Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Payment of wages (AM2016/8)

23 December 2016

Ai GROUP

4 YEARLY REVIEW OF MODERN AWARDS

PAYMENT OF WAGES

1. INTRODUCTION

1. On 5 December 2016, the Fair Work Commission (**Commission**) issued a decision[1] in relation to various award provisions relating to payment of wages.

2. The Full Bench has requested submissions addressing:

   - The provisional 'payment of wages and other amounts model term', including its treatment of accrual of payments;

   - Whether there would be benefit in either replacing the existing provisions for payment of wages in all modern awards with the model term (once finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements; and

   - Written submissions on the provisional 'payment on termination of employment' model term'

3. These submissions are advanced in response to the request by the Full Bench.

2. THE PROPOSAL TO REPLACE EXISTING PROVISIONS WITH THE MODEL TERM OR A VERSION OF IT, ADAPTED TO THE EXISTING PAYMENT ARRANGEMENTS

4. It is difficult to advance a definitive view, at this stage, as to whether it would be beneficial to replace existing provisions for payment of wages in all modern awards with a model term given the term itself has yet to be finalised. This is a matter that should be revisited once the content of the proposed term is settled.

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

5. Both current payment practices and current award regulation of such matters vary across industries. Accordingly, the impact of the implementation of the model term should, to some extent, be considered on an award by award basis. Although we have not undertaken a comprehensive assessment of the consequences of introducing the provisional model term into each award, it appears that there are elements of the proposed clause that would be problematic in the context of some industries and occupations.

6. Achieving a greater degree of standardisation across award terms regulating payment of wages may assist in ensuring the modern awards system is simple and easy to understand. However, this factor alone does not *necessarily* warrant making significant changes to the safety net that could disrupt current practices, impose an additional regulatory burden upon employers and restrict the use of flexible arrangements regarding payment of wages.

7. Even if it there may be some benefit to adopting a model clause across the system, the Commission must be satisfied that each award, if varied, will only include terms to the extent necessary to achieve the modern awards objective.

8. The Commission has observed that it is, *"…not readily apparent that the differences between the various modern award payment of wages provisions in terms of frequency of payment, part days, payment in arrears, the types of payments they are expressed to regulate and other difference in the wording of provisions, in fact reflect different characteristics of enterprises covered by the various awards."*[2] Although such factors not being "readily apparent" may warrant further consideration of such matters in the context of the review, it should not automatically justify an assumption that all elements of the proposed model term are necessary in each award. The Commission should not assume that such matters do not exist.

[2] [2016] FWCFB 8463

9. In considering whether to adopt the model clause across the award system the Commission should have regard to existing practices in relation to the payment of wages within particular industries or occupations. The history of current provisions is also a relevant consideration.

10. There are elements of the model term that would disturb current practices within industry or reduce existing flexibilities. This includes, for example, undermining the operation of existing annualised salary or pay averaging arrangements or limiting utilisation of monthly pay. We address such matters in more detail in these submissions. There may be capacity to modify the proposed model term in order to address such matters. In other instances it may be appropriate to instead leave it to interested parties to advance submissions in support of certain changes in the context of particular awards. It is important that the Commission has sufficient materials before it to enable a proper consideration of relevant matters before a variation is made.

11. Ai Group supports the Commission's decision to review payment of wages provisions in awards. Elements of certain current provisions are either archaic or unreasonably restrictive. The development of a model term is a useful catalyst for this. However, the nature of the subject matter to be dealt with by such provisions does not necessarily lend itself to a uniform adoption of all elements of the model term in all awards.

12. The Full Bench has identified the possibility of pursing an approach of implementing a model term which is appropriately adapted to existing award payment arrangements.

13. Ai Group anticipates that there may be a need to tailor the model provision to accommodate important current award provisions and the needs of parties covered by such instruments. Of course, what constitutes appropriate adaption may be contentious. It is difficult to address such matters in the abstract. Nonetheless, by way of example, we contend that existing flexibilities in relation to the payment of wages (such as terms permitting, without limitation, monthly pay arrangements or pay averaging systems) should not be lost without cogent reasons for the change being established. What constitutes appropriate

adaption is best considered on an award by award basis. We nonetheless agree that there is merit in the alteration of some elements of current award provisions governing payment of wages to reflect the approach adopted within the model term.

14. As an aside, we note here that there is a degree of overlap between the Commission's considerations of the matters before it and the deliberations of the separately constituted Full Bench considering the annualised salary arrangements in modern awards. The outcome of either proceeding may have a bearing on matters being considered in the other. For example, any proposed regulation of payment in arrears may serve to reinforce the need for retention of existing flexibilities associated within current award terms facilitating the payment of annualised salaries. It may even necessitate the introduction of such provisions within award that do not currently contain them.

3. THE PROVISIONAL PAYMENT OF WAGES AND OTHER AMOUNTS MODEL TERM

15. In the sections that follow we identify elements of the model term that either warrant amendment or should not be adopted within all modern awards. The model term is as follows:

> **X. Payment of wages and other amounts**
>
> **x.1 Pay periods and pay days**
>
> (a) The employer must pay each employee no later than 7 days after the end of each pay period:
>
> (i) the employee's wages for the pay period; and
>
> (ii) all other amounts that are due to the employee under this award and the NES for the pay period.
>
> (b) An employee's pay period may be:
>
> (i) one week;
>
> (ii) two weeks; or
>
> (iii) subject to paragraph (e), one month.
>
> (c) The employer must notify each employee in writing of their pay day and pay period.
>
> (d) Subject to paragraph (e), the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.

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

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

The proposed limitation on payment in arrears

16. As observed by the Full Bench, most modern awards do not provide that wages should be paid within a specified period after the end of the pay period.

17. The Full Bench has reached a provisional view that all modern awards should include a term placing a limit on payment in arrears.[3] The element of the proposed model clause dealing with this issue provides:

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

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

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

18. The proposed variation represents a significant change to the safety net. It has the potential to disrupt existing arrangements and practices within a number of industries governing the payment of an employee's remuneration. This includes disrupting annualised salary and pay averaging arrangements that employers and employees currently operate under pursuant to contractual arrangements.

19. In some cases, placing a limit on payment in arrears would potentially undermine or conflict with the operation of award clauses that deal with payment of wages in a much more flexible manner. This may include award clauses enabling the payment of annualised salaries or the implementation of pay averaging arrangements. By way of example, an award provision dealing with pay averaging is contained in clause 34 of the *Manufacturing and associated Industries and Occupations Award 2010:*

[3] [2016] FWCFB at 32

34.1 Period of payment

(a) Except as provided in clause 34.1(b), wages must be paid weekly or fortnightly, either:

- 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.

(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.

…

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.

21. Given the potential disruption of current arrangements, and the absence of material before the Full Bench establishing current payment practices adopted by parties covered by each modern award, the Commission should refrain from imposing a uniform obligation in relation to payments in arrears. Instead, any party that asserts that a payment in arrears provision is warranted in a particular award should be afforded an opportunity to advance a case establishing that such a change is necessary, in the relevant sense.

The setting of a regular pay day and the requirement to notify employees of it in writing

22. The proposed clause requires that an employer must notify each employee in writing of their pay day and pay period. The relevant provision states:

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

23. It should not be accepted that it is *necessary* for every award to provide for the setting of a regular pay day. Nor should it be accepted that such notification must be in writing.

24. Clause X.1(a) requires that an employer must pay relevant amounts to each employee "no later than 7 days after the end of each pay period." The effect of this clause is that employees will have certainty that they will not be required to wait for more than 7 days from the end of the pay period for the relevant payment to be made.

25. Clause x.1 (a) does not necessitate the setting of a specific 'pay day'. This is appropriate. In practice employers may, for various reasons, not always be in a position to make payments on the exact same day of the week. This may be a product of the nature of their operations, resource constraints or of unforeseen events (an obvious example is the unexpected absence of relevant payroll personnel). The approach contemplated by clause x.1 (a) affords employers a reasonable degree of flexibility in the way that they manage or process the payment of wages. They can process the payments on different days provided that it is within the outer limit of 7 days after the end of the pay period.

26. However, clause x.1(c) infers that a more restrictive approach to that contemplated by x.1(a) should be adopted. It assumes that there will be a set pay day (even if it doesn't expressly require it). We do not see that it is necessary to adopt this approach in all industries. Such a change would potentially disrupt practices in industries that are not currently subject to such restrictions. This particular change should not be made absent an understanding of current practices the capacity for employers to accommodate the variation.

27. As long as an employee is receiving their pay within seven days of the relevant pay period there is no particular unfairness visited upon the employee. In practice, many employers have a notional pay day but often make the payments at an earlier date. This is not disadvantageous to an employee.

28. The Full Bench has not identified why it is said to now be necessary for employees to receive *written* notice of their pay day and pay period. The SDA proposed change to the Fast Food Industry Award 2010 and the Hair and Beauty Industry Award 2010, which was a product of discussions between relevant industry associations (including through conciliation facilitated by the Commission) would not have required that employees be notified in writing of the relevant matters.

29. Of course, in many circumstances employees are engaged with very little formality. It is not uncommon for employers to engage employees without reducing the terms of an engagement to writing, but to instead merely rely on the award and legislation to largely govern such matters. Given this context, award obligations requiring that employers document matters in writing, or notify employees of matters in writing, add to the administrative burden imposed upon employers.

30. A proper assessment of the burden on employers flowing from the proposed obligations cannot be made absent evidence about engagement practices in each industry affected by the proposed change.

31. Regardless, there is a cumulative impact of award obligations that mandate employees be notified or advised or matters in writing that should not be overlooked. The Commission should seek to minimise the regulatory burden flowing from awards, to the extent possible. It is desirable that such instruments not be overly prescriptive.

32. If the model term is adopted, a failure to notify an employee in writing would expose an employer to significant financial penalties, even in circumstances where they may have complied with the substantive obligation to provide the relevant payments within the requisite period. It is not a requirement that should

be imposed on employers lightly or merely because the provision of such a written notice may be viewed as either good practice or of some benefit to employees.

33. The necessity to provide written notice of the relevant pay period is further undermined by the practical reality that such matters will become evident to an employee once they have been paid. This is not the kind of matter that needs to be the subject of an written record.

Should provision be made for pay days falling on a public holiday?

34. An employer should not be required to process payments to employees on a public holiday. There are obvious difficulties associated with the potential absence of staff responsible for such activities. Any award term regulating the payment of wages, and/or the extent to which they can be paid in arrears, should enable the payment to be made a later point in such circumstances.

35. In our view, the imperative to make provision for such matters is lessened, but not overcome, by the operation of the *Acts Interpretation Act 1901*. It is trite to observe that many employers and employees will not be familiar with the operation of relevant elements of the *Acts Interpretation Act 1901*. An approach of relying solely on the operation of such legislation to deal the difficulties presented by public holidays is not consistent with that element of the modern awards objective that speaks to the need to ensure a 'simple, easy to understand, stable and sustainable modern award system'. The inclusion of a note alerting a reader may go some way to addressing this difficulty. However, adopting such an approach is a somewhat complex and convoluted solution. A better approach would be for the award to simply specify what may occur when a pay day falls on a public holiday.

36. Furthermore, the Commission should not lightly leave it to the continued operation of legislation (other than the *Fair Work Act*) to ensure that awards and the NES constitute a fair and relevant safety net, particularly not legislation that does not specifically regulate the workplace relations system. Adopting such an approach risks giving rise to the need to vary awards in the event that such

legislation is amended. This is not consistent with the need to maintain a stable award system.

37. For the above reasons the Commission should be satisfied that affording a level of flexibility in relation to the payment of wages provisions in order to accommodate public holidays is *necessary,* as contemplated by s138.

The types of payments to be regulated

38. It is not clear precisely what payments are to be captured by the reference to 'wages' within the model clause. We are concerned that it may capture various over-award payments.

39. We do not envisage that the Full Bench intends to regulate the payment of entitlements not arising from the award or NES. Nonetheless, this could be the effect of the model clause.

40. It is not *necessary,*[4] or even desirable, for awards to regulate the frequency at which an employee receives over-award payments that an employer elects to provide. The nature of award obligations relating to minimum rates and over-award payments was considered by the Full Bench in the context of determining, as part of this Review, whether award-derived penalties and loadings should be applied to the relevant minimum rate or over-award rate:

> [96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings.[5]

41. A comparable approach should be taken in relation to payment of wages provisions. The awards should only regulate the payment of amounts due under an award or the NES. This could be achieved by amending X.1(a) to provide:

[4] As contemplated by s.138

[5] [2015] FWCFB 4658

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

42. Over-award payments may take many forms. For example, they may include the payment of commissions or bonuses on a monthly, quarterly or annual basis. In other instances, such over-award payments may constitute the payment of an annualised salary paid as compensation for various matters. Alternatively, they may simply constitute the provision of a higher rate of pay than that applicable under the award. In some contexts, there are relatively sophisticated contractual arrangements that govern the application of such over-award payments. Awards should not in any way restrict the conditions upon which over-award payments are made.

The proposed restrictions on use of monthly pay systems

43. The model clause only provides for limited use of monthly pay periods.

44. The Full Bench's summary of current payment of wages provisions suggests, in effect, that an unfettered capacity to utilise monthly pay periods is a common element of a number of modern awards. Although the provisional model term would alter this situation, the decision does not identify any cogent reason for now adopting a more restrictive approach. This element of the clause is also out of step with the legislation's approach of only requiring that relevant amounts be paid "at least monthly."

45. Any model term should be cast in the most flexible terms that are appropriate. If a specific award context dictates a greater level of protection being afforded to employees, this should be achieved through tailoring the provision to address such matters. From a procedural perspective, parties seeking a more restrictive approach should establish that it is *necessary* to achieve the modern awards objective. Absent such an approach the Commission cannot be positively satisfied that greater restrictions on the use monthly pay than currently apply are necessary in order to achieve the modern awards objective.

46. If, contrary to our submission, the Full Bench considers that monthly pay should restricted to circumstances where it is agreed (subject to transitional arrangements), there should be an additional facilitative provision introduced that enables the adoption of monthly pay where agreed by the majority of affected employees covered by the award (or if necessary in a particular classification). There is likely to be a reduced administrative burden for employers if they are able to apply a uniform approach to the application of pay periods.

47. If the awards are to be amended to restrict access to monthly pay, they should include a transitional provision that maintains the status quo for employers already paying employees monthly. However, we do not see why this should be limited to current practices applied in the context of particular classifications, as contemplated by paragraph (e) of the model clause. There may, conceptually, be some force to adopting such an approach in awards with classification structures that suggest that the characteristics of different employees may warrant different level of protection in this regard. However, we do not envisage that this would be a common situation. A better approach would be to permit employers that currently use monthly pay periods for employees covered by the award to simply continue such practices. The more restrictive approach should only be adopted in circumstances that the Commission is persuaded by a party that it is *necessary* in the context of a particular award.

48. It is vital that an employer and employee are able to agree on a monthly pay arrangement as part of an offer and acceptance of employment. This is a very common existing approach. Monthly pay arrangements are very commonly included in written offers of employment that are given to prospective employees for their consideration prior to employment contracts being established.

4. THE PROVISIONAL 'PAYMENT ON TERMINATION OF EMPLOYMENT MODEL TERM'

49. The Full Bench has released an amended provisional 'payment on termination of employment' model term that both regulates the time at which termination payments are made and makes clear that employees are entitled to be paid wages in respect of any incomplete pay period worked up to the end of the employee's employment. The model term is as follows:

> **Payment on termination of employment**
>
> (a) Subject to paragraph (b), the employer must pay an employee no later than 7 days after the employee's last day of employment:
>
> (i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment; and
>
> (ii) all other amounts that are due to the employee under this award and the NES.
>
> (b) The requirement to pay an employee no later than 7 days after the employee's last day of employment is subject to s.117(2) of the Act and to any order of the Commission in relation to an application under s.120 of the Act.
>
> Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.
>
> Note 2: Section 120 of the Act provides that in some circumstances an employer can apply to the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES. In dealing with an application, the Commission could make an order delaying the requirement to make payment until after the Commission makes a decision on the application.

Interaction with clauses permitting deductions from amounts payable to employees

50. Ai Group is concerned that there is a potential tension between the proposed clause and existing award clauses that enable an employer to withhold monies due to an employee under the award or the NES upon termination of their employment. In particular, this arises in circumstances where the employee initiates the termination of their employment but fails to provide the requisite notice or has been granted leave in advance.

51. An example of a Notice of Termination by Employee clause is clause 22.2 of the *Manufacturing and Associated Industries and Occupations Award 2010*:

22.2 Notice of termination by an employee

The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

52. Modern award clauses dealing with the granting of annual leave in advance include the following provision:

(d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause 41.9, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

53. At the very least, the drafting of the model clause may cause an employer to overlook their capacity to make the relevant deductions pursuant to the operation of the above cited provisions.

54. We assume the Full Bench does not intend to alter the operation of award clauses dealing with notice of termination to be provided by employees or the capacity of an employer to make a relevant deduction for annual leave granted in advance (Indeed we acknowledge that, arguably, the proposed clause may not have this effect when the award is read as a whole). If our assumptions in this regard are misplaced, we would seek the opportunity to address this matter in further detail.

55. If the model default term is to be included in awards it should be amended to make clear that it operates subject to award clauses authorising deductions from termination payments. The inclusion of a reference to such clauses will reduce the risk of employers being misled into paying an employee more than is necessary, should they read the new provision in isolation. This will assist to ensure that the award is simple and easy to understand.[6]

[6] As contemplated by s134(1)(g)

The types of payment regulated

56. The model clause should also be amended to clarify that it is only regulates the payment of amounts payable pursuant to the NES or award.

57. Employers and employees should be free to determine arrangements governing the payment for any element of an individual's wages that exceeds entitlements set by the award. There are many legitimate reasons why over-award payments may not be provided until a point in time beyond 7 days from the date of termination. It is not *necessary* for a minimum safety net of terms and conditions to regulate such matters.

Section 120 considerations

58. The Commission has proposed that the model term be qualified so that, where an employer has made an application under s.120, the Commission will be able to make an order delaying the requirement to pay redundancy pay to which the employee is entitled under s.119 of the Act.

59. Ai Group agrees that it is important that the clause not operate to undermine the operation of s.120. We nonetheless have concerns about the manner in which the proposed clause seeks to deal with this matter.

60. It is not clear what power the Commission has to make an order of the nature contemplated by the model clause. Section 120 only expressly empowers the Commission to determine the amount of redundancy pay entitlement under s.119. It does not empower the Commission to make an order as to when the amount is payable.

61. Similarly, the Commission cannot make an order varying award provisions pursuant to an application under s.120. The Commission could make a determination varying the relevant award provision pursuant section 157 (even

of its own initiative), however this would necessitate it being satisfied that the determination is necessary to achieve the modern award's objective.[7]

62. We are also concerned that circumstances may arise where the Commission does not make an order relieving the employer of the relevant obligation. This could be either for reasons such as administrative delays or a positive decision of a Commissioner. We respectfully suggest that the granting of such an order should not be a matter that is at the discretion of an individual member of the Commission or dependent upon the Commission's action. The relief from the proposed new obligation should be automatic, if a s.120 application is made.

63. Ai Group is also concerned that the proposed approach will, from an employer's perspective, complicate the process for making a s.120 application. An employer would not only need to establish a case for the granting of relief under s.120, but also separately seek to move the Commission to make an order relieving it of the obligations under the award.

64. The model provision should be amended so that the award derived obligation simply does not apply in circumstances where a section 120 application is made. This is different to the award obligation being subject to an order of the Commission in relation to an application under s.120.

65. Importantly, the award obligation should be taken never to have applied in circumstances where such an application is made more than seven days after the date of termination. There is no limitation on the timeframe for making such an application and awards should not operate to effectively create one. Although we appreciate the imperative for employees to receive redundancy pay in a timely manner, this must be weighed against the need not to undermine the policy objective of s.120.

66. A potentially appropriate alternate clause would be:

> The requirement to pay an employee no later than 7 days after the employee's last day of employment will not apply, and will be deemed to have never applied, if an employer makes application under s.120 of the Act to have the amount of redundancy pay

[7] This is a product of the requirements of s.157 and 134(2).

payable to the employee reduced. In such circumstances any redundancy pay will be payable from a date determined by the Commission, provided that this date is not less than 7 days from the date of the Commission's decision in relation to the employer's application.