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Sent: Sunday, 19 April 2020 11:12 PM
To: Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>
Cc: AMOD <AMOD@fwc.gov.au>
Subject: AM2016/8 Payment of Wages on Termination - Ai Group Reply Submission

Dear Associates,

Please find **attached** a submission of the Australian Industry Group (**Ai Group**) in relation to the above matter.

We were regrettably not in a position to file our submission in accordance with the Commission's directions (as amended). We accordingly seek leave to file and rely upon the enclosed submission. We do not anticipate that the short delay will cause any prejudice to any interested party.

We apologise sincerely for the delay in filing our submission and thank the Commission for considering our application for leave.

Yours sincerely,

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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Payment of Wages on Termination
(AM2016/8)

19 April 2020

Ai
GROUP

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

A. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in reply in response to directions issued by the Fair Work Commission (**Commission**) on 13 March 2020.
2. The submission relates to Ai Group's claim to vary 14 modern awards by replacing the extant payment on termination clause with the 'model term' (**Model Clause**) developed by the Commission¹ (**Ai Group Claim**).
3. We continue to rely on our submission dated 21 August 2019 (**August 2019 Submission**) in support of our claim.

¹ *4 yearly review of modern awards – Payment of wages* [2018] FWCFB 3566 at [119].

B. THE Ai GROUP CLAIM

4. Ai Group seeks a variation to the following awards:

- (a) The *Aged Care Award 2010* (**Aged Care Award**);
- (b) The *Black Coal Mining Industry Award 2010* (**Black Coal Award**);
- (c) The *Building and Construction General On-Site Award 2010* (**Building Award**);
- (d) The *Business Equipment Award 2010* (**Business Equipment Award**);
- (e) The *Electrical, Electronic and Communications Contracting Award 2010* (**Electrical Contracting Award**);
- (f) The *Food, Beverage and Tobacco Manufacturing Award 2010* (**FBT Award**);
- (g) The *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award**);
- (h) The *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);
- (i) The *Meat Industry Award 2010* (**Meat Award**);
- (j) The *Mobile Crane Hiring Award 2010* (**Mobile Crane Award**);
- (k) The *Plumbing and Fire Sprinklers Award 2010* (**Plumbing Award**);
- (l) The *Road Transport (Long Distance Operations) Award 2010* (**Long Distance Transport Award**);
- (m) The *Road Transport and Distribution Award 2010* (**Road Transport Award**); and
- (n) The *Seafood Processing Award 2010* (**Seafood Processing Award**).

5. In each case, Ai Group proposes that the extant payment of termination provision be replaced with the Model Clause, which is in the following terms:

X. Payment on termination of employment

(a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:

(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and

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

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

Note 3: State and Territory long service leave laws or long service leave entitlements under s.113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

6. Draft determinations giving effect to the proposed variations are attached at **Annexure A** to the August 2019 Submission.

7. Submissions in opposition to Ai Group's Claim have been filed as follows:

Award	Union
Aged Care Award	None
Black Coal Award	CFMMEU – Mining and Energy Division
Building Award	CFMMEU – Construction and General Division AMWU
Business Equipment Award	CEPU
Electrical Contracting Award	CEPU
FBT Award	AMWU
Graphic Arts Award	AMWU
Manufacturing Award	AMWU CFMMEU – Manufacturing Division CFMMEU – Construction and General Division
Meat Award	AMIEU
Mobile Crane Award	CFMMEU – Construction and General Division
Plumbing Award	None
Long Distance Award	None
Road Transport Award	None
Seafood Processing Award	None

8. As can be seen from the table above, no submissions in opposition to our claim have been filed in respect of the following awards:

- (a) The Aged Care Award;
- (b) The Plumbing Award;
- (c) The Long Distance Award;
- (d) The Road Transport Award; and
- (e) The Seafood Processing Award.

9. The Commission should, in our submission be satisfied for the reasons set out in our submissions that the aforementioned awards should be varied consistent the Ai Group Claim. No party has sought to argue otherwise in these proceedings, despite ample opportunity having been afforded to file such material.

10. This submission relates to the submissions filed in respect of the balance of the awards that are the subject of the Ai Group Claim.
11. We note at the outset that none of the unions' submissions raise matters that fundamentally undermine our August 2019 Submission; nor do they raise any matters of merit or fact specific to the relevant awards and the industries in which they operate that might suggest that a payment on termination clause that deviates from the Model Clause is warranted.

C. THE AMWU'S SUBMISSION

12. The AMWU opposes the Ai Group Claim in respect of the following awards:
 - (a) The Manufacturing Award;
 - (b) The Graphic Arts Award;
 - (c) The Building Award; and
 - (d) The FBT Award.

13. The AMWU's opposition to the Ai Group Claim appears to be grounded in the following key contentions:
 - (a) Ai Group has not advanced any evidence in support of the claim.
 - (b) As a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes.
 - (c) The grant of the claim could adversely impact employees seeking certain government benefits.

14. We deal with each of these contentions in turn below, as well as the evidence filed by the AMWU.

15. The AMWU has also filed draft determinations proposing alternate variations to the Manufacturing Award, Graphic Arts Award and FBT Award, which we later return to.

That Ai Group has not advanced any evidence in support of the claim

16. The absence of evidence filed in support of the Ai Group Claim should not result in its dismissal. Our claim is advanced on the basis of various matters that are of obvious merit and logic, as well as decisions very recently made by the Commission regarding many of the matters that are in issue in these proceedings. Those decisions culminated in the development of the Model Clause and its insertion in the majority of modern awards. The absence of

evidence is not, in those circumstances, fatal to the grant of the claim, as appears to be asserted by the AMWU.

That as a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes

17. The AMWU's submissions rely on the implementation of the Single Touch Payroll (**STP**) scheme. As we understand it, the STP simply results in certain information being provided to the Australian Taxation Office each time an employer pays its employees and has resulted in an employer no longer having to produce an annual payment summary for each employee.
18. It is not clear to us how STP addresses the difficulties associated with administering payment on termination in accordance with the extant provisions contained in the Manufacturing Award, FBT Award, Graphic Arts Award or Building Award. Despite the implementation of the STP, it is for an employer to identify an employee's entitlements on termination, ensure that those entitlements are correctly calculated and to administer and process that payment to the employee.
19. Specifically, it remains the case that:
 - (a) The requirement to pay potentially large sums of money within an extremely limited period of time may pose challenges associated with an employer's cash flow.
 - (b) Employers may incur additional costs and a greater regulatory burden associated with administering a separate payment on termination.
 - (c) Depending upon the circumstances of the termination, employers may have limited opportunity to seek legal advice about an employee's entitlements before they are required to make the payment.
20. Accordingly, the various grounds we have advanced in support of the Ai Group Claim remain apposite, notwithstanding the implementation of STP.

The grant of the claim could adversely impact employees seeking certain government benefits

21. These are arguments that have previously been advanced by the AMWU and dealt with by the Commission, in the context of its consideration of an earlier Ai Group claim in which it sought variations to the relevant awards such that they enabled payment on termination on the next normal pay day: (our emphasis)

[94] It is also relevant that a delay in the payment of the amounts owing to an employee upon the termination of their employment may delay their access to social security payments.

[95] As pointed out by the AMWU, under the provisional default term it is conceivable that some employees may have to wait for up to a month before they receive their termination entitlements. Such a delay may impact on the capacity for employees whose employment has been terminated to access Newstart or other social security benefits.

[96] According to information received from the Department of Social Services, an applicant for Newstart may be subject to a number of waiting periods including a Liquid Assets Waiting Period (LAWP) or an Income Maintenance Period (IMP). The LAWP may require an applicant to wait for up to 13 weeks before they can access Newstart, depending upon the amount of funds that are readily available to them. The definition of 'liquid assets' for the purpose of the LAWP includes money owed to the applicant by their former employer. The IMP involves an assessment of the termination payments received by an employee against the employee's 'ordinary income'. The number of weeks of ordinary income represented by the termination payment then forms the basis of the IMP. As a general rule, the IMP takes effect from the date the employer pays the termination payment.

[97] The AMWU submits that under the default term:

'... these employees – who know that they are owed money, but not exactly how much – may have to wait until the monies are paid before they can accurately inform Centrelink of how much cash they have on hand. This may result in them delaying their initial application to Centrelink for up to a month, effectively increasing their waiting period before they can access important benefits by the same period of time.'

...

[99] We think an appropriate balance between the various considerations is for the model term to provide that all unpaid wages and all other amounts due to an employee under the modern award and the NES are to be paid 'no later than 7 days after the employee's last day of employment'.

[100] Such a provision ensures that employees receive their termination payments in a timely way while providing employers with sufficient time to calculate and pay the sums due. Such a term would address the 'impracticability' arguments advanced on behalf of the employers. We accept that we may impose some 'time costs' associated with obtaining information about the hours worked in the prior pay period and may require

'out of cycle' EFT transactions in some instances, but the costs involved are unlikely to be substantial.²

22. Notwithstanding the AMWU's submissions, the Commission has previously determined that a requirement that payment be made within 7 days after termination strikes an appropriate balance between the interests of employers and employees. There is no warrant for reaching a different conclusion in respect of the Manufacturing Award, FBT Award, Graphic Arts Award or Building Award.

The AMWU's evidence

23. The AMWU has filed a witness statement from its own payroll officer. The statement goes no further than to describe the payroll practices of the union. It says nothing of the experience of employers covered by the relevant awards, using different payroll systems, different banking systems or of the application of the extant provisions to a range of different types of terminations.
24. The evidence is of limited if any probative value and should be afforded very little weight.

The AMWU's draft determinations

25. The draft determinations filed by the AMWU do not address the many concerns raised by Ai Group regarding the extant provisions. They retain the problematic elements of the current provisions.
26. Indeed in some instances the proposals advanced would only exacerbate our concerns. We take for example the Manufacturing Award proposal, which would continue to require the payment of wages as per the extant clause but would additionally also regulate the payment of other amounts such as payments due under the NES.

² 4 yearly review of modern awards [2016] FWCFB 8463 at [94] – [100].

27. The AMWU's proposals seek to 'have the best of both worlds' by closing any regulatory gap left by the current provisions in respect of the timeframe within which certain payments must be made, without consideration for the need to ensure that the provisions strike an appropriate balance between the interests of employees and employers. The Model Clause better achieves that balance and should therefore be adopted instead of the union's proposals.

D. THE CFMMEU – CONSTRUCTION AND GENERAL DIVISION AND CFMMEU – MANUFACTURING DIVISION SUBMISSIONS

28. The CFMMEU opposes the Ai Group Claim in respect of the following awards:
- (a) The Building Award;
 - (b) The Manufacturing Award; and
 - (c) The Mobile Crane Award.
29. The union’s opposition to the Ai Group Claim appears to be grounded in the following key contentions:
- (a) Ai Group has not addressed certain matters identified in the Commission’s decision of 26 July 2019.
 - (b) Ai Group has not advanced any evidence in support of the claim.
 - (c) As a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes.
 - (d) The grant of the claim would be unfair to employees.
 - (e) Ai Group’s arguments about the application of s.120 in the context of the Building Award are misplaced.
30. We deal with each of these contentions in turn below, as well as the evidence filed by the union.
31. The union has also filed draft determinations proposing alternate variations to the aforementioned awards, which we later return to.

That Ai Group has not addressed certain matters identified in the Commission’s decision of 26 July 2019

32. At paragraph 19 of the union’s submissions, it cites paragraph [19] of the Commission’s decision of 26 July 2019. The union submits that in that decision, the Commission “identified the matters that would need to be addressed in

submissions to enable the Full Bench to properly consider any variation to existing terms” (our emphasis). It goes on to argue that “as the applicants have failed to address these matters the applications should be dismissed on this basis alone”.

33. Read in isolation, the submission purports that the relevant comments made by the Commission concerned the Ai Group Claim and the approach it would take to considering the variations here advanced. The submissions suggest that the Commission’s decision prescribes specific matters that must be addressed in order for the Commission to entertain the claims.
34. The union’s submissions mischaracterise the Commission’s decision. The relevant comments were made in the context of its consideration of proposed changes to the *Aluminium Industry Award 2010*: (our emphasis)

Aluminium Industry Award 2010

[12] In a submission dated 23 August 2018 Ai Group set out a proposed variation to the model term to be inserted into the *Aluminium Industry Award 2010* (Aluminium Award). The proposed variation is agreed with the AWU.

...

[19] The fact that two parties with an interest in this award have agreed on the form of a proposed variation is of some relevance, but is far from decisive. To properly consider the variation proposed we would require further submissions which address the merit of the proposal, including:

- the circumstances pertaining to the relevant industry (such as, the number and size of the enterprises covered by the award; and the extent of enterprise agreement coverage and the manner in which those agreements deal with termination payments);
- whether the existing term has given rise to any practical difficulties; and
- whether there are any practical impediments to the employers covered by the award making termination payments within 7 days (and, if so, what are those impediments).³

35. The CFMMEU has, quite inappropriately, sought to extract paragraph [19] from the above passage and argue that the applicants’ failure to address the matters there listed should be fatal to its claims. When read in its context, it becomes

³ 4 yearly review of modern awards - Payment of wages [2019] FWCFB 5146 at [12] – [19].

clear that that is not at all the effect of the decision cited by the union.

36. Ai Group's August 2019 Submission appropriately and adequately address the key bases upon which the Commission should grant its claim. This includes matters associated with deficiencies arising from the extant provisions.
37. We note that the third bullet point at paragraph [19] of the decision is not relevant to the Ai Group Claim. Ai Group has not sought to argue in the context of the matter presently before the Full Bench that there are practical impediments to employers covered by the relevant awards making termination payments within 7 days. The issue arose in the context of the *Aluminium Industry Award 2010* because the parties had there proposed the insertion of a clause that instead permitted payment on the next normal pay day.

That Ai Group has not advanced any evidence in support of the claim

38. The absence of evidence filed in support of the Ai Group Claim should not result in its dismissal. Our claim is advanced on the basis of various matters that are of obvious merit and logic, as well as decisions very recently made by the Commission regarding many of the matters that are in issue in these proceedings. Those decisions culminated in the development of the Model Clause and its insertion in the majority of modern awards. The absence of evidence is not, in those circumstances, fatal to the grant of the claim, as appears to be asserted by the union.

That as a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes

39. The union's submissions rely on the implementation of various technological developments concerning payroll processes. This includes STP. We refer to and rely on the submissions made earlier in response to similar arguments made by the AMWU in this regard.

That the grant of the claim would be unfair to employees

40. The union argues that the grant of the claim would be unfair to employees because they would have to wait for longer to receive their payments on termination.
41. Ai Group refers to and relies on paragraphs 17 – 18 of our August 2019 Submission in this regard.

That Ai Group's argument about the application of s.120 in the context of the Building Award is misplaced

42. Ai Group withdraws paragraph 41(a)(ii) of its August 2019 Submission.

The union's evidence

43. The union's evidence relates to its argument that as a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes. We have dealt with this submission above.

The union's draft determinations

44. Our characterisation above of the AMWU's draft determination applies also to the CFMMEU's draft determinations. Its proposals should not be adopted for the same reasons as there articulated.

E. THE CFMMEU – MINING AND ENERGY DIVISION’S SUBMISSION

45. The CFMMEU – Mining and Energy Division opposes the Ai Group Claim in respect of the Black Coal Award.
46. The union’s opposition to the Ai Group Claim appears to be grounded in the following key contentions:
- (a) The Black Coal Award does not leave a ‘regulatory gap’ in respect of the timeframe within which payment must be made for redundancy pay, annual leave or personal / carer’s leave (where relevant).
 - (b) The grant of the Ai Group Claim would create an inconsistency with clause 16.6 of the Black Coal Award.
 - (c) Where an employee’s employment is terminated at the initiative of the employer, the employer is able to determine the date of termination such that any practical difficulties arising from the application of the extant clause are alleviated.
 - (d) As a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes.
 - (e) The grant of the claim could adversely impact employees.

That the Black Coal Award does not leave a ‘regulatory gap’ in respect of the timeframe within which payment must be made for redundancy pay, annual leave or personal / carer’s leave (where relevant)

47. The union submits that by virtue of clauses 13.4 and 16.7, employees are required to be paid any leave entitlements that fall due on termination within the timeframes stipulated by clause 16.7.
48. We do not agree. Clause 16.7 requires only the payment of “wages due to an employee”; that is, wages due for work performed since the last pay day. It does not include other amounts such as accrued leave entitlements. Clause 13.4 also says nothing of the timeframes within which outstanding leave

entitlements must be paid. Though it creates an entitlement for accrued annual leave and personal / carer's leave to be paid on termination in certain circumstances, and regulates the rate at which those payments are to be made, it does not stipulate the *timeframe* within which those payments are to be made.

49. The union also argues that an entitlement to redundancy pay “arises when an employee is made redundant”. The termination of an employee’s employment for reason of redundancy is, of course, a condition precedent to any entitlement to redundancy pay arising. However, neither the Black Coal Award nor the *Fair Work Act 2009* expressly regulate *when* this payment must be made.
50. The relevant regulatory gaps, therefore, remain in the context of the Black Coal Award. The insertion of the Model Clause would address these issues.

That the grant of the Ai Group Claim would create an inconsistency with clause 16.6 of the Black Coal Award

51. We do not agree that any inconsistency between clauses 16.6 and the Model Clause would arise. Clause 16.6, in our view, operates in the context of clause 16.4, which relates to the payment of wages during the course of an employee’s employment.
52. In any event, any perceived inconsistency between clause 16.6 and the Model Clause should not be fatal to the insertion of the Model Clause. The issue can be simply addressed by making clear that the Model Clause applies notwithstanding clause 16.6.

That where an employee’s employment is terminated at the initiative of the employer, the employer is able to determine the date of termination such that any practical difficulties arising from the application of the extant clause are alleviated

53. The union’s submission ignores the practical realities of the circumstances in which the employment relationship often comes to an end. Any suggestion that employers should be able to align the termination date of an employee’s employment with the operation of the extant clause 16.7 of the Black Coal Award in a manner that minimises the cost and practical difficulties flowing from

its operation demonstrates a complete disregard for the many and varying factors that determine when an employee's employment is terminated and the often dynamic situations that lead to a termination, as a result of which it is entirely impracticable to 'plan' the employee's termination in a way that moderates the impact of clause 16.7 of the award. This is to say nothing of circumstances in which an employee's employment is terminated due to serious misconduct, with immediate effect.

54. The union's submission should not be accepted.

That as a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes

55. The union's submissions rely on the implementation of various technological developments concerning payroll processes. We refer to and rely on the submissions made earlier in response to similar arguments made by the AMWU in this regard.

56. We also refer to and rely on paragraphs 17 – 18 of our August 2019 Submission in this regard.

That the grant of the claim could adversely impact employees

57. The union makes arguments similar to those advanced by the AMWU regarding employees seeking access to Government benefits after the termination of their employment. We refer to and rely on the submissions we have earlier made in this regard.

The union's evidence

58. The union's evidence relates to its argument that as a result of recent developments in payroll processes, there has been a reduction in the administrative burden associated with payroll processes. We have dealt with this submission above.

The union's draft determination

59. The draft determination previously filed by the union does not address the many concerns raised by Ai Group regarding the extant provisions. It retains many of the problematic elements of the current provisions.

F. THE CEPU'S SUBMISSION

60. The CEPU opposes the Ai Group Claim in respect of the following awards:
- (a) The Business Equipment Award; and
 - (b) The Electrical Contracting Award.
61. The CEPU's opposition to the Ai Group Claim appears to be grounded almost exclusively in the absence of evidence filed by Ai Group.
62. The absence of evidence filed in support of the Ai Group Claim should not result in its dismissal. Our claim is advanced on the basis of various matters that are of obvious merit and logic, as well as decisions very recently made by the Commission regarding many of the matters that are in issue in these proceedings. Those decisions culminated in the development of the Model Clause and its insertion in the majority of modern awards. The absence of evidence is not, in those circumstances, fatal to the grant of the claim, as appears to be asserted by the CEPU.

G. THE AMIEU'S CORRESPONDENCE

63. On 12 March 2020 the AMIEU sent email correspondence to the chambers of Justice Ross identifying that it opposes the insertion of the Model Clause in the Meat Award. The union did not outline the reasons for its opposition and has not filed a submission articulating the basis for its position.
64. No other party has filed submissions in opposition to Ai Group's Claim in respect of the Meat Award.
65. Accordingly, the Commission should, in our submission be satisfied for the reasons set out in our submissions that the Meat Award should be varied consistent with Ai Group's claim.