

IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/8 – Electrical, Electronic and Communications Contracting Award 2010 & Business Equipment Award 2020

Submissions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (“CEPU”)

1. On 8 July 2020, a conference was held with respect to the payment of wages on termination of employment clauses in both the Electrical, Electronic and Communications Contracting Award 2010 (“**Electrical Contracting Award**”),¹ and Business Equipment Award 2020 (“**Business Award**”).²
2. On 10 July 2020, Justice Ross issued a statement inviting the parties to comment on a Proposed Clause.³ The Proposed Clause was on the following terms:

‘(a) Provided that where payment is normally made by electronic funds transfer all monies due to an employee may be transferred to the employee’s account on the next working day.

(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 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 required minimum period of notice or “has paid” to the employee payment instead of giving them 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

¹ clause 22.3 of the Electrical Contracting Award.

² clause 15.4 of the Business Award.

³ [FWC Report 10 July 2020](#) at [3].

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 on the day on which the employee's employment terminates or shortly after.'

3. On 17 July 2020, National Electrical and Communications Association (“NECA”) filed submissions opposing the insertion of the Proposed Clause on the basis that the “merged clause” does not deal with payments other than wages made to an employee by means other than electronic transfer.⁴
4. On 20 July 2020, the Australian Industry Group (“AIG”) filed submissions suggesting an alternative to the Proposed Clause.
5. This Submission is made by CEPU in response to the submissions made by NECA and AIG.
6. The CEPU acknowledges that there has been an increase reliance on electronic transfer transactions (“EFT’s”) as a means of processing wages payments by employers as highlighted by the Full Bench in its Decision of 20 May 2020⁵ and on this basis supports the insertion of the Proposed Clause.
7. In response to the submissions made by both NECA and AIG Group, the CEPU repeats and relies on its submissions of 25 September 2019 and further submissions herein:

NECA Submissions

8. At paragraph [8] of NECA submissions of 17 July 2020, NECA proposes that the Proposed Clause should be merged with the model payment of wages on termination of employment clause (“**Model Term**”) finalised by the Full Bench in its Decision of 17 July 2018.⁶

NECA's Proposal

22.3 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 termination; and*

⁴ [Submissions filed by NECA](#), 17 July 2020 at [6].

⁵ [\[2020\] FWCFB 1131](#) at [250].

⁶ [\[2018\] FWCFB 3566](#)

(ii) *all other amounts that are due to the employee under this award and the NES.*

(b) Provided that where payment is normally made by electronic funds transfer all monies due to an employee may be transferred to the employee's account on the next working day.

(c) 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 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 required minimum period of notice or "has paid" to the employee payment instead of giving them 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.'

9. The CEPU opposes NECA's proposal on the following basis:

- a. Subsection (b) of NECA's proposed clause appears to on the same terms as that proposed by the Full Bench in its Decision of 20 May 2020. This is indicative that NECA does have a genuine issue with employers being able to pay 'all monies' on the next business day after termination when payment is normally made by EFT's;
- b. Clause (a), (c) and the notes of NECA's proposed clause appear to be the Model Term. In its Decision of the 20 May 2020, the Full Bench did not accept the insertion of the Model Term into the Electrical Contracting Award and Business Award;
- c. To date no employer group has proffered any probative evidence to advance their position of the difficulties or practical problems associated with employers complying with the current Award terms, i.e making payment on the day of termination; and
- d. Any impracticality or difficulty encountered by an employer to make a payment of all monies by the next business day is remedied by subsection (b) of the Proposed Clause.

AIG Submissions

10. At paragraphs [25] and [26] of AIG submissions of 20 July 2020, AIG propose to address the concerns raised in paragraphs [19] to [24] of their submissions by amending clauses 22.3 of the Electrical Contracting Award and clause 15.4 of the Business Award as follows:

Electrical Contracting Award - AIG Proposal - Clause 22.3 –

(a) Upon termination of employment, the wages due to an employee must be paid on the day of termination, or, on the next working day, either forwarded by post to the employee or transferred their account by means of electronic funds transfer.

(b) Where an employee is paid under a rostered day off system and has accrued a credit towards a rostered day off such credit must be taken into account in calculating wages due on termination.

(c) All amounts due to an employee under this award or the NES when employment ends, other than those specified under clause 22.3(a), must be paid by no later than 7 days after the day on which the employee's employment terminates.

(d) The requirement to pay wages and other amounts under paragraphs (a) and (b) is subject to further order of the Commission and the employer making deductions authorised by this award or 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 required minimum period of notice or "has paid" to the employee payment instead of giving them notice.

Note 2: Paragraph (d) allows the Commission to make an order delaying the requirement to make a payment under clause (c). 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.'

Business Award – AIG Proposal

'15.4 Upon termination of employment, the wages due to an employee must be paid on the day of termination, or, on the next working day either forwarded by post to the employee or transferred their account by means of electronic funds transfer.

15.5 All amounts due to an employee under this award or the NES when employment ends, other than those specified un clause 15.4, must be paid by no later than 7 days after the day on which the employee's employment terminates.

15.6 The requirement to pay wages and other amounts under paragraphs 15.4 and 15.5 is subject to further order of the Commission and the employer making deductions authorised by this award or 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 required minimum period of notice or "has paid" to the employee payment instead of giving them notice.

Note 2: Paragraph 15.6 allows the Commission to make an order delaying the requirement to make a payment under clause 15.5. 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.'

11. The CEPU opposes the proposal advanced by AIG for the following reasons:
12. Firstly, AIG's proposed amendment to clause 22.3(a) of the Electrical Contracting Award and clause 15.4 of the Business Award is unnecessary. The terms of the current provisions do not prescribe the payment method required and as such the provisions are broad enough to contemplate payment made by EFT's on the day of termination.
13. In this regard, extending the provision to enable wages to be paid by EFT's on the next day is in essence providing employers with an additional day to make payment when payments is normally made by EFT's, such an extension has not been unjustified.
14. Secondly, as expressed in the Decision of 20 May 2020, there has been an increase reliance on EFT's and that processing termination payments can now be streamlined using technologies, as such, EFT's can be made in a shorter period than payments made by post or cheque.
15. Thirdly, AIG's proposal with respect to the proposed clause 22.3(c) of the Electrical Contracting Award and clause 15.5 of the Business Award attempts to extend the period for which payment can be made to 7 days oppose to the next business day on the basis that it will be impractical for an employer to make such termination payments. However, the insertion of subsection (b) in the Proposed Clause is intended to remedy such impracticalities if they exist.
16. Fourthly, the Proposed Clause intends to only apply the proviso of all monies paid by the next business day in circumstances where payment is normally made by EFT's, thus exempting employers of this obligation if payment is normally made by any other means. AIG's proposal attempts to expand the Proposed Clause to encompass all transactions methods in turn imposing an obligation to pay all monies within a defined timeframe on employers who would have been otherwise exempt.
17. Fifthly, nor AIG or any other employer group has adduced any probative evidence of:
 - a. Employers expensing difficulty complying with clause 22.3 and 15.4 of the current Awards; and
 - b. Employers having trouble paying employees all monies on termination generally, so as to warrant the need for a 7-day time period to make termination payments.
18. Sixthly, AIG highlight concerns with respect to the redundancy provisions in the Electrical Contracting Award and that the tight timeframe may serve to undermine an employer's capacity to utilise section 120 of the *Fair Work Act*.
19. Redundancy occurs at the initiative of the employer and requires the employer to provide the employee with notice or notice in lieu of being made redundant. As such, in circumstances of redundancy employers have ample time to calculate an employee's termination payment ahead

of the termination date, and thus should be in a position to determine whether an application pursuant to section 120 of the *Fair Work Act* is required well in advance of the termination date.

20. Nevertheless, an employer can rely on subsection (b) of the Proposed Clause should an extension of time to make payment be required given the employer is on notice of the redundancy as it occurs at their initiative.

CEPU

21 July 2020