Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Payment of Wages
(AM2016/8)

19 October 2016

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. On 15 August 2016, the Fair Work Commission (**Commission**) issued directions permitting the proponents of any variations to file submissions in reply by 18 October 2016.

2. The Australian Industry Group (**Ai Group**) has proposed the following variations:

    - In respect of nine modern awards, where an employee's employment is terminated, a variation such that the employee may be paid monies owing by way of an electronic funds transfer (**EFT**) in the usual pay cycle. The relevant awards presently stipulate that payment must be made at the time of termination and/or very shortly thereafter.

    - In respect of the *Food, Beverage and Tobacco Manufacturing Award 2010*, the *Electrical, Electronic and Communications Contracting Award 2010*, and the *Joinery and Building Trades Award 2010* (**Joinery Award**), variations to cure anomalies regarding the payment of annual leave loading.

3. This submission is filed in response to the submissions of the following unions in opposition to our claims and/or similar variations proposed by the Commission in its Statement of 8 September 2016[1]:

    - the Australian Manufacturing Workers' Union;

    - the Australian Workers' Union;

    - the Construction, Forestry, Mining and Energy Division – Construction and General Division (**CFMEU**)

[1] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 6401.

- the Construction, Forestry, Mining and Energy Union – Forestry, Furnishing, Building Products and Manufacturing Division;
- the Construction, Forestry, Mining and Energy Union – Mining and Energy Division;
- the Textile, Clothing and Footwear Union of Australia;
- the Transport Workers' Union; and
- United Voice.

(collectively '**the Unions'**)

4. We note that the Shop, Distributive and Allied Employees' Association filed correspondence on 13 October 2016 advising that it does not oppose Ai Group's claim to vary the *Storage Services and Wholesale Award 2010* in relation to the payment of wages on termination.

5. This submission also addresses various additional issues raised in the Commission's Statement of 14 October 2016.[2]

[2] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 7455.

2. PAYMENT ON TERMINATION OF EMPLOYMENT – Ai GROUP'S PROPOSED VARIATION

6. We here propose to address the primary bases identified by the Unions in opposition to our proposal to vary nine modern awards such that they permit an employer to pay outstanding wages due upon the termination of employment by EFT in accordance with the usual pay cycle.

7. The following lines of argument emerge from the Unions' submissions:

- That the current provisions do not create any material difficulty or disadvantage for employers;
- That there is insufficient evidence to establish that there is a problem arising from the current award clauses;
- That the proposed provisions will disadvantage employees;
- That a distinction can be drawn between the payment of wages on termination and payment made to an employee during a period of annual leave;
- That various considerations listed at s.134(1) of the *Fair Work Act 2009* (**Act** or **FW Act**) do not lend support to the variations proposed;
- That there is insufficient evidence to establish that the proposed provisions are necessary in order to ensure that the relevant awards are achieving the modern awards objective; and
- That the proposed provisions are inconsistent with s.117(2)(b) of the Act.

8. We turn to each of these propositions in turn.

The difficulties or disadvantages arising from the current clauses for employers

9. Our submissions of 20 September 2016 give detailed considerations to the difficulties or disadvantages that arise from the operation of the relevant current award clauses. The Unions' submissions to the contrary disregard the issues that we have there raised and do not make any sensible attempt at addressing them.

Evidence of a problem arising from the current award clauses

10. So often in this Review, submissions are made by interested parties alleging an absence of "evidence", as a result of which the relevant proponent's claim should fail. In these proceedings, such submissions have been made by the Unions absent any consideration of whether such evidence is in fact necessary, having regard to the manner in which our case has been mounted.

11. It is incumbent upon the proponent of a claim to establish, in an evidentiary sense, factual propositions upon which it seeks to rely in support of its claim. As the Commission stated in its Preliminary Jurisdictional Issues decision:

> [23] … However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[3]

12. Neither the statutory framework within which the Review is proceeding, nor prior Commission's authorities require or suggest that all claims made must necessarily be accompanied by evidence or that a certain evidentiary threshold must invariably be met. Rather, evidence should be tendered by a party in circumstances where they seek to make out their case on the basis of factual assertions. An interested party may, of course, simply rely on the historical context, prior consideration of the same or similar issues, or general merit-based justifications.

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

13. As outlined at paragraph 18 of our submission dated 20 September 2016, the variations proposed are sought on the following primary bases:

- The current provisions are unfair to employers become they impose additional employment costs and create a regulatory burden;
- The current provisions are irrelevant, having regard to modern payroll practices by virtue of which employees are now primarily paid by EFT;
- The current provisions are out of step with the vast majority of modern awards; and
- The proposed provisions encourage flexibility and modern work practices.

14. In light of each of the above propositions, it is submitted that the provisions proposed are necessary to ensure that the relevant awards meet the modern awards objective.

15. The first proposition identified above is admittedly a factual one. We assert that the current clauses impose additional employment costs and create a regulatory burden. This is because an employer is required to administer a separate additional transaction that would not otherwise be processed.

16. In a very recent Full Bench decision issued in the context of the annual leave common issues, the Commission accepted that evidence called by Ai Group established that "a significant number of [the 3165 employer] survey respondents said that they were charged extra fees for processing payroll outside their usual pay period"[4]. The evidence there advanced was that of a survey conducted by Ai Group in conjunction with various other organisations representing employer interests. Relevantly, the survey made enquiries as to whether the administration of a separate pay run resulted in the respondents' businesses incurring additional fees. Based on the evidence, it was accepted by the Commission that the variations there proposed, which would have the

[4] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [439].

effect of enabling an employer to make payments to an employee on annual leave during the usual pay cycle, "will reduce employment costs and the regulatory burden on business".[5]

17. In light of this recent authority and the findings made by the Full Bench, we consider that it is here open to us to rely upon the conclusions there reached to substantiate that the operation of the relevant current provisions result in an employer incurring additional employment costs and that they create a regulatory burden. There is certainly no material before the Commission that might allow it to conclude that the findings there made are not accurate or relevant for the purposes of these proceedings, given that the variation sought is advanced on a very similar basis to that proposed by the employer parties in the context of the annual leave common issues case.

18. Accordingly, we submit that the factual proposition upon which we rely has been established and accepted in very recent times by a Full Bench of the Commission and it ultimately formed the basis for the grant of very similar award variations. The Commission was clearly satisfied that Ai Group and other employer parties had discharged the requisite evidentiary burden. In such circumstances, we consider that the Commission can and should conclude that the factual findings it there made are here apposite and in the absence of any cogent reasons to the contrary, they can be relied upon to conclude that, by analogy, the current award provisions in question impose additional employment costs and create a regulatory burden.

19. The second proposition, that employees are now primarily paid by EFT (rather than other forms of payment), is uncontroversial. Indeed certain unions readily accept in their submissions that this is so.

20. The third and final propositions are matters that rely entirely upon an analysis of other modern awards and logical merit considerations that, in our view, lend support to our claim. Therefore, they do not require an evidentiary base.

[5] *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [447].

21. As can be seen, Ai Group's claim is advanced on bases such that an evidentiary case is not required. The repeated assertions made by the Unions that our claim should fail in the absence of any evidence should be ignored. They ignore the considerations that underpin the variations we seek, and the manner in which we have sought to mount our case.

The difficulties or disadvantages allegedly arising from the proposed clauses for employees

22. The Unions identify various difficulties arising from the proposed provisions which, in their view, would place employees at a disadvantage. The potential consequences raised by the Unions can broadly be categorised as follows:

- an employee may have to wait for up to one month before they receive the relevant payment;
- an employee will be unaware as to the specific amount that they will receive until up to one month after the termination of their employment; and
- it may be difficult for an employee to access government benefits.

23. Whilst this has not been made explicit, the Unions' submissions appear to presuppose that an employee whose employment has been terminated will thereafter be unemployed, thus giving rise to and/or exacerbating the implications listed above. The submissions ignore the reality that in fact many employees will move between employment by different organisations, often within a short period of time. Indeed this is likely to be the case in most instances where an employee resigns (accepting, of course, that this will not always be so). The AMWU's submissions suggest that resignations reflect two-thirds of the total number of terminations.

24. Ultimately, the material advanced by the Unions does not enable the Commission to assess with any degree of certainty as to the whether the consequences identified by the Unions in fact arise and if so, with what frequency.

25. The AMWU asserts that payment on termination at a time later than that currently contemplated by the relevant awards will delay an employee's access to government benefits. We note at the outset that the Unions have not filed any evidence that in fact establishes that this would be the impact of the provisions sought. In addition, we do not consider that the Commission's task extends to making accommodations for processes associated with accessing such benefits. Rather, that is a matter that could properly and more appropriately be addressed directly with the relevant government agency or department. The needs of the unemployed in this regard are not squarely relevant to the Commission's determination of this matter (although we accept that the need to increase workforce participation is a relevant consideration by virtue of s.134(1)(c)).

26. In any event, even if it were accepted that the proposed provisions would render employees at a disadvantage, the Commission's task is to balance that consideration against the difficulties flowing from the current provisions for employers. As the Full Bench stated in its Preliminary Jurisdictional Issues decision:

> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. …[6]

A purported distinction between payment of wages on termination and payment during a period of annual leave

27. It has been put against us by certain respondent parties that a distinction can be drawn between payment of wages to an employee upon termination of employment as compared to payment during a period of annual leave; that distinction being that in the latter situation, the employee remains in the employ of the employee. The issue is raised in response to our reliance on the Commission's decision in the annual leave common issues proceedings.

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

28. The Unions raise various hypothetical problems that might arise if our claim were granted. Primarily it is argued that if an employer pays the employee an incorrect amount, or does not pay the employee at all, it may be difficult for the employee to raise this issue with the business and pursue its resolution.

29. As we identified in our submission of 20 September 2016, 86 modern awards do not contain a provision that requires outstanding wages to be paid upon termination of employment within a specified timeframe. Prima facie it would appear to us that those awards would enable payment of such monies in accordance with the usual pay cycle.

30. We are not aware of any difficulty such as that described by the Unions arising from the 86 awards, a very significant proportion of which cover our membership. Further, it has of course been open to the Unions to seek variations to any of those awards should such an issue have arisen. We are not aware of any such applications having been made, nor has material to that effect been put before the Commission in these proceedings.

31. There are of course avenues open to an employee who is not paid amounts owning on termination. An employee is not precluded from contacting their previous employer after the termination of their employment and it should not be assumed that any difficulties associated with termination payments cannot effectively be resolved between the parties. If unsuccessful, the employee can contact the Fair Work Ombudsman for the purposes of making an underpayment claim. If the employee is a member of a union, the union could also be contacted for assistance.

32. The Unions' arguments do not identify any cogent reason why the Commission should not adopt the reasoning that led it to grant a claim in the annual leave common issues proceedings to permit the payment of wages during a period of leave in the usual pay cycle rather than prior to the employee's commencement of the leave.

The considerations identified at s.134(1) of the Act

33. To the extent that it is argued that certain considerations identified at s.134(1) of the Act do not lend support for Ai Group's claim, we refer to our earlier submission of 20 September 2016, where we have comprehensively addressed each of the relevant matters and the modern awards objective.

Evidence that the proposed provision is 'necessary' as required by s.138 of the Act

34. For the reasons we have earlier articulated, we do not consider that it is incumbent upon Ai Group to mount an evidentiary case in order to establish that the proposed provisions are necessary to ensure that each of the relevant awards are achieving the modern awards objective.

Section 117(2)(b) of the Act

35. The CFMEU alleges that the proposed provision is "inconsistent with the National Employment Standards"[7] and specifically, s.117(2)(b) of the Act. We address this issue in the section below.

[7] CFMEU submissions dated 14 October 2016 at paragraph 25.

3. PAYMENT ON TERMINATION OF EMPLOYMENT – THE COMMISSION'S PROPOSED DEFAULT TERM AND RELATED ISSUES

36. In a Statement of 14 October 2016, the Full Bench made the following comments about the Legislative scheme and its provisional view:

> ***Legislative scheme***
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> [13] Section 323 of the *Fair Work Act 2009* (FW Act) deals with both the frequency of payments to an employee for "amounts payable to the employee in relation to the performance of work" and the method for payment:
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> - - -
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> [14] In *Casey Grammar School v Independent Education Union of Australia* the Commission observed that:
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> > 'Section 323 is, as it[s] heading indicates, concerned with regulating the timing and frequency of the payment of "amount[s] payable" to an employee, together with the method by which those payments must be made. It does not create the underlying legal obligation to pay that renders an amount as "an amount payable to an employee" within the meaning of s.324(1). Rather, it operates on an existing legal obligation to pay and then imposes further obligations on the employer in relation to the timing, frequency and method of such payments. The words of s.323(1) are apt to cover all wage and wage-related amounts due from a national system employer to one of its employees, irrespective of whether those amounts become legally "payable" by virtue of the NES, an award, an individual or collective statutory agreement or a common law contract.'
>
> [15] While s.323 clearly requires an employer to pay wages and related amounts such as leave payments not later than one month after they have accrued, it is not clear whether "amounts payable to the employee in relation to the performance of work" encompasses amounts accrued under an award or the NES upon termination such as payment in lieu of annual leave (FW Act s.90(2)) and redundancy pay (s.119(1)). There does not appear to be anything else in the FW Act that addresses the timing of termination payments generally. Consequently, if s.323 does not encompass all termination payments, there would seem to be a legislative gap.
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> [16] One provision of the FW Act that does deal expressly with the timing of a termination payment is s.117. Specifically, s.117(2)(b) appears to require, where employment is terminated with payment in lieu of the statutory notice period, that the payment in lieu be made prior to or upon the termination of employment:
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> - - -
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> [17] How s.117(2)(b) sits with current award provisions in relation to payment on termination is unclear.
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> ***Provisional view and questions for the parties***
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> [18] It seems to us that the issue of payment of wages and other amounts owing on termination of employment is a broader issue than previously appreciated. There is at least a doubt that the legislative scheme covers the payment of termination payments

generally on termination. Accordingly, it is our provisional view that there is some utility in a common payment on termination provision across all 122 modern awards.

[19] It is our provisional view that each modern award should provide for the payment of wages and other amounts owing on termination of employment, to ensure that employers and employees are aware of their obligations and entitlements. It is proposed that the default term for payment of wages and other amounts due on termination of employment should be:

1. Payment on termination of employment

The employer must pay all amounts that are due to an employee under this award and the NES when the employee's employment ends:

(a) within 7 days after the employee's last day of employment; or

(b) on the next normal pay day.

[20] Unlike the ABI/AiGroup proposed variations, the provisional default term is not confined to the circumstances where an employee is paid by EFT. This is because our provisional view is that the draft determination proposed by ABI/AiGroup does not adequately address the concern that employers not be required to make termination payments within a very short timeframe. For example, if an employee's employment was terminated the day before a normal payday, the employer would be required to make the payment the following day. We are also of the provisional view that there is merit in the proposition that the current award provisions do not reflect modern payroll practices.

[21] Further, our provisional view is that there does not appear to be a sound rationale for retaining the current provisions that require payment of wages on termination within a short period after termination (such as one or two days, or 'forthwith'). Accordingly, we would propose to replace the existing provisions in respect of the timeframe for the payment of termination payments, in the 36 modern awards mentioned previously, with the provisional default term.

Question 1 *– Parties are invited to comment on the terms of the provisional default term.*

Question 2 *– Parties are invited to comment on the provisionally expressed view that the default term be inserted into all modern awards.*

Question 3 *– If any party would seek to retain a current award provision, the Full Bench requests that the party provide an explanation as to the purpose of the provision and how this particular provision meets the modern awards objective.*

Question 4 *– Parties are asked to consider how s.117(2)(b) might interact with the proposed default term and whether the clause should include reference to s.117(2)(b).*

Note: As observed above (at [16]), it appears that s.117(2)(b) requires payment in lieu of notice under the NES to be made prior to or upon termination of employment.

37. The provisional views expressed by the Full Bench in the above extract raise a number of important issues that are addressed below. The issues are complex and we have had limited time to consider them. Accordingly, we seek to reserve our rights to make further submissions about these issues.

The Legislative scheme

Section 323

38. Ai Group concurs with the views expressed by Vice President Lawler in paragraph [9] of the decision in *Casey Grammar School v Independent Education Union of Australia*, as reproduced at paragraph [14] of the Full Bench's Statement of 14 October 2016. That is, we agree that s.323 regulates the timing and frequency of amounts payable, but does not create an underlying obligation to pay.

39. With regard to the issue raised by the Full Bench at paragraph [15] of its Statement of 14 October 2016, in Ai Group's view s.323 does not cover payment in lieu of notice or redundancy pay because these are not amounts *"payable to the employee in relation to the performance of work"* (see s.323(1). Note 2 in s.323(1) supports this view because payment in lieu of notice and redundancy pay are not referred to in this Note.

40. The Explanatory Memorandum for the *Fair Work Bill 2008* contains the following explanation about Note 2:

> 1283. The legislative note after this subclause makes clear that the payment rule covers a wide range of payments, where they fall due during the relevant payment period – including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments. However, the amounts referred to in this subclause would not include superannuation contributions or non-monetary benefits.

41. The above paragraph does not refer to payment in lieu of notice or redundancy pay being included within s.323. Also, it clarifies that superannuation contributions are not included. Superannuation contributions are part of an employer's payment in lieu of notice as clarified in the following extract from the Explanatory Memorandum regarding s.117(2):

466. The intention of paragraph 117(2)(b) is to impose on an employer that makes the payment in lieu of notice, an obligation to pay either to (or for the benefit of or on behalf of) the employee, everything which the employee would have been entitled to receive had the employee worked out the required period of notice. This would include superannuation contributions an employer would otherwise have been required to make, on behalf of an employee, to a superannuation fund: see *Furey v Civil Service Association of WA (Inc)* [1999] FCA 1492; 91 FCR 407. It would also include amounts payable to an employee that the employee has agreed, under a permissible salary sacrifice or other arrangement, to forgo in order to receive other benefits.

Subsection 117(2)

42. Subsection 117(2) of the Act includes the provision that:

> The employer must not terminate the employee's employment unless…the employer has paid to the employee…payment in lieu of notice.

43. Largely similar wording to s.117(2) has been included in the federal workplace relations legislation since 1993.

44. Section 170DB(1) of the *Industrial Relations Act 1988* (after the 1993 reforms) stated:

> (1) An employer must not terminate an employee's employment unless:
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> (a) the employee has been given either the period of notice required by subsection (2), or compensation instead of notice; or
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> - - -

45. The Explanatory Memorandum for the *Industrial Relations Reform Act 1993* (which varied the *Industrial Relations Act 1988*) included the following statement with regard to s.170DB(1):

> Proposed section 170DB gives effect to Article 11 of the Termination of Employment Convention.

46. The Termination of Employment Convention was included as Schedule 10 to the Act.

47. Article 11 of the Convention did not specify whether the payment was required to be made before or after termination:

> Article 11
>
> A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious

misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

48. Subsection 170CM(1) of the *Workplace Relations Act 1996* (prior to the Work Choices reforms) stated:

> (1) Subject to subsection (8), an employer must not terminate an employee's employment unless:
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> (a) the employee has been given the required period of notice (see subsections (2) and (3)); or
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> (b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5)); or
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> - - -

49. The Explanatory Memorandum for the *Workplace Relations and Other Legislation Amendment Bill 1996* (which substantially amended the *Industrial Relations Act 1988* and changed its title to the *Workplace Relations Act 1996*) stated:

> 7.68. Section 170CM requires an employer to give a minimum period of notice of a termination to employees, or pay in lieu of that notice, unless the employee is guilty of serious misconduct.

50. There is nothing in the wording of the Explanatory Memorandum to indicate that there was any intention to make a major change to the notice of termination entitlements, as would occur if the requirement changed so as to contemplate that payments in lieu of notice must occur before the employment ends.

51. Section 661 of the *Workplace Relations Act 1996* (after the Work Choices reforms) contained the following identical wording to the previous legislation:

> (1) Subject to subsection (8), an employer must not terminate an employee's employment unless:
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> (a) the employee has been given the required period of notice (see subsections (2) and (3)); or
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> (b) the employee has been paid the required amount of compensation instead of notice (see subsections (4) and (5)); or
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> - - -

52. The Explanatory Memorandum for the Work Choices Bill does not include any relevant content regarding the meaning of the phrase *"has been paid"* in s.661.

53. In the *Fair Work Act 2009*, the phrase *"has been paid"* in s.661 of the *Workplace Relations Act 1996* was amended to *"has paid"* in s.117(2)(b).

54. The Explanatory Memorandum includes the following explanation of s.117(2):

> 465. Subclause 117(2) provides that an employer must not terminate an employee's employment unless they have given the employee the necessary period of notice worked out under subclause 117(3), or they have paid the employee in lieu of that notice. If the employee is paid in lieu of notice, paragraph 117(2)(b) requires that the employee must be paid at least the amount the employee would have received had they continued in employment until the end of the required notice period. That is, the employee must be paid for hours they would have worked during that period, at their full rate of pay (as defined in clause 18).
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> 466. The intention of paragraph 117(2)(b) is to impose on an employer that makes the payment in lieu of notice, an obligation to pay either to (or for the benefit of or on behalf of) the employee, everything which the employee would have been entitled to receive had the employee worked out the required period of notice. This would include superannuation contributions an employer would otherwise have been required to make, on behalf of an employee, to a superannuation fund: see *Furey v Civil Service Association of WA (Inc)* [1999] FCA 1492; 91 FCR 407. It would also include amounts payable to an employee that the employee has agreed, under a permissible salary sacrifice or other arrangement, to forgo in order to receive other benefits.

55. Despite the above relatively lengthy explanation of s.117(2), there is no mention of a requirement that payments in lieu of termination must occur before the employment ends, other than the opening sentence of paragraph 465 which simply repeats the relevant wording in the provision without any elaboration or discussion about the meaning of the phrase *"has paid"* in s.117(2)(b).

56. In its Statement of 14 October 2016, the Full Bench said:

> [16] One provision of the FW Act that does deal expressly with the timing of a termination payment is s.117. Specifically, s.117(2)(b) appears to require, where employment is terminated with payment in lieu of the statutory notice period, that the payment in lieu be made prior to or upon the termination of employment.

57. A footnote in the above extract referred to the judgment of Justice White in *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20. In this case White J supported the joint judgment of Tracey, Gilmour, Jagot and Beach in all

respects other than one (i.e. on whether it was open to MSL to rely on Mr Sautner's serious misconduct in defence of his claim, which involved in turn the issue of how Mr Sautner's employment contract came to an end). In this one respect, White J issued different reasons for his decision. The two paragraphs cited in the Statement appear in these different reasons.

58. We raise the above contextual matters in support of the submission that it is not entirely clear that Parliament intended that in all circumstances payment in lieu of notice by an employer must be paid at the time of, or prior to, the employment ending.

59. In any event, even if it is accepted that s.117(2) requires (or at least has the effect of indirectly requiring) that payments in lieu of notice must be paid on or prior to the date when the employment ends, the model clause proposed by the Full Bench in its Statement of 14 October 2016 would be applicable to all of the following payments:

- All monies due to an employee on termination when the employee resigns;
- All monies due to an employee on termination when the employment ends as a result of mutual agreement;
- All monies due to an employee on termination when the employee abandons his or her employment;
- All monies due to an employee on termination when the employment contract is frustrated;
- All monies due to an employee on termination when the employee has been given notice of termination by the employer rather than payment in lieu of notice;

- Outstanding wages, payments in lieu of accrued annual leave, payments in lieu of accrued long service leave, redundancy pay, and other monies payable on termination of employment by an employer with the exception of pay in lieu of notice.

The interaction between s.117(2) and payment of wage provisions in modern awards

60. Even if it is accepted that s.117(2)(b) contemplates that payments in lieu of notice must be paid at the time of, or prior to, termination of employment, it does not follow that Ai Group's proposed award clauses or the Commission's proposed default term would exclude a provision of the NES, as contemplated by s.55(1).

61. In determining the interaction between s.117(2) and payment of wage provisions in modern awards, it is necessary to first consider the entitlements and obligations covered by s.117(2) and the consequences for an employer of contravening the provision.

62. Section 117(2) does not create a direct obligation to provide a payment prior to terminating an individual's employment but instead prohibits termination from being initiated unless the requisite notice or payment has been provided. Put another way, it is not the failure to make the relevant payment that gives rise to a breach of the legislation but the act of terminating the employment in circumstances where neither notice or payment in lieu thereof has been provided.

63. This interpretation is reinforced by the relevant legislative history and the broader scheme of the Act. Such relevant contextual consideration include:

- The wording of the section as a whole and the remedies for a contravention of the s.117 (see below);
- The origins of the provisions in the *Termination of Employment Convention,* which did not identify a temporal obligation relating to the provision of payment in lieu of notice (as discussed above);

- The structure of predecessor legislative provisions enabling recovery of damages as a consequence of contravention of a comparable and similarly worded provision to 117(2). In this regard we refer the Full Bench to s.170CM and 170CR(4) of the *Workplace Relations Act 1996*, prior to the Work Choices amendments.

The wording of the s.117 as a whole and the remedies for a contravention of s.117

64. When considered as a whole it can be seen that s.117 is a prohibition on terminating an employee's employment in certain specified circumstances (subject to the exclusions in s.123).

65. Subsection 117(1) is a prohibition on terminating an employee's employment unless written notice of the day of the termination is given.

66. Subsection 117(2) is a prohibition on terminating an employee's employment unless the employer has given the employer the minimum period of notice in s.117(3), or made a payment in lieu of that notice.

67. Our contention that s.117 is, in effect, a prohibition on the termination of employees in certain specified circumstances, rather than a provision which provides a direct entitlement to a particular payment is reinforced by the remedies for contraventions of the Act.

68. If the employer contravenes s.117(2), the employer contravenes s.44(1) of the Act which states that *"(a)n employer must not contravene a provision of the National Employment Standards".*

69. If an employer contravenes s.44(1), an employee, a union or the Fair Work Ombudsman (**FWO**) can apply to the Federal Court or Federal Circuit Court to have a civil penalty imposed on the employer (s.539). If such an application is made, the Federal Court or Federal Circuit Court may make any order that the Court considers appropriate, if the Court is satisfied that the contravention has occurred (s.545(1)). The orders that the Court can make include an order

awarding compensation for a loss that the person suffered because of the contravention (s.545(2)(b)).

70. In Court proceedings, if an employer has failed to give notice of termination or make a payment in lieu of notice, the Court typically imposes a penalty upon the employer under s.546 and awards compensation to the employee equivalent to the payment in lieu of notice using the power under s.545.

71. Our contention that s.117 is, in effect, a prohibition on the termination of employees in certain specified circumstances, rather than a provision which provides a direct entitlement to a particular payment is also consistent with the following observations of Deputy President Gostencnick in *D'Souza v Henry Schein Halas* [2014] FWC 5864:

> [29].....Section 117(2) prohibits an employer terminating the employment of an employee without giving notice or making payment in lieu of notice before effecting termination.
>
> [30] If an employer terminates the employment of an employee without notice and without making payment in lieu of notice before effecting termination, the result is that the employer has acted unlawfully. It does not invalidate the termination of the employment. An employee's remedy is to apply for a penalty for a contravention of that provision by reference to a breach of s.44(1) of the Act which provides that: An employer must not contravene a provision of the National Employment Standards.

The questions in the Full Bench's Statement of 14 October 2016

Question 1 – Parties are invited to comment on the terms of the provisional default term

72. The Commission's proposed default term is:

> **1. Payment on termination of employment**
>
> The employer must pay all amounts that are due to an employee under this award and the NES when the employee's employment ends:
>
> (a) within 7 days after the employee's last day of employment; or
>
> (b) on the next normal pay day.

73. Ai Group supports the proposed model term. It addresses the issues that Ai Group's proposed variations were designed to address.

Question 2 – Parties are invited to comment on the provisionally expressed view that the default term be inserted into all modern awards

74. Ai Group supports the Commission's proposed default term becoming a model term. However, consistent with the Commission's longstanding regular approach to model award terms, all parties should have the right to argue in support of an alternative term in a particular award on the basis of industry-specific, occupational-specific or award-specific matters of relevance to that award.

Question 3 – If any party would seek to retain a current award provision, the Full Bench requests that the party provide an explanation as to the purpose of the provision and how this particular provision meets the modern awards objective

75. At this stage, Ai Group has not identified any awards that would require a different approach but we have not yet had the opportunity to consider the terms of each modern award.

Question 4 – Parties are asked to consider how s.117(2)(b) might interact with the proposed default term and whether the clause should include reference to s.117(2)(b)

76. As discussed above, even if it is assumed that s.117(2)(b) contemplates payment being made prior to termination, the proposed clause does not contravene s.55(1) given the nature of the obligation. Section 117 is, in effect, a prohibition on the termination of employees in certain specified circumstances, rather than a provision which provides a direct entitlement to a particular payment.

77. Section 55(1) provides that:

> "55(1) A modern award or enterprise agreement must not exclude the National Employment Standards".

78. Given the above explained nature of the benefit or obligation contemplated by s.117(2), we contend that an award clause that merely regulates the payment of certain amounts does not directly exclude a provision of the NES that prohibits

termination of employment in particular circumstances. That is, the clause instead deals with different, distinct subject matter.

79. Regardless, the wording of the proposed clause itself would not require or permit a party to fail to make the payment contemplated by s.117(2). Assuming compliance with s.117(2) there will be no amount contemplated under s.117(2)(b) that would remain due "when the employment ends".

80. Moreover, given the nature of the entitlement in s.117(2), no payment is "due" for the purposes of the Commission's proposed default term.

81. For clarity, we contend that the capacity to include the proposed term in a modern award would arise from s.139(a) and s.55(4). In relation to s.55(4), the proposed term is not detrimental to employees in any respect, when compared to the National Employment Standards.[8] We note that s.55(7) provides that;

> "55(7) to the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravent subsection (1).

82. Notwithstanding the above contentions we acknowledge the possibility that the proposed clause *could* mislead a party into perceiving that payment under s.117(2) is not required in circumstances where an employer terminates an employee and elects to make a payment in lieu of notice. For this reason, we accept that the inclusion of a note in the proposed clause referring to s.117(2)(b) would assist to ensure that each award is "simple and easy to understand".[9] Such a note would not only alert the reader to the existence of the obligation under s.117(2) but would also assist in ensuring that the award is interpreted and applied in a manner that does not exclude this obligation.

[8] As contemplated by s.55(4).

[9] As contemplated in s.134(1).

4. ANNUAL LEAVE LOADING – JOINERY AND BUILDING TRADES AWARD 2010

83. Ai Group's 20 September 2016 submission argued in support of the following variations to the Joinery Award:

- The deletion of existing clause 32.2(c) and the insertion of the following provision:

> (c) The employee is not entitled to payments in respect of overtime, shift loadings, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

- The deletion of existing clause 32.3 and the insertion of the following new clause 32.3:

> **32.3 Annual leave loading**
>
> (a) In addition to the payment prescribed in clause 32.2, during a period of annual leave an employee must be paid a loading of 17.5% calculated on the minimum wages, loadings and allowances by clauses 18—Classifications and minimum wages, 19—Apprentice minimum wages, 20—Adult apprentice minimum wages, 21—Trainee minimum wages, 22—Supported wage system and clauses 24.1(b), (c) and (d) as applicable and the leading hand rates prescribed by clause 24.1(a) if applicable. An employee is also entitled to the 17.5% loading on any proportionate leave on termination.
>
> (b) An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to that prescribed in clause 32.3(a) or the shift rates prescribed by this award, whichever is the greater but not both.

84. The intent of the variations is to ensure that employees do not receive a shift loading and an annual leave loading during a period of annual leave. They would instead receive whichever is the greater. It appears that the award currently requires that both annual leave loading and applicable shift rates are included in the payment for annual leave.

85. The CFMEU's submission of 14 October 2016 expresses disagreement with Ai Group's position but does not contain any valid arguments regarding why the Award should not be varied as proposed.

86. At paragraph 53 of its submission, the CFMEU endeavours to rely upon the decision of the Commission in the two year review to argue that no changes are warranted to the Joinery Award. However, the following extract from the Commission's Preliminary Jurisdictional Issues Decision highlights that the 4 yearly review is broader in scope than the two year review and the statutory frameworks governing those the reviews are different: (emphasis added)

> [19] The Review is broader in scope than the Transitional Review of modern awards completed in 2013 (the Transitional Review). The legislative context for the Transitional Review was principally set out in Item 6 of Schedule 5 to the 9 the Transitional Act. A preliminary decision issued in June 2012 as part of the Transitional Review set out the scope and legislative context of that review. The Full Bench explained how the Transitional Review would differ from the 4 yearly review of modern awards as follows:
>
> > "[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The [Transitional] Review is a "one off" process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the [Transitional] Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:
> >
> > > "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . ."
> >
> > [99] To summarise, we reject the proposition that the [Transitional] Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the [Transitional] Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this [Transitional] Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome . . ." [10]

87. At paragraph 55 of its submission, the CFMEU takes issue with the assumption that Ai Group made that her Honour SDP Drake in her January 2014 decision in s.160 proceedings regarded shift rates as being *"penalties"* for the purposes of the phrase *"applicable allowances, loadings and penalties"* in clause 32.2. The assumption is a reasonable one because rates of pay are obviously not

[10] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [19].

"loadings" or *"allowances".* In any event, nothing much turns on the issue for the purposes of these proceedings. For the purposes of the current proceedings, the key issue is that the s.160 proceedings before SDP Drake in 2013/14, only dealt with the narrow issue of whether or not clause 32.2 is ambiguous or uncertain. Her Honour did not consider whether the provision was consistent with the modern awards objective. This is obvious from SDP Drake's decision and the fact that Ai Group's application was made under s.160 of the Act and not under s.157.

88. In paragraphs 55 to 57 of its submission, the CFMEU endeavours to argue that under the pre-modern *National Joinery and Building Trades Products Award 2002* (**Joinery Award 2002**) employees were entitled to shift rates and leave loading when on annual leave. This is not correct.

89. Clause 30.7 of the Joinery Award 2002 stated:

> **30.7 Payment for Period of Leave**
>
> **30.7.1** Each employee, before going on leave, shall be paid in advance the wages which would ordinarily accrue to the employee during the currency of the leave.
>
> **Annual Leave Loading**
>
> **30.7.2** In addition to the payment prescribed in 30.7.1, an employee shall receive during a period of annual leave a loading of 17.5 per cent calculated on the rates, loadings, and allowances prescribed by clauses 17, 19.1 and 19.2 and leading hand rates as prescribed by clause 17.3 if applicable. The loading prescribed above shall also apply to proportionate leave on lawful termination.

90. It can be seen from clause 30.7.1 in the Joinery Award 2002 that an employee was entitled to receive their ordinary *"wages"* while on annual leave. In the award, "wage rates" were dealt with in clause 17 (Classifications and wage rates). Shift work, including the relevant penalties, was dealt with in clause 29; there was no reference to *"wages"* in clause 29.

91. In its submission, the CFMEU makes a creative attempt to argue that the term *"wages"* in clause 30.7.1 of the Joinery Award 2002 included shift allowances. The basis of this creative argument is as follows. First, the CFMEU highlights that the term *"rates of pay"* in clause 17.1.1 (Wage rates) was defined as the base award rate in clause 17.1.2 plus where applicable the leading hand

allowance in clause 17.4, the industry allowance in clause 19.1 and the tool allowance in clause 19.2. Second, the CFMEU argues that the term *"rate of pay for afternoon or night shift"* in clause 29.4 means the same as the term *"rate of pay"* in clause 17.1.1. A cursory reading of the two clauses highlights that the term *"rate/s of pay"* in the two clauses has a completely different meaning. In one clause the term is defined to only include the base award rate plus leading hand, industry and tool allowances. In the other clause, the term is used to set out the shift rates payable for afternoon and night shift.

92. If clause 30.7.1 in the Joinery Award 2002 used the term *"rate of pay",* rather than the term *"wages",* the CFMEU would have at least had a half-credible argument that the key pre-modern award may have required the payment of shift allowances while on annual leave. However, given that clause 17.1 (Wage rates) defines wages in a manner that does not include shift allowances, such half-credible argument does not exist.

93. Clause 57 of the CFMEU's submission clarifies that the CFMEU accepts the relevance of clause 17.1.1 of the Joinery Award 2002 in discerning the meaning of the term *"wages"* in clause 30.7.1. Accordingly, given that *"wages"* was defined in clause 17.1.1 as excluding shift allowances, Ai Group's argument that the term *"wages"* in clause 30.7.1 did not include shift allowances should be accepted by the Commission.

94. Regardless of the interpretation of the relevant clauses in the Joinery Award 2002, the provisions of the current award are inconsistent with the modern awards objective.

95. In paragraph 60 of its submission, the CFMEU misrepresents Ai Group's argument about the interpretation of the provisions of the current award. In this paragraph the CFMEU states:

> 60. The AIG are also incorrect in their interpretation of the award. The annual leave loading of 17.5% is not calculated on the amount that includes the shift loading/allowances. The loading is not applied to the shift rate contained in clause 28.3(d). Instead it is applied to the specific minimum wage rates, loadings and allowances prescribed by clauses 18, 19, 20, 21, 22, 24.1(b),(c) and (d) as applicable, and 24.1(a) if applicable.

96. In our submission of 20 September 2016, Ai Group expressed the following view about the interpretation of the current award, which aligns with the interpretation expressed by the CFMEU in the above paragraph:

> 115. It appears to be beyond contention that the annual leave loading in subclause 32.3 is to be calculated on a rate of pay which does not include shift loading because this subclause specifically states that the 17.5% is calculated on the "minimum wages, loadings and allowances prescribed by" the following clauses:
>
> - Clause 18 – Classifications and minimum wages;
> - Clause 19 – Apprentice minimum wages;
> - Clause 20 – Adult apprentice minimum wages;
> - Clause 21 – Trainee minimum wages;
> - Clause 22 – Supported wage system;
> - Clauses 24.1(b), (c) and (d) as applicable;
> - Clause 24.1(a) – leading hand rates, if applicable
>
> 116. Therefore, the amount payable under clause 32.3 (Annual leave loading), that is required to be added to the wage rate that employees are entitled to be paid under clause 32.2 (Payment for period of annual leave), is arrived at by calculating 17.5 per cent of the applicable amounts in clauses 18, 19, 20, 21, 22, 24.1(b), (c) and (d), and 24.1(a). This amount is entitled the *"Annual leave loading"* and it does not include shift loadings because these are found in clause 28, which is not one of the clauses specified in clause 32.3 (Annual leave loading).

97. For the reasons identified in our submission of 20 October 2016, the Joinery Award should be varied in the manner sought by Ai Group. These reasons include:

- The proposed variation would broadly align the terms of the Joinery Award with the approach adopted within many other major awards which require employers to pay the greater of either the 17.5 per cent annual leave loading or the shift allowances. This includes, for example, the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Clerks Private Sector Award 2010*.

- The proposed variation would align the entitlements with those in the main pre-modern award on which the Joinery Award was based, i.e. the Joinery Award 2002.

- The current terms of the Joinery Award governing the payment of annual leave and annual leave loading impose an unjustifiable and unreasonable cost upon employers.

- The current terms of the Joinery Award exceed a standard that could be said to represent a necessary element of a fair and relevant minimum safety net of terms and conditions, as contemplated by the modern awards objective. Although awards can supplement the NES, the particularly generous provisions of the Joinery Award are not "necessary", in the relevant sense, particularly given that the legislative element of the safety net determined by Parliament only mandates that employees receive their base rate of pay whilst accessing annual leave.

- The current terms of the Award exceed a standard that could be said to comprise "a fair and relevant minimum safety net of terms and conditions, as contemplated by the modern awards objective. An award term that is unreasonably and unjustifiably generous to employees cannot be regarded as forming a valid component of a *"fair* and relevant minimum safety net of terms and conditions", as contemplated by s.134(1). The notion of *'fairness'* contemplated in s.134(1) is to be assessed from the perspective of employers and employees.

- The following mandatory considerations specified in s.134(1) weigh in favour of granting the proposed variation:

    - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and

    - the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g)).

- There is no justification arising from the characteristics of employers or employees covered by the Joinery Award that would render the current very onerous annual leave provisions necessary to meet the modern awards objective.

- There is no broader relevant justification for a minimum safety net of terms and conditions delivering employees on annual leave both very high shift allowances and a separate annual leave loading. This traverses well beyond the traditional concerns of the Commission relating to the potential hardship faced by employees who may receive less than their normal rate at work when accessing annual leave.[11]

[11] The Annual Leave cases 1971, 144 CAR 528 at 534.