

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission
Payment of Wages
(AM2016/8)

20 September 2016

Ai
GROUP

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

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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 requiring the filing of written submissions and any supporting evidence by parties seeking to vary the payment of wages term in any modern award by 20 September 2016.
2. The Australian Industry Group (**Ai Group**) has proposed the following award 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* (**FBT Award**), the *Electrical, Electronic and Communications Contracting Award 2010* (**Electrical Contracting Award**), 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 support of each of the aforementioned proposed variations.
4. This submission also addresses various additional issues raised in the Commission's Statement of 8 September 2016 ([2016] FWCFB 6401).

2. THE STATUTORY FRAMEWORK

5. The matters here before the Commission are to be considered in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).
6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
7. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).
8. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.
9. We later address each element of the modern awards objective with reference to the variations proposed for the purposes of establishing that, having regard to s.138 of the Act, they should be made.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

10. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*¹ provides the framework within which the Review is to proceed.

11. The Full Bench emphasised that the extent to which a proponent must advance a merit case in support of a proposed change will depend on the circumstances:

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. 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.²

12. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

"When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq."

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (Cetin):

"Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

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

² *Ibid* at [23].

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.³

13. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated “as a matter of significance” and that “no particular primacy is attached to any of the s.134 considerations”. The Commission identified its task as needing to “balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”:

[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.⁴

³ Ibid at [24] – [27].

⁴ Ibid at [36].

4. TIMING OF PAYMENT ON TERMINATION OF EMPLOYMENT – Ai GROUP’S PROPOSED VARIATION

4.1 THE PROPOSED VARIATION

14. Some awards contain provisions that deal expressly with the payment of monies owing on termination of employment. In so doing, they may impose a timeframe within which the requisite payment is to be made. Ai Group has identified nine awards containing such a provision that we seek to have varied:

- the *Business Equipment Award 2010* (**Business Equipment Award**);
- the FBT Award;
- the *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award**);
- the *Horticulture Award 2010* (**Horticulture Award**);
- the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);
- the *Road Transport and Distribution Award 2010* (**Road Transport Award**);
- the *Road Transport (Long Distance Operations) Award 2010* (**Long Distance Award**);
- the *Storage Services and Wholesale Award 2010* (**Storage Award**);
and
- the *Wine Industry Award 2010* (**Wine Award**).

15. The relevant award terms presently in operation vary. Some require that payment is to be made immediately, without exception.⁵ Some require that payment must be made on the day of termination or forwarded by the following working day.⁶ In so doing, certain awards specify that where payment is made by the following day, it is to be by post.⁷ One enables payment to be made as soon as reasonably practicable and within two working days after termination.⁸
16. In each instance, the variation sought by Ai Group is designed to enable payment to be made upon termination of employment in accordance with the usual pay cycle if the relevant payment is made via EFT. Where payment is made by any other method, the existing provisions, which we have earlier described, would continue to operate.
17. The precise changes sought are identified in the draft determinations found at **Attachment A** to this submission. Further, the table at **Attachment B** provides a summary of Ai Group's proposed variations with reference to the relevant provisions of each award that are currently in operation.
18. The variations are sought on the following primary bases:
 - That the current provisions are unfair to employers because they impose additional employment costs and create a regulatory burden;
 - That the current provisions are irrelevant, having regard to modern payroll practices by virtue of which employees are now primarily paid by EFT;
 - That the current provisions are out of step with the vast majority of modern awards;

⁵ The Road Transport Award and the Long Distance Award.

⁶ The Business Equipment Award; the Horticulture Award; the FBT Award; the Graphic Arts Award; the Manufacturing Award and the Wine Award.

⁷ The Business Equipment Award; the Horticulture Award and the Manufacturing Award.

⁸ The Storage Award.

- That the proposed provisions encourage flexibility and modern work practices;
- That the proposed provisions are necessary to ensure that the nine awards identified are achieving the modern awards objective.

4.2 THE STATUTORY FRAMEWORK

19. We have earlier set out, in general terms, the statutory framework within which this proposal is pursued and the Commission’s approach to the Review. We do not repeat those submissions here.
20. We note that whilst s.323 of the Act deals with the frequency of payment, it does not impose a legislative requirement that monies due to an employee upon termination be paid on the date of termination.
21. Section 323 forms part of Part 2-9, Division 2 which is headed ‘Payment of wages’. It states:

323 Method and frequency of payment

(1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:

- (a) in full (except as provided by section 324); and
- (b) in money by one, or a combination, of the methods referred to in subsection (2); and
- (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

(2) The methods are as follows:

(a) cash;

(b) cheque, money order, postal order or similar order, payable to the employee;

(c) the use of an electronic funds transfer system to credit an account held by the employee;

(d) a method authorised under a modern award or an enterprise agreement.

(3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

Note: This subsection is a civil remedy provision (see Part 4-1).

22. To the extent that s.323 deals with the timing and frequency of payment, it simply requires that an employer must pay an employee amounts payable to the employee in relation to the performance of work at least monthly. The proposed term is in no way contrary to s.323 of the Act.

4.3 SECTION 138 AND THE MODERN AWARDS OBJECTIVE

23. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).
24. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

A Fair Safety Net

25. The notion of ‘fairness’ in s.134(1) is not confined in its application to employees. Consideration must also be given to the fairness or otherwise of award obligations on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a fair and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.⁹

26. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the *Workplace Relations Act 1996 (WR Act)*. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. ...¹⁰

27. The operation of the current provisions is unfair to employers. It mandates the payment of a potentially significant sum and requires an employer to make arrangements to meet this financial obligation within a very limited period of time after an employee’s employment is terminated. The additional costs incurred and regulatory burden borne by an employer due to the need to administer an additional pay run pursuant to the current clauses is also unfair.

⁹ 4 yearly review of modern awards [2015] FWCFB 3177 at [109].

¹⁰ *Re Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1 at [11].

28. The termination of an employment relationship may also be brought about by an employee's decision to resign. It is not fair that an employer is required to make the relevant payment with little or no notice. Where an employee terminates the employment relationship without any prior notice or indication of his or her intention to do so, an employer is presently put to the task of making arrangements to make final payments to that employee within a very limited period of time, irrespective of the method of payment utilised. Self-evidently, this is not a fair or reasonable outcome for employers given that they are not able to plan or pre-arrange for the payment that must be made.

A Relevant Safety Net

29. The current provisions that Ai Group seeks to vary are antiquated and fail to take into account modern payroll systems. Most employers now pay their employees by EFT. The requirement imposed by the provision is no longer relevant.
30. Consideration of various claims made in respect of annual leave in the context of the Review was the subject of a recent Full Bench decision. We refer in more detail below to one of the claims there determined. In the interim however, we simply note that the Commission in those proceedings acknowledged the need to update modern awards in light of the increased incidence of payments by EFT and in doing so, relied upon evidence called by Ai Group and other employer interests as to the significant proportion of employers who no longer pay their employees by cash, cheque or some other non-electronic method: (emphasis added)

[436] The existing award provisions which require annual leave to be paid prior to taking leave do not appear to have been the subject of any detailed arbitral consideration. It is likely that they simply reflect the position as it was in some pre-modernised awards and in state and territory legislation. During the award modernisation process these provisions were then simply translated into the existing 51 modern awards which are the subject of the Employer Group's claim, without any consideration of the merits of the provisions.

[437] Modern award terms requiring the payment of annual leave at or prior to the commencement of leave relate back to a time when employees were predominantly paid by either cash or cheque, usually with an associated requirement to attend the workplace to receive payment. In such circumstances a requirement for the payment

of annual leave at the commencement of the leave makes sense—it avoids the need for the employee to attend work (during their annual leave) simply for the purpose of collecting their pay. But the question is whether such a provision is still relevant in contemporary circumstances.

[438] Questions 18–21 of the Employer Survey are directed at this claim. Question 18 provided as follows:

“18. Do you pay any of your permanent employees by cash or cheque (or some other non-electronic transfer method) on a regular basis?”

[439] Some 3166 employers (about 85 per cent of all responses) answered no to this question (528 answered yes and 19 were unsure). Hence a substantial majority of respondents pay their employees by EFT. ...¹¹

31. The Commission decided to alter awards that presently require that payment for a period of annual leave be made prior to that leave commencing. Employers are now permitted to pay an employee by EFT during their usual pay cycle whilst on annual leave. The Full Bench determined that: (emphasis added)

[445] The variation of the relevant modern awards will ensure that each of these modern awards provides a “fair and *relevant* minimum safety net”. The variations will ensure that these modern awards are “relevant” to the needs of the modern workplace.¹²

32. The rationale underpinning the relevant award terms as presently crafted can be understood in their historical context, whereby a significant proportion of employees were paid by cash. If such an employee were to be paid outstanding money due in the next pay cycle, the employee would need to attend the workplace to collect this payment, which admittedly puts the employee to some inconvenience.
33. With the very widespread adoption of payment by EFT, that rationale becomes far less relevant. Payment can be made by an employer via EFT on termination in the same way that wages would ordinarily be paid. EFT allows employees to access their funds at banks, other financial institutions, ATMs and online at any time. Once payment is made, the funds could be accessed by the employee within a very short period of time, if not immediately.

¹¹ 4 yearly review of modern awards – Annual leave [2015] FWCFB 3406 at [436] – [439].

¹² 4 yearly review of modern awards – Annual leave [2015] FWCFB 3406 at [445].

34. An acknowledgement of the inherent differences arising from payment by cash and by EFT can be seen in the terms of some of the awards identified. For instance, clause 20.4 of the Storage Award deals with circumstances in which pay day falls on a day that the employee is to take off. The clause explicitly states it applies only where an employee is paid wages by cash or cheque, in recognition of the fact that employees paid by EFT are able to access payments made without needing to be physically present at the workplace.
35. The variation proposed will remedy the archaic and inappropriate effect of the existing provision. The Review provides a timely opportunity to modernise award terms such as these. The proposed provisions should be adopted as they better reflect contemporary payroll practices and the decreasing relevance of cash payments made to an employee whilst they are physically at the workplace.
36. It is noteworthy that the very vast majority of modern awards do not include an express requirement that payment upon termination be made within a specific timeframe. Of the 122 modern industry and occupational awards presently in operation, the following 86 do not contain such a clause:
- the *Aboriginal and Community Controlled Health Services Award 2010*;
 - the *Air Pilots Award 2010*;
 - the *Aircraft Cabin Crew Award 2010*;
 - the *Airline Operations – Ground Staff Award 2010*;
 - the *Airport Employees Award 2010*;
 - the *Alpine Resorts Award 2010*;
 - the *Aluminium Industry Award 2010*;
 - the *Ambulance and Patient Transport Industry Award 2010*;
 - the *Amusement, Events and Recreation Award 2010*;

- the *Animal Care and Veterinary Services Award 2010*;
- the *Aquaculture Industry Award 2010*;
- the *Banking, Finance and Insurance Award 2010*;
- the *Book Industry Award 2010*;
- the *Broadcasting and Recorded Entertainment Award 2010*;
- the *Car Parking Award 2010*;
- the *Cement and Lime Award 2010*;
- the *Cemetery Industry Award 2010*;
- the *Cleaning Services Award 2010*;
- the *Clerks – Private Sector Award 2010*;
- the *Coal Export Terminals Award 2010*;
- the *Commercial Sales Award 2010*;
- the *Concrete Products Award 2010*;
- the *Contract Call Centres Award 2010*;
- the *Corrections and Detention (Private Sector) Award 2010*;
- the *Cotton Ginning Award 2010*;
- the *Dredging Industry Award 2010*;
- the *Educational Services (Post-Secondary Education) Award 2010*;
- the *Educational Services (Schools) General Staff Award 2010*;
- the *Educational Services (Teachers) Award 2010*;
- the *Electrical Power Industry Award 2010*;

- the *Fast Food Industry Award 2010*;
- the *Fire Fighting Industry Award 2010*;
- the *Fitness Industry Award 2010*;
- the *Funeral Industry Award 2010*;
- the *Gardening and Landscaping Services Award 2010*;
- the *Gas Industry Award 2010*;
- the *General Retail Industry Award 2010*;
- the *Hair and Beauty Industry Award 2010*;
- the *Health Professionals and Support Services Award 2010*;
- the *Higher Education Industry-Academic Staff-Award 2010*;
- the *Higher Education Industry-General Staff-Award 2010*;
- the *Hospitality Industry (General) Award 2010*;
- the *Hydrocarbons Field Geologists Award 2010*;
- the *Hydrocarbons Industry (Upstream) Award 2010*;
- the *Joinery Award*;
- the *Journalists Published Media Award 2010*;
- the *Labour Market Assistance Industry Award 2010*;
- the *Legal Services Award 2010*;
- the *Live Performance Award 2010*;
- the *Local Government Industry Award 2010*;
- the *Mannequins and Models Award 2010*;

- the *Marine Tourism and Charter Vessels Award 2010*;
- the *Marine Towage Award 2010*;
- the *Maritime Offshore Oil and Gas Award 2010*;
- the *Medical Practitioners Award 2010*;
- the *Mining Industry Award 2010*;
- the *Miscellaneous Award 2010*;
- the *Oil Refining and Manufacturing Award 2010*;
- the *Pest Control Industry Award 2010*;
- the *Pharmacy Industry Award 2010*;
- the *Port Authorities Award 2010*;
- the *Ports, Harbours and Enclosed Water Vessels Award 2010*;
- the *Poultry Processing Award 2010*;
- the *Premixed Concrete Award 2010*;
- the *Professional Employees Award 2010*;
- the *Quarrying Award 2010*;
- the *Racing Clubs Events Award 2010*;
- the *Racing Industry Ground Maintenance Award 2010*;
- the *Rail Industry Award 2010*;
- the *Real Estate Industry Award 2010*;
- the *Registered and Licensed Clubs Award 2010*;
- the *Salt Industry Award 2010*;

- the *Seagoing Industry Award 2010*;
- the *Security Services Industry Award 2010*;
- the *Social, Community, Home Care and Disability Services Industry Award 2010*;
- the *Sporting Organisations Award 2010*;
- the *State Government Agencies Award 2010*;
- the *Stevedoring Industry Award 2010 (Stevedoring Award)*;
- the *Sugar Industry Award 2010*;
- the *Surveying Award 2010*;
- the *Telecommunications Services Award 2010*;
- the *Textile, Clothing, Footwear and Associated Industries Award 2010*;
- the *Transport (Cash in Transit) Award 2010*;
- the *Travelling Shows Award 2010*;
- the *Water Industry Award 2010*; and
- the *Wool Storage, Sampling and Testing Award 2010*.

37. We cannot identify any considerations that warrant the adoption of a different approach in the nine awards that we have identified. There do not appear to be factors specific to businesses or the workforce engaged in the relevant industries that deem the current provisions necessary in those awards, whilst not in the 86 awards identified above.

38. The fact that provisions such as that which we now seek have not previously operated in the relevant awards should not preclude the variations from being granted. To apply that logic would undermine the purpose of such a Review and stagnate any potential for change. We respectfully concur with and adopt

Vice President Watson’s comments (in his dissenting decision) regarding a claim made by employers covered by the Stevedoring Award to reduce penalty rates: (emphasis added)

[71] Having put the current penalty rate regime in issue it is incumbent on this Commission to consider the merit of the award penalty payments based on contemporary circumstances. The legislative task does not allow historical inertia to be a determinative factor, or to base decisions on the identity of applicants and supporters. Rather, the Commission must ensure that the award penalty rates represent a fair and relevant minimum safety net having regard to the various elements of the modern awards objective.

...

[76] As various Full Bench decisions make clear, the 4 yearly review is broader than the 2 year review and broader than other mechanisms under ss. 157 and 160 to seek changes to awards. The 2 year review process nevertheless permitted changes to award provisions that did not provide a fair and relevant minimum safety net. For example in relation to a review of standard award flexibility clauses as part of the 2 year review a Full Bench said:

“[211] The variations proposed are necessary to remedy the issues identified in the Transitional Review and to ensure that the model award flexibility term and modern awards are operating effectively, without anomalies or technical problems arising from the award modernisation process. We are also satisfied that the variations proposed are ‘necessary’ (within the meaning of s.138) to achieve the modern awards objective and will ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions having regard to the matters set out at paragraphs 134(1)(a)-(h). In particular, the variations proposed will provide flexible modern work practices and reduce regulatory burden while taking into account the needs of the low paid and making the model flexibility term simpler and easier to understand.”

[77] The Full Bench reviewing provisions regarding apprentice provisions of modern awards also considered whether the current provisions of awards represented a fair and relevant minimum safety net of terms and conditions of employment by reference to the factors in the modern awards objective. In various instances it was found that the provisions should be varied based on merit considerations including fairness, equity and other grounds. It is clear from the decision that the task involved a broad judgement of the type described, without applying a barrier that favours the retention of the status quo.”¹³

¹³ Re *Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [71] and [76] – [79].

39. The above comments express similar sentiments to those expressed by a Full Bench of the *Commission in LCR Mining Group v CFMEU*.¹⁴ While the comments related to laws rather than industrial instruments, the sentiments were apposite:

[46].....History is riddled with support for the notion that law that remains static invariably becomes archaic. Law that impedes innovation and is resistant to change has oft been seen to result in injustice and inefficiency.

40. The variation sought would ensure that each award sought to be varied provides a relevant safety net.

Section 134(1)(a) - Relative living standards and needs of the low paid

41. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a): (emphasis added)

[310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.

[311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life, assessed in the context of contemporary norms.¹⁵

42. The term “low paid” has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.¹⁶

¹⁴ [2016] FWCFB 400.

¹⁵ *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

¹⁶ *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

43. The variations proposed by Ai Group do not detract from the maintenance of the relative living standards and needs of the low paid. The variations sought would mean that an employee can be paid money owing upon termination on their next usual pay day. The amount paid to the employee will not be altered. It merely impacts upon the timing of that payment. An employee cannot be paid later than the next pay cycle, which is when the employee would have been paid had they not been terminated.

Section 134(1)(b) - The need to encourage collective bargaining

44. We do not anticipate that the variations proposed, if made, would undermine s.134(1)(b). It appears unlikely that the relevant current award terms would of themselves provide an impetus for engaging in the process of collective bargaining. As such, we would consider this a neutral consideration in this matter.
45. In any event, the retention of inflexible or costly provisions should not be justified on the basis that they might provide a 'bargaining chip' and as a result, encourage enterprise level negotiations:

[229] The variations concerning cashing out of annual leave are vehemently opposed by various unions and the ACTU. The ACTU is also strongly opposed to the Ai Group's application to vary the award flexibility clause. The ACTU submits that it cannot be said that all awards are not operating effectively, contain anomalies or do not meet the modern awards objective without the variation it seeks to the award flexibility clause. Some unions oppose the variations because it would remove an incentive for employers to make enterprise agreements. I note in this regard that the concept of retaining inflexibilities in awards to provide a bargaining chip for making enterprise agreements was discredited during the award simplification process from the late 1990s.¹⁷

Section 134(1)(c) - The need to promote social inclusion through increased workforce participation

46. This is a neutral consideration in this matter.

¹⁷ *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [229], citing as an example *Re BHP Coal and others* (Print S6142).

Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

47. We have earlier made submissions regarding the increased incidence of EFT payments and the need to update award terms such that they reflect modern payroll practices. To this end, the variation proposed is consistent with s.134(1)(d).

48. We note that the Full Bench dealing with the annual leave common issues held that the variation there granted in respect of payment by EFT during a period of annual leave “reflects flexible modern work practices and, accordingly, the insertion of such a term in modern awards will promote such practices, consistent with s.134(1)(d)”.¹⁸ We respectfully submit the claim now before the Commission invites the application of the same logic.

Section 134(1)(da) - The need to provide additional remuneration

49. This is a neutral consideration in this matter.

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

50. This is a neutral consideration in this matter.

Section 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden

51. Where money owing to an employee is paid upon termination by EFT, the current provisions require an employer to administer a separate pay run. This necessarily imposes additional costs on the employer by way of transactional fees charged by the bank or financial institution.

52. In addition, time spent by staff members responsible for payroll also comes at a cost to the business. We note of course that in certain small or medium enterprises, payroll personnel may not be engaged on a full-time basis. An

¹⁸ [2015] FWCFB 3406 at [446].

award term that nonetheless requires payment to be made upon termination (or within a very limited timeframe thereafter) in circumstances where the relevant payroll personnel is not otherwise required to work, imposes a clear operational difficulty for the business. Assuming that the payroll employee can be required to attend work for the purposes of processing the necessary payment, this would give rise to a clear additional labour cost.

53. The proposition that businesses can engage in enterprise bargaining to circumvent inflexible provisions such as these would be an entirely deficient response. Indeed the very businesses that are most likely impacted by the current provisions are those that also face various difficulties associated with enterprise bargaining, which may in fact preclude them from doing so. This was acknowledged by the annual leave common issues Full Bench:

[287] ... In this context we acknowledge the force of ACCI's submission that the reluctance of particular businesses to collectively bargain can arise from various factors including "small business employers lacking the expertise and resources to implement an enterprise agreement".¹⁹

54. During the two year review of modern awards, the Commission considered an application to vary several awards such that if an employee was paid by EFT, their employer could make payments during the normal pay cycle whilst the employee was on a period of annual leave, rather than an upfront lump sum payment before the employee commenced leave. While the Full Bench declined to make the variation based on the limited scope of that review, the Commission expressly contemplated the possibility of a future variation.²⁰
55. The variation there sought is analogous to what is now proposed by Ai Group. For that reason, observations made by Vice President Watson in his dissenting decision regarding the cost and regulatory impact imposed on employers who are required to pay an employee for their period of annual leave prior to that leave commencing, are apposite. His Honour stated: (emphasis added)

¹⁹ *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 at [287].

²⁰ *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [145] – [147].

[231] A further example relates to applications to modify the timing for making annual leave payments. It is proposed by ABI that the traditional obligation to make payment for annual leave in advance of the leave being taken should be modified in the case of an employee paid by electronic fund transfer so that payment is made on the employee's usual pay day. The change is intended to address the changes in cash management now common in the Australian workforce and remove an administrative burden of requiring employers to run an additional manual pay for employees who take annual leave. I consider that the change furthers the modern awards objectives of reducing employment costs and regulatory burdens without a significant disadvantage to employees. If employees receive their holiday pay on their normal payday, and can access that pay by withdrawals from their bank account, the situation cannot be described as unfair. Such a provision, developed in response to changed circumstances ensures that the award provides a fair and relevant safety net.

[232] The matter has not been considered previously because it has not been raised previously. The contention that the novelty of the proposal undermines the case for its consideration is not consistent with the notion of a review and is a recipe for awards to stagnate despite changes in relevant circumstances. It is only now, with changed practices for cash management combined with an ever-widening spread of EFT payment of wages, that opportunities for efficiencies of this nature become feasible without any real detriment to employees. In my view an appropriate case has been made out for the variation as part of this review.²¹

56. The aforementioned variation sought by ABI during the two year review was again proposed by Ai Group and other employer interests in the context of the annual leave common issues proceedings during this Review. In granting our claim, the Full Bench accepted that the evidence presented established that “a significant number of [the 3165] survey respondents said that they were charged extra fees for processing payroll outside their usual pay period”.²² In considering the modern awards objective, the Commission acknowledged that:

[447] Section 134(1)(f) is also relevant in that the variations will reduce employment costs and the regulatory burden on business.²³

57. The increased regulatory burden resulting from a clause such as the one in question is not an insignificant matter. In a recent case concerning the *Timber Industry Award 2010*, the CFMEU there sought to vary an award provision that presently requires the payment of a penalty in the event of a late payment of wages by cash or cheque. The CFMEU's claim, if successful, would have extended the application of the provision to employees paid by EFT. The union

²¹ *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [231] – [232].

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

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

was unsuccessful in its pursuit for this variation. One of the considerations that weighed against granting the claim was the additional costs and regulatory burden it would create for employers if and when they were required to pay the penalty:

[123] Against those considerations, the variation sought would increase employment costs and an increased regulatory burden through the added payments required in the event of late payment, in some circumstances where an employer has done all that they can to ensure that payment will be accessible to employees when they are due. Even where the payment obligation did not arise as a result of the proposed clause 25.8(c), an employer would nonetheless be obliged to make some payment and undertake the administrative actions necessary to do so, even in circumstances in which late payment occurred for reasons beyond the employer's control.²⁴

58. Whilst we accept that the decisions cited above have been made in the context of claims that are not identical to that which we seek, they give force to our argument that the Commission should not lightly dismiss the impact on business caused by the cost and regulatory burden of subclause 20.3.

Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards

59. Our proposal will ensure that the Award is simple and easy to understand. The proposed provisions are clear and unambiguous. We cannot foresee any consequence arising from our claim that would undermine s.134(1)(g).

Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

60. To the extent that the proposed clause is consistent with s.134(1)(b), (d), (f) and (g), it may also have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

²⁴ [2015] FWCFB 2856 at [123].

4.4 CONCLUSION

61. For the reasons here advanced, we commend the variation proposed to the Commission.

5. TIMING OF PAYMENT ON TERMINATION OF EMPLOYMENT – OTHER AWARDS

62. Attached to the Commission's statement of 8 September 2016 are draft determinations that propose changes to 25 awards. The variations proposed are in a similar vein to that sought by Ai Group. That is, in general terms, they would enable an employer to pay an employee by EFT upon termination in accordance with their usual pay cycle.

63. Of the awards identified by the Commission, Ai Group has an interest in the following:

- the *Aged Care Award 2010*;
- the *Asphalt Industry Award 2010*;
- the *Black Coal Mining Industry Award 2010*;
- the *Building and Construction General On-Site Award 2010*;
- the *Dry Cleaning and Laundry Industry Award 2010*;
- the *Electrical Contracting Award*;
- the *Horse and Greyhound Training Award 2010*;
- the *Market and Social Research Award 2010*;
- the *Meat Industry Award 2010*;
- the *Mobile Crane Hiring Award 2010*;
- the *Nurses Award 2010*;

- the *Passenger Vehicle Transportation Award 2010*;
- the *Pharmaceutical Industry Award 2010*;
- the *Plumbing and Fire Sprinklers Award 2010*;
- the *Seafood Processing Award 2010*;
- the *Timber Industry Award 2010*;
- the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*;
- and
- the *Waste Management Award 2010*.

64. For the reasons articulated earlier in this submission, Ai Group generally supports the adoption of the variations proposed to the awards above. However, we make the following brief observations regarding the specific terms of the clauses set out in the Commission's draft determinations in respect of those awards.

The 'Wages' Due

65. The matter we here address arises in the following awards:

- the *Aged Care Award 2010*;
- the *Building and Construction General On-Site Award 2010*;
- the *Dry Cleaning and Laundry Industry Award 2010*;
- the *Horse and Greyhound Training Award 2010*;
- the *Nurses Award 2010*;
- the *Passenger Vehicle Transportation Award 2010*;
- the *Plumbing and Fire Sprinklers Award 2010*;
- the *Timber Industry Award 2010*; and

- the *Waste Management Award 2010*.

66. In each of these awards, the current provision dealing with the timing of payment on termination refers to the amount due in various different ways, including for instance “all money due”²⁵, “monies”²⁶, “all wages and other monies”²⁷ or “all wages and holiday pay”²⁸.

67. Despite this, the new provisions proposed to be inserted uniformly refer to the “wages due”. That is, they would enable an employer to pay any “wages due” by EFT in the usual pay cycle.

68. We are concerned that the use of the terminology “wages due” may give rise to confusion as to whether the provision applies to all money owing on termination or whether it is confined in its application to certain components of the amount due. We note that the *Nurses Award 2010* presently differentiates between wages due and other monies due upon termination.

69. For the purposes of ensuring consistency and clarity, we submit that the provisions proposed by the Commission, in respect of the aforementioned awards, should be drafted as follows:

- the *Aged Care Award 2010*;

(b) Despite clause 17.3(a), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee’s account in accordance with the usual pay cycle.

- the *Building and Construction General On-Site Award 2010*;

(b) Despite clause 31.4(a) if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee’s account in accordance with the usual pay cycle.

²⁵ See for example the *Waste Management Award 2010*;

²⁶ See for example the *Plumbing and Fire Sprinklers Award 2010*.

²⁷ See for example the *Nurses Award 2010*.

²⁸ See for example *Horse and Greyhound Training Award 2010*.

- the *Dry Cleaning and Laundry Industry Award 2010*;

(b) Despite clause 19.3(a), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Horse and Greyhound Training Award 2010*;

(b) Despite clause 18.1(a), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Nurses Award 2010*;

(b) Despite clause 18.3(a), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Passenger Vehicle Transportation Award 2010*;

19.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all moneys due to the employee within two working days unless the employee is normally paid by electronic funds transfer, in which case **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Plumbing and Fire Sprinklers Award 2010*;

(c) Despite clause 27.4(a) and (b), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Timber Industry Award 2010*; and

(c) Despite clause 25.3(a), if the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

- the *Waste Management Award 2010*.

(b) If the employee is normally paid by electronic funds transfer, **wages money** due may be transferred into the employee's account in accordance with the usual pay cycle.

70. This is consistent with the approach adopted by Ai Group in crafting the variations that it seeks.

‘Payment by post’

71. In response to the question raised at paragraph [8](i)(a) of the Commission’s Statement of 8 September 2016, in our view it would be envisaged that payments sent via post would be made by cheque.

The Plumbing and Fire Sprinklers Award 2010

72. The reference to “next working day” in clause 27.4(a) of the draft determination should be changed to “within two working days” as provided for in clause 27.4 of the current award.
73. Also, the waiting time provision in clause 27.4 is inconsistent with the modern awards objective and should be removed, in particular, due its adverse impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)). The decision of a Full Bench of the Commission in *4 yearly review of modern awards - Timber Industry Award 2010* [2015] FWCFB 2856 supports the removal of the provision given that the provision has some similarities to the clause that the CFMEU was proposing in those proceedings.

The Vehicle Manufacturing, Repair, Services and Retail Award 2010

74. Clause 24.4 of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* is in the following terms: (emphasis added)

24.4 Payment of wages on termination

(a) Upon termination of the employment, the employer will pay wages due to an employee:

(i) on the day of such termination;

(ii) by forwarding such wages to the employee on the next working day; or

(iii) at the employer’s place of business on a stated day not later than seven days after such termination. If the employer requires the employee to visit such place of business to collect wages then, in addition to the amount of moneys due, the employer will pay the employee an additional four hours’ ordinary pay.

Except that where an employee abandons his or her employment or the employee’s employment is terminated without notice for serious and wilful misconduct the employer will pay the wages due to the employee within two business days (not including a Saturday, Sunday or public holiday) of the termination.

(b) An employer may deduct from monies due to an employee such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.

75. The Commission has proposed the insertion of the following new clause 24.4(a)(iv):

(iv) if the employee is normally paid by electronic funds transfer, wages due may be transferred into the employee's account in accordance with the usual pay cycle.

76. The effect of the proposed provision would be to enable wages owing to be paid by EFT in the usual pay cycle, however it is not clear that such a provision operates notwithstanding clauses 24.4(a)(i), (ii) and (iii) or the paragraph that follows (underlined above). Without this being made clear, the proposed clause is potentially inconsistent in its terms with the aforementioned elements of clause 24.4.

77. Accordingly, the proposed clause 24.4(a)(iv) should instead be inserted as a new clause 24.4(c):

(c) Despite clause 24.4(a), if the employee is normally paid by electronic funds transfer, ~~wages money~~ due may be transferred into the employee's account in accordance with the usual pay cycle.

6. ANNUAL LEAVE LOADING – FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2010

78. Ai Group has proposed variations to clause 34.4(c) of the FBT Award. The change is supported by the AMWU. We understand that the variation is not opposed by any party.
79. Given that the variation is being advanced with the consent of the other major interested parties, and that it reflects a change that has been made to an almost identical provision in the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)* we propose to only briefly set out the relevant reason for the change, and the relevant history of the FBT Award. Ai Group would seek to advance more detailed submissions in the event that the Full Bench has any unforeseen concerns or reservations relating to the proposed variation.
80. Ai Group prepared a draft determination and this was filed on 19 July 2016. It proposes the deletion of clause 34.4(c) and the insertion in lieu thereof the following:

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

81. For context, clauses 34.4 and 34.5 of the FBT Award currently provides;

34.4 Payment for period of annual leave

(a) Instead of the base rate of pay as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period.

(b) Subject to clause 34.4(c), the wages to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, including allowances, loadings and penalties paid for all purposes of the award, first aid allowance and any other wages payable under the employee's contract of employment including any overaward payment.

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

34.5 Annual leave loading

During a period of annual leave an employee must also be paid a loading calculated on the wages prescribed in clause 34.4. The loading must be as follows:

(a) Day work

An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 34.4 or the relevant weekend penalty rates, whichever is the greater but not both.

(b) Shiftwork

An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 34.4 or the shift loading including relevant weekend penalty rates, whichever is the greater but not both.

82. The variation is intended to address a potential anomaly in the wording of clause 34. The variation will also assist in ensuring that the FBT Award is simple and easy to understand.²⁹
83. In short, the variation is intended to ensure that shift loadings and weekend penalties are not paid twice. That is, it is intended to ensure the clause does not result in any unfair “double dipping.” It is also intended to ensure that the 17.5 per cent annual leave loading is not required to be calculated on a rate that already includes such amounts.
84. Clauses 34.4(a) and 34.4(b) deal with payments during annual leave. They are cast in terms which could lead to arguments that they capture shift loadings and weekend penalty rates. Clause 34.4(c) does not currently exclude such payments. Clause 34.5 deals with annual leave loading and provides that, “...*an employee must also be paid a loading calculated on the wages prescribed in clause 34.4.*” This gives rise to the possible unfair and unintended consequence of employees getting the relevant loading on top of, and in addition to, the relevant shift loadings and weekend penalties. We contend that although the wording of clause 34.5(b) suggests that this is not intended, it could be argued that such an outcome flows from a literal reading of the award clauses.

²⁹ As contemplated by s.134(1) of the FW Act

85. The variation proposed is consistent with a variation recently made to a virtually identical provision in the Manufacturing Award.³⁰ In that context the Full Bench said;

Payment for annual leave

[78] The parties have agreed that clause 31.3(c) of the Exposure Draft should be amended to remove a potential anomaly that might allow for payment of shift loadings and the annual leave loading for periods of annual leave. We agree with the proposal to remove any potential anomaly. The clause will be amended to read:

(c) Subject to clause 31.4, the employee is not entitled to payments in respect of overtime, shift loading, weekend penalty rates, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

86. In the context of the proceedings associated with variation to the Manufacturing Award, Ai Group traced the history of the provision. We contend that this history established that there was no historical justification for any “double dipping.”
87. The FBT Award should be varied in essentially the same manner as the Manufacturing Award. There is no reason for this Full Bench to adopt an inconsistent approach.
88. The history of the FBT Award supports this proposition given that the FBT Award was largely based on the Manufacturing Award and the relevant clause is substantively in the same terms.
89. When the FBT Award was being developed, the parties and the AIRC were faced with modernising awards in an industry where there were a number of major food industry awards with different union respondents. For this reason, the FBT Award was based on the Manufacturing Award, as identified in Ai Group’s Award Modernisation Stage 3 Pre-Exposure Draft Submission of 6 March 2009 (emphasis added):

“124. In developing the terms of our proposed *Food, Beverage and Tobacco Manufacturing Industry Award 2010*, Ai Group has largely based the provisions on the Modern Manufacturing Award.”

³⁰ [2015] FWCFB 7236

90. Attached to the above Ai Group submission at Annexure C was a proposed draft award. Ai Group's proposed draft award included the following provision:

35.4 Payment for period of annual leave

(a) Instead of the **base rate of pay** as referred to in s.35(1) of the NES, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period.

(b) Subject to clause 35.4(c), the wages to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, including allowances, loadings and penalties paid for all purposes of the award, first aid allowance and any other wages payable under the employee's contract of employment including any overaward payment.

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

35.5 Annual leave loading

(a) During a period of annual leave an employee must also be paid a loading calculated on the wages prescribed in clause 35.4.

(b) The loading must be as follows:

(i) Day work

An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 35.4 or the relevant weekend penalty rates, whichever is the greater but not both.

(ii) Shiftwork

An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 35.4 or the shift loading including relevant weekend penalty rates, whichever is the greater but not both.

91. The above clause is (in substantive terms) identical to what was clause 41.4(c) in the Manufacturing Award, prior to its recent amendment.
92. In its Stage 3 Award Modernisation Statement of 22 May 2009,^[1] the Award Modernisation Full Bench stated that the exposure draft for the FBT Award was largely based on Ai Group's draft award (emphasis added):

“[87] The exposure draft is largely based on that submitted by the Ai Group. However, the definition of “food, beverage and tobacco manufacturing” has been altered to reduce the potential for overlap with other modern awards and exposure drafts. Further, the draft specifically excludes those covered by the Manufacturing Modern Award and the proposed Meat Industry Award 2010, Poultry Processing Award 2010 and Wine Industry Award 2010. Our preliminary view is that the award

^[1] [2009] AIRCFB 450.

should not cover clerical employees.”

93. Accordingly, the background to why clause 34.4 was included in the FBT Award is clear. It was adopted from the Manufacturing Award, as proposed by Ai Group.
94. There is no discernible reason attributable to the characteristics of employers or employees covered by the FBT Award that would warrant a different approach to that now endorsed by the Full Bench in respect of the Manufacturing Award.
95. Accordingly, the Full Bench should vary the FBT Award in the manner proposed by Ai Group.
96. 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. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a fair and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.³¹

97. A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former *Workplace Relations Act 1996* which required the AIRC to “ensure a safety net of fair minimum wages and conditions of employment...”:

“In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups...”³²

³¹ 4 yearly review of modern awards [2015] FWCFB 3177 at [109].

³² *Re Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1 at [11].

98. It is inherently unfair for an employer to be required to pay a shift allowance or loading twice while an employee is on annual leave. Such an approach would result in employees who are on annual leave receiving much higher level of remuneration than they would receive for actually working. There is no industrial merit to employees receiving such payments. Similarly, if the 17.5 percent annual leave loading is required to be calculated on an amount that includes shift loadings/allowances, the value of the loading for a shift worker will be unfairly increased compared to that received by day workers. There is no apparent justification for this. For these reasons, the current anomalous award terms cannot be regarded as “fair”, for the purposes of s.134(1).
99. The following mandatory considerations specified in s.134(1) would 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)).
100. Ai Group acknowledges that the terminology used in the exposure drafts to identify amounts such as 'shift loadings' is still a contentious issue in the context of this Review. We have previously identified that inconsistent and problematic approaches to the use of such terms have been adopted within exposure drafts.³³ For reasons of consistency, it may be necessary to adopt different wording to that proposed in our draft determination, whilst still achieving the same intent

³³ Ai Group submission, General Issues Arising from Exposure Drafts, 31 August 2016

7. ANNUAL LEAVE LOADING – ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2010

101. In relation to the Electrical Contracting Award, Ai Group has proposed substantively similar amendments to those outlined in the previous section regarding clause 34.4(c) of the FBT Award.

102. In the draft determination filed on 19 July 2016 we proposed that clause 28.2(b) of the EECC Award be deleted and replaced with the following:

(b) Instead of the base rate of pay specified in the NES, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period, exclusive of payments in respect of overtime, shift loading, weekend penalty rates, special rates, travel and fares or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

103. We understand that the ETU, NECA, ABI, NSW Business Chamber and Master Electricians Australia agree to the proposed change. We do not understand any party to be opposed to claimed variation.

104. Clauses 28.2 and 28.4 of the Electrical Contracting Award currently provide as follows:

28.2 Payment for annual leave

(a) The NES prescribes the basis for payment for annual leave, including payment for untaken leave upon the termination of employment.

(b) Instead of the base rate of pay specified in the NES, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period, exclusive of payments in respect of overtime, special rates, travel and fares or any other payment which might have been payable to the employee as a reimbursement for expenses incurred

28.4 Annual leave loading

In addition to the payment provided for in clause 28.2, an employer is required to pay an additional leave loading as follows:

(a) Day work

When an employee takes a period of paid annual leave, the employee will be paid an annual leave loading of 17.5% of the payment under clause 28.2.

(b) Shiftwork

Where the employee would have received shift loadings had the employee not been on leave during the relevant period and such loadings would have entitled the employee to a greater amount than a loading of 17.5% of the payment under clause 28.2, then the shift loadings must be added to the rate of wage prescribed by this subclause instead of the 17.5% loading.

(c) Annual leave loading on termination

The leave loading prescribed will also apply to proportionate leave on termination but will not apply where an employee is dismissed by the employer for reasons of malingering, inefficiency, neglect of duty, misconduct or refusing duty.

105. The above provisions are substantively similar, although not identical in form, to those contained in the Manufacturing Award and FBT Award. The Electrical Contracting Award was developed in a later stage of the Part 10A Award modernisation proceedings than the Manufacturing Award.
106. The making of the Electrical Contracting Award was different to the making of the Manufacturing Award in that it was based on a draft prepared by the NECA and the CEPU.³⁴ The wording of the relevant clauses does not appear to have squarely arisen from the terms of any particular predecessor award.
107. Ai Group has not identified any detailed consideration of the contentious clause in the decisions of the AIRC made in the context of the Part 10A Award Modernisation Process.
108. In essence we submit that the variation to the Electrical Contracting Award is necessary to address an anomaly in the wording of clause 28.2 which potentially results in “double dipping”, with shift premiums being paid twice. It is also necessary to ensure that there is no unfair requirement to calculate the annual leave loading on a quantum that includes shift premiums.
109. The proposed variation would result in the same substantive outcome as has been endorsed by the Full Bench in the context of the Manufacturing Award.

³⁴ [2009] AIRCFB 50 at [45]

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

110. On 19 July 2016, Ai Group filed a draft determination which would vary the Joinery Award to delete clause 32.2(c) and insert 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.

111. Pursuant to the draft determination, clause 32.3 would also be deleted and replaced with the following provision:

- (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.

112. 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. This would broadly align the terms of the award with the approach adopted within many other major awards. In contrast, it appears that the award currently requires that both annual leave loading and applicable shift rates are included in the payment for annual leave.

113. The current terms of the award governing the payment of annual leave and annual leave loading impose an unjustifiable and unreasonable cost upon employers. They 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.

114. Subclauses 32.2 and 32.3 of the Joinery Award are currently worded as follows:

‘32.2 Payment for period of annual leave

- (a) Instead of the **base rate of pay** as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid the wages they would have received in respect of the ordinary hours the employee would have worked had the employee not been on leave during the relevant period.
- (b) Subject to clause 32.2(c), the wages to be paid must be worked out on the basis of what the employee would have been paid under this award for working ordinary hours during the period of annual leave, including applicable allowances, loadings and penalties paid for all purposes of the award, first aid allowance, if applicable, and any other wages payable under the employee’s contract of employment including any overaward payment.
- (c) The employee is not entitled to payments in respect of overtime, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

32.3 Annual leave loading

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 prescribed 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.

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).
117. In July 2016, Ai Group made an application to vary the Joinery Award under s.160 of the FW Act to clarify that the rate in clause 32.2 does not include shift rates (2013/15). Ai Group argued that clause 32.2 was ambiguous and/or uncertain.
118. In a decision of 2 January 2014,³⁵ Senior Deputy President Drake decided that clause 32.2 is not ambiguous or uncertain and that the phrase “*applicable allowances, loadings and penalties*” includes the shift rates. Her Honour relevantly stated:
- [10] Clause 32.2 (b) defines what an employee would have been paid whilst working ordinary hours as including applicable allowances, loadings and penalties under the award as well as any other wages payable under the contract of employment, including over award payments. I am satisfied that shift rates are within this definition.
119. The shift rates in clause 28.3(d) are rates of pay and are consequently not allowances or loadings. Therefore, we assume that her Honour has decided that the shift rates are “penalties” for the purposes of clause 32.2.
120. Importantly, in the s.160 proceedings Senior Deputy President Drake only dealt with the narrow issue of whether or not clause 32.2 is ambiguous or uncertain. In those proceedings, Ai Group accepted and submitted that the Commission must find that an award provision is ambiguous or uncertain, before deciding to vary a provision under s.160 on one of these bases. Her Honour did not

³⁵ [2014] FWC 32.

consider whether the provision was consistent with the modern awards objective.

121. The effect of the existing provision is that employees receive a 17.5 per cent annual leave loading on top of the shift loading. This contrasts with the provisions in numerous awards where shift workers receive either the annual leave loading or the relevant shift loading. The existing provision is particularly generous for employees, and particularly costly for employers, because the shift rates in the award are so high (e.g. 150% for afternoon shift and night shift).
122. The modern Joinery Award was primarily based on the *National Joinery and Building Trades Products Award 2002 (Joinery Award 2002)* as clarified by the Full Bench in its *Stage 2 Award Modernisation Statement*.³⁶ The relevant clause in the 2002 Award was clause 30.7:

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.

123. It can be seen that in the Joinery Award 2002, the 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.
124. Regardless of the interpretation of the relevant clauses in the Joinery Award 2002, the provisions of the existing award are inconsistent with the modern awards objective.

³⁶ [2009] AIRCFB 50 at [54].

125. 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. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a fair and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.³⁷

126. A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former *Workplace Relations Act 1996* which required the AIRC to “ensure a safety net of fair minimum wages and conditions of employment...”:

“In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups...”³⁸

127. It is inherently unfair for an employer to be required to pay a shift allowance or loading twice while an employee is on annual leave. Such an approach would result in employees who are on annual leave receiving much higher level of remuneration than they would receive for actually working. There is no industrial merit to employees receiving such payments. Similarly, if the 17.5 percent annual leave loading is required to be calculated on an amount that includes shift loadings/allowances, the value of the loading for a shift worker will be unfairly increased compared to that received by day workers. There is no apparent justification for this. For these reasons, the current anomalous award terms cannot be regarded as “fair”, for the purposes of s.134(1).

³⁷ 4 yearly review of modern awards [2015] FWCFB 3177 at [109].

³⁸ *Re Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1 at [11].

128. The following mandatory considerations specified in s.134(1) would 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)).

129. The current awards terms are out of step with approach adopted in many major awards which require employers to pay the greater of either the 17.5 per cent loading or the shift allowances. This includes, for example, the Manufacturing Award and the *Clerks Private Sector Award 2010*.

130. Ai Group acknowledges that there may be justification for differences in the terms of individual awards. As observed in the *Preliminary Jurisdictional Issues Decision*:

“The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.”³⁹

131. Nonetheless, there is no apparent 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.

132. Moreover, we cannot identify any 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 appears to traverse 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.⁴⁰

³⁹ [2014] FWCFB 1788 at 60

⁴⁰ The Annual Leave cases 1971, 144 CAR 528 at 534

133. Although awards can of course supplement the NES, it is also difficult to accept that the particularly generous provisions of the Joinery Award are necessary, in the relevant sense, 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.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Business Equipment Award 2010*² be varied by:

1. Deleting clause 25.4 and inserting in lieu:

25.4 Upon termination of employment, the wages due to an employee must be paid on the day of such termination or forwarded by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000021.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Food, Beverage and Tobacco Manufacturing Award 2010*² be varied by:

1. Deleting clause 28.3 and inserting in lieu:

28.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

- B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000073.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Graphic Arts, Printing and Publishing Award 2010*² be varied by:

1. Deleting clause 28.5 and inserting in lieu:

28.5 Payment on termination

(a) On termination of employment, all monies due to an employee may be paid by EFT in accordance with the usual pay cycle.

(b) Where payment is made by cash or cheque, all such monies must be paid on the day of termination.

(c) Except where clause 28.5(a) applies, all monies are to be forwarded to an employee dismissed without notice by post by the end of the next business day following the termination.

- B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000026.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Horticulture Award 2010*² be varied by:

1. Deleting clause 19.3 and inserting in lieu:

19.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

- B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000028.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Manufacturing and Associated Industries and Occupations Award 2010*² be varied by:

1. Deleting clause 34.3 and inserting in lieu:

34.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

- B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000010.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Road Transport and Distribution Award 2010*² be varied by:

1. Deleting clause 20.3 and inserting in lieu:

20.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all moneys due to the employee forthwith. Provided that, where such moneys are paid by EFT, payment may be made in accordance with the usual pay cycle.

B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000038.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Road Transport (Long Distance Operations) Award 2010*² be varied by:

1. Deleting clause 18.3 and inserting in lieu:

18.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all money due to the employee immediately. Provided that, where such money is paid by EFT, payment may be made in accordance with the usual pay cycle.

B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000039.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Storage Services and Wholesale Award 2010*² be varied by:

1. Deleting clause 20.3 and inserting in lieu:

20.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee as soon as reasonably practicable and within two working days after the termination. Provided that where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

- B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000084.



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages on termination (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

SYDNEY, XX XXXX 2016

4 yearly review of modern awards – payment of wages on termination.

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Wine Industry Award 2010*² be varied by:

1. Deleting clause 26.3 and inserting in lieu:

26.3 On termination of the employment, wages due to an employee must be paid on the day of such termination or be forwarded to the employee on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.

B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000090.

AM2016/8 Payment of Wages – Summary of Ai Group Claims

	Award	Clause	Proposal
1	Business Equipment Award 2010	<p>25. Payment of wages</p> <p>25.1 Wages must be paid weekly, fortnightly, four-weekly, half-monthly, monthly or in accordance with existing practices, by cash or by cheque or to the credit of the employee's account in a bank or other recognised financial institution, or in any agreed combination of the foregoing.</p> <p>25.2 Wages must be paid, either:</p> <p>(a) according to the average number of ordinary hours worked per pay period; or</p> <p>(b) by agreement with either the majority of employees or with an individual employee according to the actual ordinary hours worked each pay period.</p> <p>25.3 Where wages are paid in cash, such payment must be made during normal working hours.</p> <p>25.4 Upon termination of employment, the wages due to an employee must be paid on the day of such termination or forwarded by post on the next working day.</p>	<p>25.4 Upon termination of employment, the wages due to an employee must be paid on the day of such termination or forwarded by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>
2	Food, Beverage and Tobacco Manufacturing Award 2010	<p>28. Payment of wages</p> <p>28.1 Period of payment</p> <p>(a) Except as provided in clause 28.1(b), wages must be paid weekly or fortnightly, either:</p> <p>(i) according to the actual ordinary hours worked each week or fortnight; or</p> <p>(ii) according to the average number of ordinary hours worked each week or fortnight.</p> <p>(b) By agreement between the employer and the majority of employees in the relevant enterprise, wages may be paid three weekly, four weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.</p>	<p>28.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>

28.2 Method of payment

Wages must be paid by cash, cheque or electronic funds transfer into the employee's bank or other recognised financial institution account.

28.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee on the next working day.

28.4 Day off coinciding with pay day

Where an employee is paid wages by cash or cheque and the employee is, by virtue of the arrangement of their ordinary hours, to take a day off on a day which coincides with pay day, such employee must be paid no later than the working day immediately following pay day. However, if the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

28.5 Wages to be paid during working hours

(a) Where an employee is paid wages by cash or cheque such wages are to be paid during ordinary working hours.

(b) If an employee is paid wages by cash and is kept waiting for their wages on pay day, after the usual time for ceasing work, the employee is to be paid at overtime rates for the period they are kept waiting.

28.6 Absences from duty under an averaging system

Where an employee's ordinary hours in a week are greater or less than 38 hours and such employee's pay is averaged to avoid fluctuating wage payments, the following is to apply:

(a) the employee will accrue a credit for each day they work ordinary hours in excess of the daily average;

(b) the employee will not accrue a credit for each day of absence from duty, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service; and

		<p>(c) an employee absent for part of a day, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service, accrues a proportion of the credit for the day, based on the proportion of the working day that the employee was in attendance.</p>	
3	Graphic Arts, Printing and Publishing Award 2010	<p>28. Payment of wages</p> <p>28.1 Wages must be paid weekly or fortnightly as determined by the employer. Wages may be paid four weekly or monthly if agreed with an individual employee.</p> <p>28.2 In the case of an employee whose ordinary hours of work are arranged so that the employee works a constant number of hours each week, wages will be paid according to the actual ordinary hours worked each week. In the case of an employee whose ordinary hours of work are arranged so that the employee works an average number of ordinary hours each week during a particular work cycle, wages will be paid according to a weekly average of ordinary hours worked even though more or less than 38 ordinary hours may be worked in a particular week of the work cycle.</p> <p>28.3 Wages will be paid in cash, cheque or electronic funds transfer (as determined by the employer) provided that wages made by electronic funds transfer will be credited to an employee's bank or financial institution account without cost to the employee at the time of transfer.</p> <p>28.4 If an employee is paid wages by cash and wages are not paid within ordinary working hours, time and one half will be paid for all non-working time during which an employee is kept waiting for payment of wages except where the delay is beyond the employer's control</p> <p>28.5 Payment on termination</p> <p>On termination of employment, all monies due to an employee must be paid on the day of termination. When an employee is dismissed without notice all monies are to be forwarded to the employee by post or electronic funds transfer by the end of the next business day following the termination.</p> <p>28.6 An employee whose rostered day off falls on payday will be paid their wages no later than the employee's ordinary working day immediately following pay day. Provided that, where the employee is able to make suitable arrangements, wages may be paid on the working day preceding payday. This provision does not apply to employees paid by electronic funds transfer.</p>	<p>28.5 Payment on termination</p> <p>(a) On termination of employment, all monies due to an employee may be paid by EFT in accordance with the usual pay cycle.</p> <p>(b) Where payment is made by cash or cheque, all such monies must be paid on the day of termination.</p> <p>(c) Except where clause 28.5(a) applies, all monies are to be forwarded to an employee dismissed without notice by post by the end of the next business day following the termination.</p>

4	Horticulture Award 2010	<p>19. Payment of wages</p> <p>19.1 Period of payment</p> <p>Wages must be paid weekly or fortnightly according to the actual ordinary hours worked each week or fortnight, or according to the applicable piecework payment.</p> <p>19.2 Method of payment</p> <p>Wages must be paid by cash, cheque or electronic funds transfer into the employee's bank or other recognised financial institution account.</p> <p>19.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day.</p>	<p>19.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>
5	Manufacturing and Associated Industries and Occupations Award 2010	<p>34. Payment of wages</p> <p>34.1 Period of payment</p> <p>(a) Except as provided in clause 34.1(b), wages must be paid weekly or fortnightly, either:</p> <ul style="list-style-type: none"> • according to the actual ordinary hours worked each week or fortnight; or • according to the average number of ordinary hours worked each week or fortnight. <p>(b) By agreement between the employer and the majority of employees in the relevant enterprise, wages may be paid three weekly, four weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.</p> <p>34.2 Method of payment</p> <p>(a) Wages must be paid by cash, cheque or electronic funds transfer into the employee's bank or other recognised financial institution account.</p> <p>(b) In the case of an employee paid by cheque, if the employee requires it, the employer is to have a facility available during ordinary hours for the encashment of the cheque.</p>	<p>34.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>

34.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day.

34.4 Day off coinciding with pay day

Where an employee is paid wages by cash or cheque and the employee is, by virtue of the arrangement of their ordinary hours, to take a day off on a day which coincides with pay day, such employee must be paid no later than the working day immediately following pay day. However, if the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

34.5 Wages to be paid during working hours

(a) Where an employee is paid wages by cash or cheque such wages are to be paid during ordinary working hours.

(b) If an employee is paid wages by cash and is kept waiting for their wages on pay day, after the usual time for ceasing work, the employee is to be paid at overtime rates for the period they are kept waiting.

34.6 Absences from duty under an averaging system

Where an employee's ordinary hours in a week are greater or less than 38 hours and such employee's pay is averaged to avoid fluctuating wage payments, the following is to apply:

(a) The employee will accrue a credit for each day they work ordinary hours in excess of the daily average.

(b) The employee will not accrue a credit for each day of absence from duty, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service.

(c) An employee absent for part of a day, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service, accrues a proportion of the credit for the day, based on the proportion of the working day that the employee was in attendance.

6	Road Transport and Distribution Award 2010	<p>20. Payment of wages</p> <p>20.1 All earnings, including overtime, must be paid in the employer's time on a day to be fixed by the employer, but not later than Thursday of each week. Once fixed, the day must not be altered more than once in three months.</p> <p>20.2 All earnings, including overtime, must be paid within four business days of the expiration of the week in which they accrue.</p> <p>20.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all moneys due to the employee forthwith.</p> <p>20.4 The employer at its discretion may pay an employee by EFT to a bank account nominated by the employee in question.</p>	<p>20.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all moneys due to the employee forthwith. Provided that, where such moneys are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>
7	Road Transport (Long Distance Operations) Award 2010	<p>18. Payment of wages</p> <p>18.1 All earnings, including overtime, must be paid in the employer's time on a day to be fixed by the employer, but not later than Thursday of each week. Once fixed, the day must not be altered more than once in three months.</p> <p>18.2 All earnings, including overtime, must be paid within two days of the expiration of the week in which they accrue.</p> <p>18.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all money due to the employee immediately.</p> <p>18.4 The employer at its discretion may pay an employee by electronic funds transfer to a bank account nominated by an employee.</p>	<p>18.3 Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all money due to the employee immediately. Provided that, where such money is paid by EFT, payment may be made in accordance with the usual pay cycle.</p>
8	Storage Services and Wholesale Award 2010	<p>20. Payment of wages</p> <p>20.1 Period of payment</p> <ul style="list-style-type: none"> • must be paid weekly or fortnightly. <p>20.2 Method of payment</p> <p>Wages must be paid by cash or cheque during working hours or by electronic funds transfer into the employee's bank or other recognised financial institution account.</p>	<p>20.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee as soon as reasonably practicable and within two working days after the termination. Provided that where such wages are paid by EFT,</p>

		<p>20.3 Payment of wages on termination of employment</p> <p>On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee as soon as reasonably practicable and within two working days after the termination.</p> <p>20.4 Public holiday or day off coinciding with pay day</p> <p>Where an employee is paid wages by cash or cheque and the employee is, by virtue of the day being a public holiday or of the arrangement of the employee's ordinary hours, to take a day off on a day which coincides with pay day, such employee must be paid no later than the working day preceding pay day. However, if the employer is able to make suitable arrangements and the employee agrees, wages may be paid on the working day immediately following pay day.</p>	<p>payment may be made in accordance with the usual pay cycle.</p>
9	Wine Industry Award 2010	<p>26. Payment of wages</p> <p>26.1 Wages must be paid either weekly or fortnightly. Alternative intervals of payment may be used for so long as the employee agrees in writing.</p> <p>26.2 Wages must be paid by cash or electronic funds transfer (EFT) into the employee's nominated bank or other recognised financial institution account.</p> <p>26.3 On termination of the employment, wages due to an employee must be paid on the day of such termination or be forwarded to the employee on the next working day.</p>	<p>26.3 On termination of the employment, wages due to an employee must be paid on the day of such termination or be forwarded to the employee on the next working day. Provided that, where such wages are paid by EFT, payment may be made in accordance with the usual pay cycle.</p>