

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

Payment of Wages on Termination  
Vehicle Award  
(AM2016/8)

**29 May 2020**

**Ai**  
GROUP

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

**1. INTRODUCTION**

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to paragraphs [47] – [93] of the 20 May Decision<sup>1</sup> of the Fair Work Commission (**Commission**) settling the wording of the ‘Payment of Wages’ term in the draft *Vehicle, Repair, Services and Retail Award 2020* (**Vehicle Award**) and the draft [Determination](#) subsequently issued to give effect to the Commission’s Decision.
2. Ai Group has noted the following issues with the Determination issued to include the proposed ‘Payment of Wages’ term:
  - The term does not clearly provide that commission payments constitute an exception to the general rule provided under proposed cl. 17.6(a) that “all other amounts” due to an employee under the Award are to be paid no later than 7 days after the day on which the employee’s employment terminates;
  - The term is unclear as to the point from which the 7-day timeframe commences for the purposes of commission payments under proposed cl. 17.6(b);
  - The provision for “further order of the Commission” under cl. 17.6(c) does not clearly apply to commission payments;
  - There is a minor clause referencing error in Note 2.
3. These issues are elaborated upon below and variations are proposed which are intended to resolve each of these.

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<sup>1</sup> [2020] FWCFB 1131.

## **Commission payments should be clearly excluded from the application of the general 7-day timeframe for payment of wages on termination**

4. In its 20 May Decision, the Commission stated in respect of commission payments:

We accept that in the context of a particular award there may well be 'legitimate reasons' why an over-award payment may not be paid until a point in time later than 7 days from the date of termination. Commission payments are a case in point...

5. The proposed amendments to the model Payment of Wages term by both the AMWU and the MTO acknowledged that separate treatment was needed for payment of commission in the context of termination of employment.<sup>2</sup> This is acknowledged in paragraphs [76] - [76] of the 20 May Decision and partly reflected in the Determination.
6. Proposed cl. 17.6(b) provides separately for commission payments where the entitlement arises at a later date than the date of termination.
7. Clause 28.4(f) of the most recent version of the Vehicle Award allows for payment of commission within 14 days of termination in respect of vehicles which have already been delivered.
8. Although these provisions clearly evince an intention that the 7-day timeframe from termination does not apply to commission payments, these are not explicitly excluded from cl. 17.6(a). For this reason, Ai Group proposes that the following variation be made to proposed cl. 17.6(a)(ii):

### **17.6 Payment on termination of employment**

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

...

(ii) Except where otherwise provided, all other amounts that are due to the employee under this award and the NES.

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<sup>2</sup> [2020] FWCFB 1131, [54], [60].

9. Although readers of the Award would likely be on notice as regards the different timeframes applicable for commission payments in respect of vehicles delivered prior to termination (as is clear from proposed cl. 17.6(b)), no signpost is included regarding commission payments for vehicles delivered on or after termination which are dealt with in cl. 28.4(f). As such, Ai Group's proposed variation signifies to the reader that not all amounts relevant to payment on termination are dealt with in cl. 17.6(a).

### **Commission payments at a later date than the date of termination**

10. The proposed variations to the model Payment of Wages term filed by the MTO and the AWMU principally differed on two counts:
- The timeframe within which commission payments are to be made;
  - The point from which this timeframe is to be calculated.
11. The MTO's proposed clause, supported by Ai Group, favoured payment to be made within 14 days of the delivery of the vehicle.
12. The AMWU's proposed clause stated that the relevant commission payments would be payable within 7 days of becoming applicable.
13. Although it is clear from paragraph [75] of the 20 May Decision that the 7-day timeframe was preferred by the Commission, no mention was made of the date from which the 7-days are to commence.
14. It is unclear when a commission payment "becomes applicable". These words do not appear elsewhere in the Award. Ai Group proposes that the Determination be amended to clarify that the 7-day period for commission payments to which an employee becomes entitled after the date of termination should commence from the delivery date of the vehicle.
15. An appropriate variation to the Draft Determination would read as follows:

Where a person principally employed to perform vehicle sales related duties is entitled to commission payments at a later date than the date of termination, those payments will be payable within 7 days of ~~becoming applicable~~ the delivery of the vehicle.

## Further orders of the Commission

16. Proposed cl. 17.6(c) is reflective of a paragraph inserted into the model term to provide some capacity for the Commission to provide relief from any unintended consequences of its inclusion. In its 17 July 2018 Decision, the Commission finalised the model term and said in relation to this provision (emphasis added, references omitted):<sup>3</sup>

[111] At present, the requirement under paragraph (a) of the model term to make payment no later than 7 days after termination is qualified by providing in paragraph (b) that it is subject to 'any order of the Commission in relation to an application under s.120'. Instead of that approach, the present paragraph (b) will be omitted and a new paragraph (b) will provide that the requirement to pay wages and other amounts under paragraph (a) is 'subject to further order of the Commission'. We consider that this will reduce the complexity of the model term and also provide some capacity for the Commission to provide relief from unintended consequences of the model term. New text will be added to Note 2 of the model term to draw attention to the capacity of the Commission to make an order relieving an employer of the payment requirement under the model term and the reference to s.120 in the note will be adjusted accordingly.

[112] The new provision for 'further order of the Commission' could be utilised to provide relief from the requirement to pay redundancy payments no later than 7 days after termination if an employer makes an application under s.120 of the Act, but it will not be confined to that circumstance. The new provision will enable the Commission to provide relief from the requirement under the model term to make particular payments within the 7 day period if this is warranted in the circumstances concerned. That said, we emphasise our intention that such relief will only be granted where there are compelling reasons to do so. We also note that the Commission has no capacity to provide relief from the requirement under s.323 of the Act to pay accrued amounts 'at least monthly'.

17. Proposed cl. 17.6(c) restricts the Commission's capacity to provide relief under this section to amounts dealt with under cl. 17.6(a). As cl. 17.6(a) pertains to amounts due to an employee within 7 days of termination, it is likely that Commission payments would be unfairly excluded from the application of this provision.
18. Ai Group proposes that the following variation be made to cl. 17.6(c) of the Draft Determination to ensure that the Commission is able to provide appropriate relief in respect of commission payments:

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<sup>3</sup> [2018] FWCFB 3566, [111] – [112].

The requirement to pay wages and other amounts under ~~clause 17.6(a)~~ clauses 17.6(a), 17.6(b) and 28.4(f) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

### **Incorrect clause reference in Note 2**

19. A minor error has been detected in Note 2. It should be varied as follows:

**NOTE 2:** Clause ~~17.6(b)~~ 17.6(c) allows the Commission to make an order delaying the requirement to make a payment under clause 17.6. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.