

4 YEARLY REVIEW OF MODERN AWARDS

Fair Work Act 2009

COMMON ISSUES – PAYMENT OF WAGES

((AM2016/8))

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MINING AND ENERGY DIVISION

SUBMISSION IN RESPONSE TO DRAFT DETERMINATION PREPARED BY THE FAIR WORK COMMISSION AND TO THE SUBMISSIONS BY THE AUSTRALIAN INDUSTRY GROUP AND AUSTRALIAN BUSINESS INDUSTRIAL.

1. In a statement dated 2 August 2016, a Full Bench of the Fair Work Commission (“FWC”) constituted to deal with the common issue of “Payment of Wages” as part of the 4 yearly review of modern awards, observed that with respect to the award provision on the payment of wages on termination of employment, there were an additional 27 Awards with such a provision, in addition to the 10 Awards already before the Full Bench.¹
2. The Full Bench resolved to review the provisions in those 27 Awards in addition to the Awards already before it. To facilitate the process, the Full Bench published a draft determination for each of those Awards; a draft based upon the provision sought by the Australian Industry Group (“AiGroup”) and Australian Business Industrial (“ABI”) in the other 10 Awards. In doing so the Full Bench made it clear that the draft determinations did not “represent the concluded (or provisional) view of the Full Bench.”²

¹ [2016] FWCFB 5254, dated 2 August 2016, PN [14]

² [2016] FWCFB 5254, dated 2 August 2016, PN [14]

3. The Full Bench published the draft determinations on 8 September 2016. One of those determinations seeks to vary the Black Coal Mining Industry Award 2010.³
4. The Construction, Forestry, Mining and Energy Union, Mining and Energy Union ("CFMEU") is an interested party in the Black Coal Mining Industry Award 2010 ("BCMIA"). The CFMEU is opposed to the BCMIA being varied in the form as set out in the draft determination.
5. On 20 September 2016, the CFMEU filed a submission and draft determination in the FWC that seeks to vary the payment upon termination of employment provision in the BCMIA but in a manner that is different to the draft determination published by the Full Bench.
6. In essence, the draft determinations published by the Full Bench and the draft determinations sought by the AiGroup and ABI provide that where an employee is paid by electronic funds transfer (EFT), payment upon termination of employment, "wage due may be transferred into the employee's account in accordance with the usual pay cycle".⁴ The CFMEU, on the other hand, seeks that payment upon termination, regardless of the form of payment, be made upon the day of termination or within 72 hours of the termination.⁵ The variation sought by the CFMEU is to provide for payment by EFT within 72 hours of the termination, whereas under the current award, any payment within 72 hours must be by post.
7. In its submission in support of the variations sought in 9 Awards, the AiGroup noted the 25 draft determinations published by the Full Bench on 8 September 2016 and stated that "For the reasons articulated earlier

³ [2016] FWCFB 6401, dated 8 September 2016

⁴ See the draft determination for the Black Coal Mining Industry Award 2010 attached to the decision in [2016] FWCFB 6401.

⁵ See the submission by the CFMEU filed in the FWC on 20 September.

in this submission, Ai Group generally support the adoption of the variations proposed to the awards above.”⁶ The ABI says likewise.⁷

8. It follows that we express our opposition to the draft determination for the BCMIA by expressing our opposition to the reasons as given by the AiGroup and ABI for supporting that variation. In that regard the CFMEU submits that both submissions fail the “merit” test to warrant the BCMIA being varied.
9. At the outset, the AiGroup asserts that any provision that does not permit payment by EFT to be made in accordance with the usual pay period is unfair to employers. This appears to be so because such a provision requires an employer “to meet this financial obligation within a very limited period of time after an employee’s employment is terminated”⁸ and can put an employer to the (regulatory) burden and cost of “the need to administer an additional pay run.”⁹
10. This submission lacks merit for the following reasons:
 - 10.1 On its own terms, the alleged “unfairness” only applies in circumstances where payment is by EFT and not where payment is made by cash or cheque. The AiGroup seeks no change to circumstances where payment is made by cash or cheque.¹⁰ Regardless of how an employee is paid, the employer would, on AiGroup’s reasoning have, “very limited time” to process the termination pay. Regardless of how the employee is paid, someone has to calculate the final pay and if paid by cash or cheque, make payment on the day of termination or shortly thereafter as provided

⁶ Australian Industry Group, Submission: Payment of Wages (AM2016/8), 20 September 2016, paragraph 64.

⁷ Australian Business Industrial and the NSW Business Chamber, Modern Awards Review 2014, Payment of Wages (AM2016/8), 20 September 2016, paragraph 2.5

⁸ AiGroup Submission, 20 September 2016, paragraph 27

⁹ AiGroup Submission, 20 September 2016, paragraph 27

¹⁰ The Manufacturing and Associated Industries and Occupations Award 2010, provides for payment by cash, cheque or EFT (see sub clause 34.2(a)), yet the AiGroup is content for its members to continue to be required to pay, where those forms of payment apply, on the day of termination of employment or by post on the next working day.

in various awards. On this basis the AiGroup position is implausible and inconsistent.

10.2 This implausibility and inconsistency is exacerbated when it is considered that the AiGroup has been selective in the Awards it has chosen to be varied. For example, the AiGroup says that it is an interested party in the modern award review of the BCMIA. The BCMIA provides for payment on the day of termination or by post within 72 hours. Yet the AiGroup did not seek to vary the BCMIA.

10.3 Part of the claim of “unfairness” appears to lie in the view of the termination payment as a “potentially significant sum”. What comprises a “potentially significant sum” is unexplained. It is submitted that the quantum of the payment is not relevant to the timing of the payment. To the extent that it raises a “cash flow” issue, this point is raised by ABI and is addressed in our response to its submission. Needless to say, the AiGroup does not advance any submission in substance on this point.

10.4 The AiGroup submission fails to deal with the issue of the obligation to give notice of termination of employment. The only, albeit oblique, reference to notice is where the AiGroup states “It is not fair that an employer is required to make the relevant payment with little or no notice.”¹¹ In the BCMIA, an employee must give a week’s notice of termination of employment whilst an employer must give the notice as set out in the National Employment Standards.¹² Under the current BCMIA this means that where an employee gives notice, the employer has a maximum period of 10 days (a week of 7 days plus 72 hours) In the modern context of computerized payroll systems, emails, intranet, internet, and mobile phones, it is reasonable to expect that an employer could easily meet this timetable. Indeed, there is no reason why the payment cannot be made on the day of termination of employment.

¹¹ AiGroup Submission, 20 September 2016, paragraph 28

¹² BCMIA, clause 13.2 and 13.3

- 10.5 The AiGroup submission fails to take into account the provision for pay records in the Fair Work Regulations. Under the Regulations, an employer is required to keep up to date records on hours of work and leave entitlements.¹³
- 10.6 The AiGroup submission fails take account of the advantages of contemporary computerized systems of administration and their capacity to handle both routine and complex issues quickly, accurately and efficiently. Given modern day payroll systems, it is difficult to accept that an employer cannot have an employee's pay made up on the day of termination or at least within 72 hours of termination of employment.
- 10.7 For most companies, it is not unknown for employees to resign or indeed be dismissed. It is fair to expect that companies will – or certainly should – have an established system in place for dealing with such events expeditiously. What is unfair, in our submission, is an employee being expected to wait for the next pay day to receive his/her final pay simply because the employer does not have a system in place to deal with the matter expeditiously, more so in the context of contemporary payroll systems.
- 10.8 The AiGroup refers to the unfairness of incurring additional costs and the regulatory burden of having to “administer an additional pay run pursuant to the current clauses...”.¹⁴ The AiGroup does not explain what additional costs are incurred or what regulatory burden employers have to bear. In those circumstances, the AiGroup submission cannot be accepted at face value.¹⁵ The notion that the cost of transacting a person's pay is such that it is unfair or that it is overly burdensome on an employer is, at face value, implausible. In our submission the claim by AiGroup in this instance is an example of where the term “regulatory burden” is exaggerated.

¹³ Fair Work Regulations, Part 3-6, Division 3, Regulations 3.31 - 3.44

¹⁴ AiGroup Submission, 20 September 2016, paragraph 27

¹⁵ It is noted that the ABI submission addresses the issue of cost and time of an “additional run”. This is addressed later in this submission.

11. The AiGroup asserts that the current provisions “are antiquated and fail to take into account modern payroll systems.”¹⁶ The emphasis is placed on payment by EFT in this regard. The AiGroup relies on survey data provided in the annual leave common issue case to support its view that most employers pay by EFT. The CFMEU is unaware of any hard data on that point but would not cavil with the proposition that most employers in the coal mining industry pay their employees by EFT. Be that as it may, it is difficult to see how that assists the AiGroup’s case. The mere presence of modern payroll systems does not explain why an employer should not comply with the provision as sought by the CFMEU or current provisions in awards that oblige an employer to pay on the day or within a short period thereafter.
12. That AiGroup contends that given EFT any employee whose employment is terminated would no longer have to return to the workplace to collect his/her final pay if he/she was not paid on the day of termination of employment.¹⁷ That undoubtedly is the case. But it does not address why an employee should be compelled to wait until the next usual payday to collect his/her final pay.
13. The AiGroup seeks to rely on the fact that 86 modern awards do not contain a payment upon termination of employment provision. But in doing so the AiGroup does not present any examination of any of those awards to explain why they do not contain such a provision. In our submission, AiGroup cannot simply and blindly rely on other awards merely because they do not have a certain provision. As the Full Bench noted in the Preliminary Jurisdictional Issues Case:
- “6. There may be *no one set* of provisions in a particular modern which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular

¹⁶ AiGroup Submission, 20 September 2016, paragraph 29

¹⁷ AiGroup Submission, 20 September 2016, paragraph 32-33

modern award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.”¹⁸

14. The AiGroup seeks to rely on a dissenting decision of Watson VP and a Full Bench Decision to contend that to preclude the variations sought – and by extension the draft determinations prepared by the Full Bench – would be to “undermine the purpose of such a Review and stagnate any potential for change.”¹⁹ In response it is submitted:

14.1 The decision of Watson VP was a dissenting one and as such is not an expression of the position of the FWC. In any event, the decision is at odds with the Full Bench in the Preliminary Jurisdictional Issues Case. The notion that “The legislative task does not allow historical inertia to be a determinative factor” – whatever “historical inertia” means – as mentioned in the quote in the AiGroup submission, is at odds with the view of the importance of “having regard to the historical context applicable to each modern award.”²⁰

14.2 The quote of the Full Bench in the LCR Mining decision is obiter. It is observed that the AiGroup refers to the quote as “sentiments”.

14.3 In any event, if the point being made by the AiGroup is that the FWC should ensure that award provisions are compatible with the contemporary situation, we submit that it goes against the AiGroup variation and submission. As noted above, with modern information and communications technology such as sophisticated computer systems for payroll, internet access, intranet access, email systems,

¹⁸ [2014] FWCFB 1788, 17 March 2014, points 6 and 7 in PN [60]

¹⁹ AiGroup Submission, 20 September 2016, paragraphs 38-40

²⁰ [2014] FWCFB 1788, 17 March 2014, point 5 at PN [60]

mobile phones, lap tops, ipads and a range of desktop facilities, it is surely the case that an employer can efficiently and quickly and cheaply make up an employee's final pay on the day of termination or shortly thereafter as sought by the CFMEU in the BCMIA or by other Unions.

14.4 One consistent and indisputable characteristic of the forms of technology available for use in payroll transactions is their capacity to transmit and deal with information very quickly. But, what we have in the context of the AiGroup applications and in the draft determinations, is a provision that is based on providing more time than it currently takes and is provided by various awards, to make the same necessary transaction.

15. With regard to the elements of s 134 as addressed by the AiGroup, it is submitted (where we do not address the element, it means that we see it as neutral):

15.1 With respect to s 134(a), based on the measurement of two thirds of the median (adult) ordinary time earnings as used by the FWC in the Annual Wage Review, a level 3 miner in the BCMIA is low paid.²¹ The AiGroup say that the variation "merely impacts on the timing of that payment".²² As we point out in paragraphs 18 and 19 of this submission, the delay in the receipt of the final pay can have a detrimental effect on the employee and the longer the pay period the greater the effect.

15.2 With respect to s 134(1)(d), it is our submission that granting the variation sought (and of course the draft determinations prepared by the Full Bench), will work against providing a modern work practice consistent with the technology and systems available by providing a disincentive to introduce systems that facilitate the final payment being made either on the day of termination or within 72 hours.

²¹ In the Annual Wage Review 2015-2016, the FWC used a figure of \$800 as at August 2014 (see PN [360] At that time the minimum wage for a level 3 miner was \$791.90 (see PR551589)

²² AiGroup Submission, 20 September 2016, paragraph 43

15.3 With respect to s 134(1)(f) it is our submission that any cost and time would be negligible at best. More so in the context of modern technology and systems. Further, as stated above the notion of a regulatory burden is exaggerated and, given modern technology and systems, it can be met with a minimum of fuss.

15.4 With respect to s 134 (1)(h) the notion that granting the application “may also have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy”²³ is, with respect, fanciful. It is noted that it is said without much conviction.

16. The ABI submission raises 5 points in support of its variations. In that respect, we submit:

16.1 Whilst ABI acknowledge the benefit of notice, they focus on summary dismissal or where notice is “paid out”. Regardless of the whether the dismissal is summary or notice is paid out, there is no reason why an employer cannot pay the employee on the day of termination or within 72 hours.

16.2 It is noted that ABI rely on a statement of the Manager, Payroll Services, CSR Ltd. The weight that can be given to this statement is minimal, being confined to the experience of and the management practices at CSR Ltd. CSR Ltd is not an owner or operator of coal mines and as such, the statement has no relevance to the BCMIA.

16.3 In any event, the fact that the “Treasury Department” requires 24 hours notice to ensure sufficient funds are available is not a product of the clause but a product of a management practice in CSR.²⁴ The fact that CSR is often not notified until around midday or finds it difficult to confirm the hours worked or to have to chase things up, is not a product of the clause but a product of the management practices in CSR.²⁵

²³ AiGroup Submission, 20 September 2016, paragraph 60

²⁴ Statement of Mr. Scott Farquharson, dated 16 September 2016, paragraph 10(b)

²⁵ Statement of Mr. Scott Farquharson, dated 16 September 2016, paragraph 10(a),(c), (d)

- 16.4 ABI state that employers can have difficulty obtaining wage information necessary to process payments.²⁶ Again, as with the CSR position, this is a management issue, not a product of the award provision. Further, it is an even less plausible reason in the context of modern forms of information technology.
- 16.5 ABI state that employers sometimes need time to make funds available for payment. Again, this is a management practice and not a product of the award. It is noted that ABI does not say that this is a universal problem, but only that it can occur “sometimes”.²⁷ It is difficult to accept that a company cannot access the funds necessary to pay an employee’s final pay on or around the time of the termination. Companies must be aware of their leave liabilities and wage costs and should be in a position to meet them.
- 16.6 ABI state that to process termination payments manually imposes time and administrative costs.²⁸ Again, with computer systems and modern technology time should not be an issue. Nor should the cost. It is noted the Mr. Farquharson states that the cost to CSR of a bank transaction out of the normal payroll time is \$10.50, with time of between 30 minutes to 1 hour.²⁹ We do not seek to rely on this evidence as it expresses the situation in CSR. However, we do say is that, in the circumstances of a termination of employment and taking the combination of ongoing employment payroll records and modern payroll systems, the time and cost is not of any consequence and no justification for granting the application.
- 16.7 The ABI contends that points made in clause 6.2 of this submission are consistent with s 134(d) and (f). In that regard we rely on our comments in paragraphs 15.2 and 15.3 above.

²⁶ ABI Submission, 20 September 2016, paragraph 6.2 (2)

²⁷ ABI Submission, 20 September 2016, paragraph 6.2(3)

²⁸ ABU Submission, 20 September 2016, paragraph 6.2(4),(5)

²⁹ Statement of Mr. Scott Farquharson, 16 September 2016, paragraphs 12, 14

17. A further item in support of the variation is reliance upon the decision in the annual leave common issues matter where the Full Bench determined to vary awards to provide for payment of annual leave during the usual pay cycle.³⁰ Further, in proceedings before the FWC on this matter, the President posed the question of how an employee would be disadvantaged by being paid his/her final pay in line with the usual pay period.³¹

18. In response to the annual leave decision and the question posed by the President, the CFMEU refers to our submission made in support of our variation to the BCMIA. In that submission we say:
“Unlike an employee taking some form of leave, an employee, upon termination of employment, does not have an ongoing employment relationship with the employer. The employee may not have alternative employment. The employee will be required, however, to meet his/her ongoing costs. In those circumstances, it is reasonable for an employee to want his/her final payment as soon as possible in order to determine their financial situation and plan at least for the immediate future. Whilst an employee may have some idea of what the final pay is likely to be, the employee cannot be sure of what it is going to be. It is not reasonable to expect an employee to have to wait up to 14 days in order to receive his/her final pay.”³²

19. On balance, it is submitted that given the impact on the employee as against the impact on the employer of a provision providing for payment upon termination or within 72 hours, the balance must be struck in favour of the employee. Given modern day work systems, the cost to the employer is negligible, whereas the cost to an employee of having to wait up to 14 days can be significant, particularly if the employee is unemployed and wants to plan ahead.

³⁰ AiGroup Submission, 20 September 2016, paragraphs 30-33

³¹ Transcript of Proceedings, Am2016/8, 27 July 2016, PN158

³² Submission by CFMEU, dated 20 September 2016, paragraph 12.6 (footnote deleted)

20. In summary, the CFMEU is opposed to the variation sought by the AiGroup and ABI in the sense that the determinations sought are the same as the determination for the BCMIA drafted by the Full Bench as a means to facilitate the proceedings. It is submitted that in the modern context an employer should be able to pay an employee on the day of termination or shortly thereafter and in the case of the BCMI, within 72 hours. It is submitted that the cost and time to an employer is negligible such as to have no effect on its operations. It is submitted that the benefit to an employee of receiving his/her final payment on the day of termination or within 72 hours is manifest and different to any payment during on ongoing employment relationship. On a cost/benefit analysis the benefit to the employee outweighs the cost to the employer. Accordingly the FWC should not grant the application as sought by the AiGroup and ABI nor as set out in the draft determinations prepared by the Full Bench.

Construction, Forestry, Mining and Energy Union
Mining and Energy Division
13 October 2016