

FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

AM2016/8

Submissions regarding Full Bench Decision [2018] FWCFB 3566 on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Rail Employers**)

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Submissions regarding Full Bench decision [2018] FWCFB 3566

1. These submissions are provided in response to the request by the Full Bench in [2018] FWCFB 3566¹ for parties to provide any submissions regarding the "Payment on termination of employment" model term (**Model Clause**), where the Full Bench has expressed the provisional view that a clause should be included in the 86 modern awards which are currently silent in respect of the time period within which termination payments are to be made.
2. These submissions are provided on behalf of the Rail Employers in respect of the Rail Industry Award 2010 (**Rail Award**), which is one of the 86 modern awards which currently make no provision at all regarding the time period within which termination payments are to be made.
3. For the reasons set out below, the Rail Employers respectfully submit that with one minor variation to increase the period for payment from 7 days to 14 days after the day on which the employee's employment terminates, the Model Clause is otherwise suitable for inclusion in the Rail Award.

The Model Clause

4. The Model Clause proposed for inclusion in the Rail Award, among the other 85 silent modern awards, reads as follows:

X. 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:*
 - (i) *the employee's wages under this award for any complete or incomplete pay period up to the end of the day of the termination; and*
 - (ii) *all other amounts that are due to the employee under this award and the NES.*
- (b) *The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or 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: Paragraph (b) allows the Commission to make an order delaying the requirement to make a payment under clause X. 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.

Note 3: State and Territory long service leave laws or long service leave entitlements under s. 113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

¹ [2018] FWCFB 3566 at [158].

The proposed variation

5. The Full Bench has previously acknowledged that, while there is utility in a clause regarding termination payments to the effect of the Model Clause being included across all 122 modern awards, the varying idiosyncrasies from industry to industry necessitates the form of such a clause being considered on a case by case basis.²
6. The Rail Employers acknowledge and accept as appropriate the views of the Full Bench that it was not prepared to adopt the position previously advanced by other parties in submissions that the Model Clause should be amended in its application to *all* modern awards, such that payments should be made in accordance with each employee's pay cycle.³ The Rail Employers acknowledge that, in many industry circumstances, a temporal time limit of 7 days for payment may indeed be appropriate.
7. The Rail Employers submit, however, in adopting a case by case approach to the application of the Model Clause, that in respect of its application to the Rail Award, the period for payment of any amounts owing should be extended from 7 days to 14 days after the day on which an employee's employment terminates.
8. In considering the rationale behind the decision to set the proposed payment period at 7 days, the Full Bench in [2018] FWCFB 3566 referred back to the following comments in the December 2016 decision⁴:

"We think an appropriate balance between the various considerations is for the model term to provide that all unpaid wages and all other amounts due to an employee under the modern award and the NES are to be paid 'no later than 7 days after the employee's last day of employment'.

Such a provision ensures that employees receive their termination payments in a timely way, while providing employers with sufficient time to calculate and pay the sums due. Such a term would address the 'impracticability' arguments advanced on behalf of the employers. We accept that it may impose some 'time costs' associated with obtaining information about the hours worked in the prior pay period and may require 'out of cycle' EFT transactions in some instances, but the costs involved are unlikely to be substantial." Emphasis added.

9. While the Full Bench's aim to strike a balance between the needs of both employees and employers in setting the period for payment is noted, the Rail Employers respectfully submit that the Model Clause in its current form does not in all circumstances provide sufficient time to allow the Rail Employers to pay sums due and, as a result, fails to address the impracticability inherent in such a clause for the Rail Employers.
10. Many of the Rail Employers presently operate on a fortnightly pay cycle. Even with this limitation, sums due and payable to employees on termination are typically paid within a period of 7 days. That said, as the Full Bench has correctly observed⁵, such payments often require processing of an out of cycle transaction which the Rail Employers are not in a position to guarantee will in all circumstances and at all times be possible, depending on the timing of any such termination. In these circumstances, while as a matter of course the Rail Employers endeavour to make payments owing as a matter of expediency, a 14 day temporal limit within which any such payment *must* be made is a requirement which accurately acknowledges the

² [2018] FWCFB 3566 at [18].

³ [2018] FWCFB 3566 at [34] - [36].

⁴ [2018] FWCFB 3566 at [46].

⁵ [2018] FWCFB 3566 at [46].

practical limitations that may arise and, by extension, represents a more appropriate balance, which the Full Bench identified to be a key consideration in determining the appropriate time limit.

11. Further, practical limitations make the imposition of 7 day temporal time limit for payments untenable, such that the balance sought by the Full Bench between the needs of employer and employee will not be achieved, in particular:
 - (a) the payroll systems utilised by a number of Rail Employers are not fully automated. The Full Bench has correctly observed that some termination payments will require an "out of cycle" transaction. Such transactions are not achieved via a wholly automated process, but typically require manual sign off and input for processing. While the Rail Employers have suggested a period of 14 days in an effort to strike a balance between the needs of employer and employee, it is not uncommon, at present, for such manual processing to take more than 14 days; and
 - (b) in some circumstances the nature of an employee's termination will require the execution of documents by both the employer and employee. Such a process may have the effect of prolonging the period for payment beyond 7 days. A period of 14 days goes further to ensuring the Rail Employers will be in a position to see to the execution of such documentation while mitigating the risk of breach should a shorter 7 day period not be achievable.

12. The Full Bench has expressed some, albeit minor, concern that the considerations in sections 134(1)(d) and 134(1)(f) of the *Fair Work Act 2009*, being considerations in the modern awards objective, tell *against* varying modern awards to include the Model Clause. The Rail Employers respectfully submit that, in respect of the Rail Award, the proposed amendment of the timing for payment from 7 to 14 days does much to address these concerns as they apply to the Rail Award:
 - (a) in respect of section 134(1)(d), the increase in time to match the pay cycle of the Rail Employers ensures that Rail Employers will always be positioned to make payments within a valid pay cycle, thereby eliminating the need for any out of cycle payments to be arranged. Avoiding the need for such payments will ensure the efficient and productive operation of the Rail Employers' business by ensuring the smooth completion of payments to terminated employees in accordance with the operating pay cycle; and
 - (b) in respect of section 134(1)(f), the proposed amendment will completely eliminate the regulatory administrative burden upon the Rail Employers' businesses identified by the Full Bench⁶ in making such payments, by ensuring that all payments, at their most extreme temporal limit, will never be beyond a standard pay cycle payment for the Rail Employers.



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⁶ [2018] FWCFB 3566 at [146].