment in arrears in those industries where it is established that there is currently an absence of such regulation and where such a vacuum is causing a problem. This would still leave employees the protection of s.323.

47. If our primary contention is not accepted, the Full Bench should implement any new obligation in a prospective manner. The possibility of such a potential course of action was identified by the President during the 4 May 2017 Conference.[9]

48. Relevantly, Ai Group proposes that parties should be afforded a window following the annunciation by the Full Bench of any variation to awards and the commencement of such changes so as to enable parties to come to terms with how they will implement any new requirements. In this regard, the Joint Employer Model Clause contemplates clause X.1(a) not commencing operation until 6 months after the issuing of any order (i.e. any determination) varying awards.

[9] PN 204

49. If the Commission accepts the proposition that any new obligation should not disturb existing arrangements between an employer and employee which are consistent with the current regulatory framework, the Commission could limit the application of the obligation proposed in clause x.1(a) of the Joint Employer Model Term to employees engaged after the commencement of any new provision.