

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/8 Payment of Wages
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



Reply Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 80,000 members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The AMWU makes the following submissions in relation to the directions of 15 August 2016 and in response to the submissions of the Australian Industry Group (AiG), and the submission on behalf of Australian Business Industrial and the NSW Chamber of Commerce (ABI).
2. It is also made in response to the Commission's Statement of 8 September 2016 ([2016] FWCFB 6401).
3. The AMWU opposes the variations sought in relation to payment on termination by AiG and supported by ABI in relation to the Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award), the Food, Beverage and Tobacco Manufacturing Award 2010 (the Food Award), and the Graphic Arts, Printing and Publishing Award 2010 (the Graphic Arts Award).
4. The AMWU also opposes the variation in relation to payment on termination proposed by the Commission to the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (Vehicle Award).
5. The AMWU opposes these variations because the current payment on termination clauses ensure that workers are provided with the monies owed to them in a fair and timely fashion, which is particularly important for a range of practical reasons. Payment on termination clauses are established industry practice and are well understood and easily implemented by employers.

No problem with existing clause

6. The most obvious reason that the AMWU opposes the variations is because neither AiG nor ABI have been able to establish what the problem is with the existing clause.
7. In 2012, 2.5 million employees separated from their employers¹, a significant number of them would have been covered by the terms of the 27 awards with a clause that provide a timeframe around payment on termination.
8. If we focus only on the period since the implementation of the Modern Awards in 2010, there have been around 15 million employment separations. That means there have been hundreds of thousands, possibly more than a million, employment separations which have resulted in a payment on termination clause being activated in the relevant award since 2010.
9. Despite the huge number of occasions on which this clause has been used, AiG and ABI have, between them have provided only a single witness who claims to have been negatively impacted by these awards conditions.

¹ D'Arcy, P., Gustafsson, L., Lewis, C. & Wiltshire, T., Reserve Bank of Australia, Labour Market Turnover and Mobility, Bulletin, December Quarter, 2012, p. 3

10. The overwhelming lack of concern about these clauses from employers supports the AMWU claim that payment on termination is an established industry practice in the areas where they apply and that they are easily understood and implemented by the vast bulk of employers covered by the relevant awards.
11. Despite the claims made in sections 2 and 3 of the ABI claim, there is no evidence of widespread breaches of the awards as they relate to payment on terminations. If it was as difficult to process the necessary wage information or obtain the required money in the required time period, one would rightly assume that there would be significant disputation referred to the Fair Work Ombudsman in relation to breaches of the award. Given that no evidence beyond a single witness has been tendered to support these claims, they should be given little weight by the Commission.
12. The AMWU submits that given the requirement under s.134(1)(g) of the Fair Work Act that the Commission “ensure a simple, easy to understand, stable and sustainable modern award system”, making unnecessary and unrequested changes to a well understood and easily implemented award clause does not meet the Modern Award Objectives.
13. The Preliminary Jurisdictional Issues Decision² in this review is relevant on this point where the Full Bench decided that:

“[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.”³
14. Following this principle, the employers must demonstrate that there is merit in their argument and demonstrate what changed circumstances warrant the change that they seek.

Payment on termination about more than logistical concerns

15. Both AiG and ABI submissions make a great deal of the change to electronic funds transfer (EFT) payments over recent decades. While the requirement that an employee be paid their wages on the day that they were terminated originally had a logistical component (that is, an envelope with cash in it) that is no longer required when they are paid by EFT, that is clearly not the only consideration of this clause.

² 4 yearly review of modern awards: Preliminary Jurisdictional issues [\[2014\] FWCFB 1788](#)

³ 4 yearly review of modern awards: Preliminary Jurisdictional issues [\[2014\] FWCFB 1788](#) at [23]

16. Using clause 34.3 of the Manufacturing Award as an example, the second part of the payment on termination clause allows for payment to be “forwarded to the employee by post on the next working day.” If the only reason for the payment on termination clause was logistical considerations relating to people being paid in cash, then the clause would have allowed for the payment to be forwarded to the employee “in accordance with the usual pay cycle.”
17. The fact that this clause required employees to be paid as promptly as possible following their termination, regardless of whether it was in cash on the day of termination or by cheque the day after, indicates that there were deeper considerations in the drafting of this clause.
18. Indeed, while the Metal Industry Award 1984 had a general requirement that wages be paid during work hours (clause 7 (e)), it wasn’t until the Metal, Engineering and Associated Industries Award 1998 that a specific payment on termination clause was included (clause 5.11.3).
19. Given the evidence of ABI, that there was already a significant number of EFT transactions relative to cheque transactions at this point in time, it again points to concerns beyond simple logistics that underpinned this clause.
20. There are a number of legitimate reasons why an employee would benefit from being paid promptly following the termination of their employment:
 - a. Some employees need to wait up to a month until the next EFT cycle;
 - b. Budgeting;
 - c. Accessing government benefits;
 - d. Terminated employees need the money.

Waiting up to a month for their final pay

21. Clause 34.1(b) of the Manufacturing Award, clause 28.1 (b) of the Food Award, clause 28.1 of the Graphic Arts Award and clause 24.1 of the Vehicle Award allow for an employee to be paid monthly.
22. An analysis of the responses of 858 employers that were surveyed by the Fair Work Commission’s Australian Workplace Relations Survey indicates that 15% (132 employers) of employers pay their employers monthly⁴.
23. If an employee is terminated shortly after a pay period, they will have to wait up to a month to receive their final pay.

⁴ Australian Workplace Relations Survey, variables WP_PAY_PERIOD_1 (col AKD), WP_PAY_PERIOD_2 (Col AKE), WP_PAY_PERIOD_3 (Col AKF), WP_PAY_PERIOD_4 (Col AKG).

Note that clause 3.5(a) & (b) of the Deed of Licence to Access the Australian Workplace Relations Study Dataset does not allow the AMWU to provide copies of the data that underpins this statement, but interested parties can gain access to the data by contacting the Fair Work Commission directly.

24. It is simply unacceptable to make any employee wait for any length of time to access money which is rightly owed to them by an employer with whom they no longer have a relationship. Clearly, the longer the employee is forced to wait, the greater the unfairness of the situation.
25. Given the time value of money – that is, having money on hand now is more valuable than having that same amount of money on hand in the future – this variation is effectively asking Award safety net reliant employees to provide their former employers with interest free pay-day loans for a significant sum of money for up to a month.
26. This is an unfair impost on any employee and particularly so for low-income employees. Asking low-paid employees to go without money that is owed to them for as long as a month will have significant effects on their living standards. As such, this variation would not meet the requirements in s.134(1)(a).
27. A modern award system wide change which allows employers to withhold entitlements for a month would be the equivalent of the Commission providing an immediate interest free line of credit to employers, with Award safety net reliant employees providing the capital.

Budgeting becomes very difficult

28. Another consequences of the variations being sought is that employees will only receive their pay slip for their final pay at the time it is paid. As required under s.536(1) of the Fair Work Act, employers are only required to provide a pay slip “within one working day of paying an amount to the employee.”
29. This will leave many employees in the dark for up to a month about how much it is that they will receive in their final pay.
30. Given the stress that the termination of employment can often cause, not knowing how much money will be paid creates additional strain on employees trying to make ends meet with no income.

Accessing government benefits is much harder

31. It is also important that the Commission consider the impact of withholding a terminated workers’ final pay for up to a month on their ability to claim government benefits.
32. Terminated workers who wish to apply for Newstart or a number of other benefits must serve a Liquid Assets Waiting Period (LAWP) before accessing benefits under the current rules. If an applicant has between \$5,500 or \$11,000 in savings (depending on their circumstances) they can be forced to wait up to 13 weeks before they can submit a claim.

33. By forcing terminated workers to wait up to a month to find out what their final pay will be, let alone providing access to that money, this variation would make it extremely difficult for workers to access these benefits in a timely manner.
34. The LAWP specifically includes money which is owed to you by your employer⁵. As such, these employees – who know that they are owed money, but not exactly how much – may have to wait until the monies are paid before they can accurately inform Centrelink of how much cash they have on hand. This may result in them delaying their initial application to Centrelink for up to a month, effectively increasing their waiting period before they can access important benefits by the same period of time.
35. Given the well established importance of finding new employment quickly in order to remain connected to the labour market, these variations are likely to have a negative impact on workforce participation and social inclusion and would not meet the requirements under s.134(1)(c).

Terminated employees need the money

36. One third of employees who leave their job do so because their employment has been terminated involuntarily. For these employees, access to money is crucial in assisting them to find other work.
37. These expenses may include, petrol and travel fares, new clothes, additional phone or internet usage charges, assistance with developing a resume, work tools, short training courses or licences, amongst other things
38. Another one third of employees who leave their job do so voluntarily for person reasons. These sorts of reasons include "family reasons, left holiday job to return to studies, own ill health or injury, closed or sold own business for non-economic reasons and retirement."⁶
39. In most of these cases, the employee is not necessarily moving to a situation where they were going to continue to earn an income.
40. For these groups, access to money that is owed to them in a timely fashion is important. They may need to buy text books, study supplies, pay for medical treatment or medicine, provide for a young child or modify their residence to care for an elderly or ill family member.
41. In summary, in two thirds of cases people left their job and moved into a situation where they may not have access to an income. For these employees, timely access to monies that were owned can make a significant difference to their ability to find new work and look after themselves and their families.

⁵ <https://www.humanservices.gov.au/customer/enablers/liquid-assets-waiting-period>, accessed 12 October 2016

⁶ D'Arcy, P., Gustafsson, L., Lewis, C. & Wiltshire, T., Reserve Bank of Australia, Labour Market Turnover and Mobility, Bulletin, December Quarter, 2012, p. 3

42. This again shows why low-paid employees, who are less likely to have savings to fall back on, will suffer disproportionately from the proposed variation. As such, the variations do not meet the requirements of s.134(1)(a).
43. The figures also go to supporting a retention of the present requirement for timely payments of entitlements on termination in order that the Modern Award System can better support Modern Awards Objective 134(1)(c) about social inclusion through workforce participation.

Relative simplicity of EFT compared to previous wage payment methods

44. It has never been easier to pay employees for the work that they have done. Online Banking, user friendly payroll systems, EFT, cloud-based applications, human resources software and more have made it easier and cheaper to pay employees.
45. When payment on termination laws were first introduced in the 1960s, they required an employer to have sufficient cash on hand in order to pay an employee on their final days work. If there was insufficient cash, an employer had to drive to a bank, queue up, withdraw the cash and return to the workplace to give it to the employee. To calculate the final pay, paper-based employee records had to be located and analysed. The hours of work that the employee had recently worked were also recorded on physical pieces of paper and those had to be located and tabulated.
46. All of these processes had to be completed on the same day with the employee often being entitled to be paid overtime rates for any time that they were kept waiting.
47. The traditional approach to paying wages on termination was much more labour intensive and expensive than that which modern businesses – small and large – have at their disposal. Indeed, the AiG submission (p. 35) uses this new technology as a supporting argument for the variation.
48. However, despite this acknowledgement that the processes that underpin payment on termination are very different to those originally envisaged both the AiG (p. 51-58) and ABI (s.6.2) submissions claim that these processes are incapable of dealing with ad hoc payments on termination.
49. This claim should be rejected by the Commission. It is entirely without basis to claim that the modern, flexible, automated, electronic payroll and banking solutions that are available to all businesses – small and large – are incapable of processing ad hoc employee payments in a cheap, timely and efficient manner.
50. Payroll and account keeping software, such as MYOB, is available from as little as \$45 a month for small businesses (Attachment A) and it can be run on any internet connected device. Banks such as Commonwealth (Attachment B) and Bankwest (Attachment D) offer no-fee or low-fee (\$10 a month) business transaction accounts with unlimited electronic transactions.

51. This software does not require accountants and book keepers to run them, but are aimed squarely at business owners to assist them to operate their businesses with the smallest overheads possible. Online banking is easily accessible and used by most people in their daily lives.
52. It is simply not credible to argue that it is not reasonable to require business owners to process ad hoc payments to their employees, given how much easier for all business owners to do now than it has ever been in the past.
53. Paying employees on termination does not require additional work, it simply requires work to be brought forward. The only evidence presented to this Commission in this regard is the statement from Mr Farquharson. At paragraphs 10-12 of that statement, Mr Farquharson sets out what he describes are the “extra administrative burden” of processing payments manually:
 - a. Contact an internal department to ensure that there is sufficient money to pay the employee;
 - b. Find out what hours the employee worked;
 - c. Have those hours of work approved by a manager;
 - d. Process the payment manually.
54. As described by Mr Farquharson, items a, b and c are all required to be completed regardless of when the employee is going to be paid. There still needs to be enough money to pay an employee and the employee’s pay slips still need to be calculated and approved.
55. The only additional work that is described in the statement is for the administrative employee to hit “pay now” at the end of the process, rather than having it automatically processed at the regular EFT date.
56. Given that the only “additional” resource is the actual payment, it important for the Commission to note the ubiquity of EFT transactions in modern society. Technology has made the payment of entitlements on termination much easier than they have ever been in history. Technology has significantly lifted the so called “burden” of payment obligations on employers. The EFT of a payment on termination is as simple as friends transferring money to each other after a dinner bill has been split or flatmates transferring money to each other for utility bills or rent.
57. So while it may take 30 minutes to 1 hour to process the payment on termination for these employees, there is no evidence, even in the statement from Mr Farquharson that this is additional work as a result of the award requirement for payment on termination.
58. As such, there does not seem to be any support for the claim by the AiG and ABI that the variation sought would achieve the modern award objective under s.134(1)(d)

and s.134(1)(f) to improve productivity and reflect modern work practices in the workplace.

Conclusion

59. There is simply no evidence before the Commission that could lead it to reach the conclusion that the proposed variations will improve productivity in the workplace.
60. It has never been easier or cheaper for employers to process ad hoc payments for employees. Given the significant harms that would accrue to employees from a decision to leave them waiting for up to a month for their final pay, the variations sought by AiG and ABI in relation to the Manufacturing Award, Food Award and Graphic Arts Award and the variation proposed by the Commission in relation to the Vehicles Award should be rejected.
61. A decision to grant the employer's claim would amount to the Commission deciding:
 - a. That employers should be able to avoid one extra electronic payment, the kind that Australians do on a regular basis with their smart phones every time they split a bill at dinner, or an electricity bill or rent amongst flat mates;
 - b. That employers should receive an interest free loan to the value of entitlements owed on termination for up to a month;
 - c. That around one third of safety net Award reliant employees who have their employment terminated should be set back before they have even begun their searching for alternative employment.

Response to Question

62. In response to the question asked by the Commission in paragraph 8 (ii)(b) of its statement of 8 September 2016, the AMWU is of the view that the phrase "by forwarding such wages to the employee on the next working day" at clause 24.4(a)(ii) of the Vehicle Award should be taken to mean that the wages owed should be paid to the employee through the most appropriate method on the next working day. Custom and practice in the industry is that this would be mean that employees would be paid electronically into their usual bank account.

Dated 13 October 2016