CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/8

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Common issues – Payment of wages (AM2016/8)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) IN REPLY

14th October 2016

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). In a Statement issued on 24th February 2016 ([2016] FWC 1191) the President, Justice Ross, identified a number of claims for changes to the payment of wages provisions in different awards and referred the matters to a separate Full Bench[1].

2. The Full Bench that was constituted to deal with the payment of wages claims issued a Statement on 15th June 2016 ([2016] FWCFB 3737) in which they identified the following 5 issues as matters they would deal with:

    - Timing of payment of wages
    - Removing a restriction on the days for payment of wages
    - Timing of payment on termination of employment
    - Penalties for late payment of wages
    - Annual leave loading

3. Further Statements were issued by the Full Bench on 6th July 2016[2], 2nd August 2016[3], 15th August 2016[4] and 8th September 2016[5]. The 15th August 2016 Statement included directions for the filing of written submissions and supporting evidence. Submissions from parties opposing any of the variations were to be filed by 4pm on Thursday 13th October 2016. The Construction, Forestry, Mining and Energy Union, Construction and General Division (CFMEU C&G), who opposes the variations proposed, sought and was granted an extension to file our submission by 4pm on Friday 14th October 2016.

4. In the 8th September 2016 Statement the Full Bench decided to publish draft determinations on a number of awards that dealt with the specific issue of the timing of payment on termination of employment. The draft determinations did not represent the concluded (or provisional) view of the Full Bench, but were published to facilitate the review of the particular clauses.[6]The Full Bench also raised the issues of award provisions that provided for termination payments to be made by post and awards that provided for termination payments to be 'forwarded' but did not

[1] See paragraphs [16] to [19]
[2] [2016] FWCFB 4519
[3] [2016] FWCFB 5254
[4] [2016] FWCFB 5741
[5] [2016] FWCFB 6401
[6] See paragraph [7]

specify the means by which this was to occur. The Full Bench invited parties to make submissions on these additional issues.[7]

5. The main awards that the CFMEU C&G has an interest in are the *Building and Construction General On-site Award 2010, Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010*. This submission is therefore mainly concerned with the variations prosed for these awards. Having said that, we also have an interest in a number of other awards which cover the work of our members including but not limited to the *Concrete Products Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010*, and the *Waste Management Award 2010*. Where the issues are common across the awards, unless otherwise stated, our comments and submissions equally apply to all of these awards.

6. In regard to the matters before the Full Bench the issues which affect the awards for which we have an interest are:

    - Timing of payment on termination of employment;
    - Penalty for late payment of wages; and
    - Annual leave loading

7. In the 2nd August 2016 Statement the Full Bench noted that the MBA claims, in the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010,* relating to the penalty for late payment of wages would be dealt with during the Award Stage of the Review[8]. Accordingly they are not matters to be dealt with by this Full Bench. It is not clear however where the ABI claim (on the same issue) to vary the *Joinery and Building Trades Award 2010* is to be considered. During the Conciliation Conference heard on 27th July 2016, the President stated the following:

> *PN330*
>
> *JUSTICE ROSS: Generally speaking, if they're a range of sort of interrelated issues and parties have commenced the discussion in the award stage and they have a view that they should continue in the award stage, if that's the collective view coming out of the group involved in those, then I'm content for them to be dealt with in the award stage.*

[7] See paragraphs [8] and [9]
[8] [2016] FWCFB 5254 at paragraph [17]

On this basis we have presumed that the ABI claim for the *Joinery and Building Trades Award 2010* will be dealt with in the Award Stage. If we are wrong on this we would seek leave to submit a further submission before the hearing on 21st October 2016.

The Nature of the Review

8. The Full Bench in their 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision (the Preliminary Jurisdictional Issues decision), stated:

> *"[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*."[9]

9. The same Full Bench also made a number of important observations relevant to the conduct of the Review,

> *"[24] In conducting the review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective ……. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.*
>
> *…….*

[9] [2014] FWCFB 1788

> *[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.* "[10]

10. The above extracts emphasise that in prosecuting their claims before the Commission, it is imperative that the employer organisations: (a)advance a merit based argument in support of the proposed variations; (b) address the legislative provisions (c) and (most critically) provide probative evidence to establish a factual basis for a variation of an award provision that is presumed to meet the modern award objective. The extracts also confirm that the history of awards are important, particularly the award modernisation proceedings resulting in the creation of the modern awards. Further, they illustrate that at the time modern awards were made, there was legislative acceptance that they achieved the modern awards objective. The extracts also confirm that previous Full Bench decisions relevant to a contested issue are relevant and should be followed unless there are cogent reasons for not doing so.

11. As this submission will demonstrate, when the employer organisations claims are considered against the tests outlined in the above paragraph they clearly fail. We therefore submit that their proposed variations should be rejected.

Timing of Payment on Termination of Employment

12. The original claims by Australian Business Industrial (ABI) and the Australian Industry Group (AIG), to vary the timing of payment on termination of employment provisions, did not include the *Building and Construction General On-site Award 2010*, the *Joinery and Building Trades Award 2010*, or the *Mobile Crane Hiring Award 2010*. The Full Bench, however, has decided to review the provisions in the *Building and Construction General On-site Award 2010* and the *Mobile Crane Hiring Award 2010* as part of these proceedings.

13. The variations sought by both the ABI and AIG essentially seek to insert an additional provision that would allow payments due on termination to be paid in the normal pay cycle. The draft determinations published by the Full Bench are in similar terms. For example, the proposed variation for the *Building and Construction General On-site Award 2010* is as follows:

[10] Ibid

"1. By deleting clause 31.4 and inserting the following:

31.4

(a) When notice is given, all monies due to the employee must be paid at the time of termination of employment. Where this is not practicable, the employer will have two working days to send monies due to the employee by registered post.

(b) Despite 31.4(a) if the employee is normally paid by electronic funds transfer, wages due may be transferred into the employee's account in accordance with the usual pay cycle."

14. It is unclear from the draft determination which pay cycle is to be used, i.e. the pay cycle ending before or the pay cycle ending after termination. Based on the very limited evidence, provided we assume the intent is to use the pay cycle ending after termination.

15. In regard to the submissions of the parties supporting the variations, as stated above, there is either no or, at best, very limited evidence. The ABI submission relies on APCA statistics on the growth of EFT payments at the expense of cheque payments, and a witness statement from *one*, we repeat one, employer, Mr. Scott Farquharson from CSR. Significantly no other employer organisation (doubtless representing thousands of employers) supporting the variations has provided any evidence from an actual employer. This means either that: (a) there are no issues of any practical significance with the extant provisions; or (b) the present provisions are operating effectively. The issues seem to exist solely within the minds of the employer organisations. In the absence of any probative evidence, the employer organisations seek to rely on previous decisions of the Commission, particularly the *4 Yearly Review of Modern Awards -Annual Leave* decision[11] (the Annual Leave Decision). In the case of the MBA, no evidence of submissions have been provided at all.

16. Mr Farquharson evidence is not probative. It cannot intelligibly form the basis for the variation of 37 disparate industry awards. Mr. Farquharson's statement is Spartan and meagre, running to only 13 paragraphs. It does not identify how many termination payments he has overseen since the creation of the modern awards, nor which awards cover the employees employed by his organisation and the number of employees covered by each award. His statement does nothing more than identify the bureaucratic and systematic processes adopted by CSR, a large corporation. This evidence is irrelevant to the majority of small businesses covered by the

[11] [2015] FWCFB 3406

Building and Construction General On-site Award 2010, Joinery and Building Trades Award 2010 and *Mobile Crane Hiring Award 2010*.

17. In regard to the APCA statistics, it is not contested that the majority of employees are now paid by EFT. But that does not assist the employer arguments. With the advancement of new technology, payments can now almost be, and soon will be, made instantaneously. The new Reserve Bank Governor, Mr. Philip Lowe told the House of Representatives Standing Committee on Economics on 22nd September 2016:

> "*A second major project is the New Payments Platform. This project has been under the guidance of the Reserve Bank's Payments System Board. It is a cooperative effort between the Bank and the payments industry to modernise key parts of our electronic payments system.*
>
> *When this work is completed we will all be able to make instantaneous payments to one another, with the money transferring between accounts in a matter of seconds, even if the funds have to move between banks. Addressing will be simplified; an email address or a mobile phone number will be able to be used instead of a payer needing to know an account number and BSB. We will also be able to send a lot more information with payments. The first payments using this new system should be able to be made late next year. As one part of our contribution to this project, the Reserve Bank is building the necessary infrastructure to allow funds to be transferred between financial institutions in real time.*"[12]

18. With the payments being able to be made "in a matter of seconds" and the availability and indeed use of modern payroll computer software, the claim of Mr. Farquharson that it takes "anywhere from the same day and up to 5 days" for the paperwork to come through from the relevant line manager is more an indication of an organisational inefficiency that an award compliance issue.

19. In regard to the Annual Leave Decision, which a number of the employer organisations rely on, the decision to allow annual leave payments during an employee's normal pay cycle whilst on leave has to be seen in its appropriate context, namely, ongoing employment. Termination of employment is significantly different as the contract of employment ends on the date of termination. The Annual Leave decision dealt solely and specifically with payments made during the currency of the employment contract and employment relationship, not at its end.

[12] http://www.rba.gov.au/speeches/2016/sp-gov-2016-09-22.html

20. More significantly, payments due on termination are part of the National Employment Standards which apply to the majority of award covered employees, and are dealt with in s.117 of the FW Act. Notably, the notice of termination provisions set out in s.117 do not apply to daily hire employees in the building and construction industry and specific other employees identified in s.123(3) of the FW Act.

21. For employees covered by s.117 the relevant provisions are as follows:

Division 11—Notice of termination and redundancy pay

Subdivision A—Notice of termination or payment in lieu of notice

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

(a) delivering it personally; or

(b) leaving it at the employee's last known address; or

(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

22. Under s.117(1), an employer cannot terminate an employee unless they give the employee written notice of the day of termination. Under s.117(2)(a) the amount of notice must be at least the minimum period determined in accordance with s.117(3), which ranges from a minimum of 1 week and up to 5 weeks. It follows that in all cases where an employer gives an employee notice of termination, the employer will know at least one week in advance of termination that the employee is to be terminated. They, after all, are the person making the decision to terminate.

23. In the majority of terminations, where notice is given, the employer has plenty of time to check employment records, make sure sufficient funds are available and ensure that the termination day coincides with the end of a pay cycle. It should also be noted that as there is an obligation under the consultation regarding major workplace change provisions in modern awards (with significant effects including cases of termination of employment[13]) the time period may be considerably longer. This point is indirectly recognised by the ABI in paragraph 6.2 1(a) of their written submission.

24. In situations where notice is given, the issues complained of in paragraph 10 of Mr. Farguharson's statement would not arise. Further, with good management of the termination, payment should be able to be arranged so that it coincides with the normal pay cycle so that the

[13] See clause 8.1 of the Building and Construction General On-site Award 2010 for example.

need to make a payment "out of cycle" would not occur. For these situations there is no need to vary the award.

25. But the above scenario is not what the employer organisations are seeking to address. What they want to change is the obligation to make payment at the time of termination where payments are made in lieu of notice. The fundamental problem here is that what they are seeking to do is inconsistent with the National Employment Standards.

26. Under s.117(2)(b) of the FW Act an employer must not terminate an employee's employment unless the employer "***has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee(or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice*** ." This section is unambiguous. Where payment is made in lieu of notice, the employee must be paid the amount of notice at the time of termination.

27. The variations sought by the employer organisations impermissibly seek to nullify or exclude s.117(2)(b). Under s.44 of the FW Act an employer must not contravene a provision of the NES. Further, under s.55(1), a modern award must not exclude the National Employment Standards. On the authority of the Full Bench decision of 8th May 2015 on *Alleged NES Inconsistencies* (see paragraph [37] to [39] of [2015] FWCFB 3023) such provisions should not be included in modern awards.

28. The requirement to pay an employee's entitlements at the time of termination, where payment is made in lieu of notice has been confirmed by a number of decisions of the Commission and courts.

29. In Taylor & Hose Corp Pty Ltd and Anor ([2015] FCCA 1804), Judge Jarret found that:

> "*4. In these proceedings the applicant contends that the Fair Work Act has been contravened in two respects, and insofar as the first respondent is concerned there is no dispute about the contraventions.*
>
> *5. The first contravention is that pursuant to s.117(2) of the Act,* ***the applicant was not paid the appropriate amount of money upon the termination of her employment or before the termination of her employment****. Section 117(2) of the Fair Work Act is part of the National Employment Standards, and a contravention of the National employment Standards is actionable under the Fair Work Act according to s.44(1) of the Act. It is a civil penalty provision.*" *(emphasis ours)*

30. In D'Souza v Henry Schein Halas ([2014] FWC 5864), Deputy President Gostencnik observed that:

> *"[29] With respect these submissions have no substance. They misunderstand the effect on the employment relationship of an unlawful act. They misunderstood the distinction between the contract of employment and the relationship of employment under that contract. Section 117(2) prohibits an employer terminating the employment of an employee without giving notice or making payment in lieu of notice before effecting termination.*
>
> *[30]* ***If an employer terminates the employment of an employee without notice and without making payment in lieu of notice before effecting termination, the result is that the employer has acted unlawfully****. It does not invalidate the termination of the employment. An employee's remedy is to apply for a penalty for a contravention of that provision by reference to a breach of s.44(1) of the Act which provides that:*
>
> *An employer must not contravene a provision of the National Employment Standards.*" *(emphasis ours)*

31. In Melbourne Stadiums Ltd v Sautner ([2015] FCAFC 20), Justice White observed that:

> "*214. On its proper construction, s.117(2) prohibits the termination of an employee's employment unless (relevantly) the employer "has paid" the requisite payment in lieu of notice. A contravention of s.117(2) is a contravention of a National Employment Standards for which a civil penalty may be imposed: Fair Work Act, s 44(1) and s 539. Accordingly, employers who terminate an employee's employment in the circumstances contemplated by s.117(2) without providing the minimum period of notice or by making a payment in lieu of notice at the time of termination are likely to expose themselves to the imposition of a civil penalty*."

32. In light of the abovementioned decisions, the witness statement of Mr. Farquharson, to the extent that it may still be relied upon, is of serious concern. Mr Farquharson implies at paragraph 10 that CSR may not have paid employees prior to the date of termination where payment was made in lieu of notice. If this is correct then it is an admission by an employer that they have contravened the NES. As CSR is a large corporation we submit that the Full Bench should bring this to the attention of the Fair Work Ombudsman for further investigation.

33. The remaining situations not covered by s.117(2) would be those where an employee is summarily dismissed for misconduct or where an employee fails to give the required notice as specified under the modern award. We submit that in those situations there is no monetary disadvantage to the employer. Indeed, the opposite applies.

34. In cases of summary dismissal there is no obligation on the employer to provide notice or payment in lieu of notice[14]. In situations of summary dismissal the employer usually has time to consider carefully the issue, particularly any potential implications for an unfair dismissal application, before the final decision is made and will have time to make the financial arrangements.

35. In regard to the notice required to be given by an employee, under s.118 of the FW Act a modern award or enterprise agreement may include terms specifying the period of notice to be given by an employee to terminate his or her employment. Most, if not all, modern awards contain the following provision for employees covered by the NES provisions:

> "*11.2 Notice of termination by an employee*
>
> > *The notice of termination required to be given by an employee is the same as that required of an employer, except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination, under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause, less any period of notice actually given by the employee.*"[15]

36. Where an employee gives the required notice, the observations outlined in paragraphs 22 to 24 above would similarly apply. In situations where the employer decides to make a payment in lieu of notice we submit that the provisions of s.117(2)(b) would apply as the employer has technically decided to bring forward the date of termination.

37. In the case of an employee failing to give notice under the award clause, the employer can withhold from any monies due to an employee on termination an amount not exceeding the amount an employee would have been paid under the award in respect of the period required less any period of notice actually given. The potential amount of money able to be withheld would we submit be far greater than the costs for making a payment "out of cycle" as set out in paragraphs 12 and 13 of Mr. Farquharson's statement.

[14] See s.123(1)(b) of the FW Act
[15] Clause 11.2 from the Mobile Crane Hiring Award 2010

38. Turning to the reasons advanced by the employer parties, the ABI refers to the impracticality of the existing award provisions with respect to EFT transactions. This is averred in an evidentiary void. In any event, as demonstrated above, the impracticalities do not materialise where the required notice is given by either the employer or employee, and where payment is made in lieu of notice, s. 117 of the FW Act prevents the employer making payments after the date of termination. Where the employee fails to give notice the employer is able to withhold monies. Therefore no financial disadvantage accrues to the employer. In situations of serious misconduct, decisions by employers to terminate are not taken lightly, and where they are made, employers usually have taken some time before the final decision which will allow them to make the appropriate financial arrangements.

39. The AIG complain that the existing award provisions are unfair to employers; that the current provisions are irrelevant having regard to modern payroll practices; that they are out of step with the vast majority of modern awards; that the proposed provisions encourage flexibility and modern work practices; and that the proposed provisions are necessary to ensure that awards are achieving the modern awards objective.

40. In regard to the unfairness to employers argument, we have demonstrated above that there is no real detriment or unfairness to employers. Where notice is given and worked through, the employer has ample time (and obviously prior notice) to make the necessary financial arrangements. Where payment is made in lieu of notice—a decision that can only be made by an employer—the FW Act requires payment on or before termination. In other situations, i.e. summary dismissal and where an employee fails to give notice, the employer is not required to pay the employee notice anyway.

41. In regard to modern payroll systems, we would point out that payment by EFT has eased the burden on employers as they no longer have to collect the cash from the bank. The speed of these EFT transactions will increase once the new payments platform being developed by the Reserve Bank comes into operation. If anything, the existing provisions are far from archaic and are more in tune with the instantaneous financial payments systems that modern technology has introduced.

42. The AIG have failed to provide any evidence to show that the current award provisions are not meeting the modern awards objective nor have they provided any evidence of any significant change that has occurred since modern awards were made to justify such a drastic change. On the authority of the Preliminary Jurisdictional Issues Decision, as referred to in paragraphs 8 to 11 above, the AIG have failed to meet the test required to justify the variation sought.

43. We submit that there is no need for the CFMEU C&G to address the "Wages Due" matter identified in paragraphs 65 to 70 of the AIG submission.

44. The only other employer organisation submission of any substance related to the *Building and Construction General On-site Award 2010* is that of the HIA. Even this submission is bereft of any detail regarding the *Building and Construction General On-site Award 2010* and mainly deals with the *Timber Industry Award 2010*. To the extent that the HIA rely on the Annual Leave Decision we have addressed why that decision is not relevant to these proceedings in paragraphs 9 to 37 above. Those parts of this submission are relevant to weekly hire employees engaged under the *Building and Construction General On-site Award 2010.*

45. In regard to daily hire employees covered by the *Building and Construction General On-site Award 2010,* we note that such employees are not covered by s.117 of the FW Act because of the provisions of s.123(3)(b). We submit however that daily hire employees should not be disadvantaged compared to weekly hire employees in regard to when monies owed are to be paid on termination. We would add that as the employees are daily hire and the employer has the ability to dismiss an employee by giving notice either before or at the usual starting time of any working day and that the notice expires at the completion of that day's work, it would be incumbent on employers to ensure that they have sufficient funds to comply with the requirements of clause 31.4 of the *Building and Construction General On-site Award 2010.*

46. There has been no evidence provided by any employer organisation to show that the existing provision in the *Building and Construction General On-site Award 2010* is not working or is creating problems for employers. Indeed the MBA refer to the practicality of the existing provision which allows for the employers of daily hire employees to pay them within two working days of the termination.[16]

47. The only complaint appears to be that made by the HIA in paragraph 3.1.18 of their submission where they refer to the complexity of determining redundancy payments, banked RDO's and any additional tax implications. Given that the majority of employers in the industry will be making contributions to redundancy funds to offset any redundancy liability (as allowed for under clause 17.4 of the *Building and Construction General On-site Award* 2010), the calculation of redundancy entitlements is hardly onerous, and even the most simple of computerised payroll systems allows for the accumulation of RDO's[17] and can calculate tax payments. With the added entitlement to make any payment within two working days of the termination, there is clearly sufficient time for employers, even small employers, to finalise entitlements.

[16] See paragraph 16b. of the MBA submission
[17] http://www.reckon.com.au/library/pdf/RDOs%20in%20RAB.pdf

48. In regard to the issue raised in the 8th September 2016 Statement concerning termination payments being made by post, it would be up to the employer to determine whether the payment is in cash or cheque form, although we doubt that any employer would use the cash option (unless they had some ulterior motive!). We do not see any need to alter this provision.

49. The CMEU C&G therefore submits that the Full Bench should not make any variation to the payment of wages provisions in the *Building and Construction General On-site Award 2010,* the *Mobile Crane Hiring Award 2010*, the *Manufacturing and Associated Industries and Occupations Award 2010*, and the *Waste Management Award 2010.*

Penalty for Late Payment of Wages

50. The ABI is seeking to vary the provisions in 10 modern awards which impose a penalty for late payment of wages. Of the 10 awards[18] involved, only the *Joinery and Building Trades Award 2010* is of interest to the CFMEU C&G. As outline in paragraph 7 above, we have presumed that the ABI claim for the *Joinery and Building Trades Award 2010* will be dealt with in the Award Stage. Accordingly we do not intend to make specific submissions in these proceedings in regard to that award other than to say that we reject the draft determination attached to the MBA submission (Annexure E) which seeks to vary more than the provisions concerning waiting time.

Annual Leave Loading Issue

51. The AIG seeks to vary the *Joinery and Building Trades Award 2010* to replace clauses 32.2(c) and 32.3. The intent of the variations is to "ensure that employees do not receive a shift loading and an annual leave loading during a period of annual leave. They would instead receive whichever is the greater."[19]

52. The AIG claim that the current terms of the award governing the payment of annual leave and annual leave loading impose an unjustifiable and unreasonable cost on employers and that they exceed the standard of a fair and relevant minimum safety net contemplated by the modern awards objective.

53. The AIG however provide no evidence of those costs, nor have they provided any evidence from employers that they find the costs to be unjustifiable or unreasonable. In regard to the award meeting the modern awards objective, the AIG conveniently ignores the decision of the Full Bench in the 2012 Award Review, which found that the award only required minor

[18] See paragraph [18] of the 2nd August Statement [2016] FWCFB 5254
[19] AIG Submission at paragraph 112

variations dealing with the slushing allowance and a rostered day off in order to achieve the modern awards objective.[20]

54. The AIG then make a convoluted attempt to demonstrate that the wages payable under clause 32.2 should not include shift "penalties" and make a weak attempt to show that under the annual leave clause in the *National Joinery and Building Trades Products Award 2002* (being the award on which the modern award was primarily based), employees were not entitled to the shift rates for the annual leave payment.

55. In regard to the decision[21] of SDP Drake there is nothing in that decision which supports the assumption made in paragraph 119 of the AIG submission that her Honour decided that the shift rates *are penalties for the purpose of clause 32.2. What SDP Drake did decide is that:*

> *"[7] .....if shift work constituted their ordinary hours of work as defined in clause 28 of the award, then the wages earned by them for those ordinary hours of work would be the basis of the calculation referred to in clause 32.2(a). Had it been intended to exclude the shift rate from the calculation in clause 32.2 it would have been an easy matter to do so.*
>
> .....
>
> *[10] clause 32.2(b) defines what an employee would have been paid whilst working ordinary hours .....I am satisfied that shift rates are within this definition."*

56. This is consistent with the provisions of the *National Joinery and Building Trades Products Award 2002*. Under that award, clause 30.7.1 referred to employees being paid in advance the wages which would ordinarily accrue to the employee during the currency of leave.

57. Under clause 17.1 – Wage rates, it provided that:

> "17.1.1 Except as elsewhere provided in this Award, the minimum rates of pay payable to an adult employee (other than an apprentice) in a classification or class of work specified in 17.2 shall be the total of the base rate identified in 17.1.2 plus where applicable the allowances prescribed in clauses 17.4, 19.1 and 19.2 of this award."[22] (underlining added)

It is clear and unambiguous that the terms 'wage rates' and 'rate of pay' under that award were interchangeable.

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[20] [2013] FWCFB 3751 at [90]
[21] [2014] FWC 32
[22] https://www.fwc.gov.au/documents/consolidated_awards/ap/ap817265/asframe.html

58. Under clause 29.4 of that award it was provided that,

> "29.4 Other than work on a Saturday, Sunday or holiday, the rate of pay for afternoon or night shift shall be time and a half and the rate for early morning and early afternoon shift shall be time and a quarter, provided that the employee is employed continuously for five shifts Monday to Friday in any week. The observance of a holiday in any week shall not be regarded as a break in continuity for the purposes of this subclause."
>
> Under that *National Joinery and Building Trades Products Award* shiftworkers were paid a rate of pay, in other words a wage rate for working the different shifts. It was therefore not an "allowance", "loading" or "penalty" and was the wage rate to be used in calculating the annual leave payment.

59. In regard to the silly claim in paragraph 127 of the AIG submission that the current award provision would "result in employees who are on annual leave receiving a much higher level of remuneration than they would receive for actually working. There is no industrial merit to employees receiving such payment", this is absolute nonsense. Why is this any different to a non shiftworker who receives a leave loading in addition to their usual wages? Such workers also receive a higher level of remuneration than they would receive if they were performing working.

60. The AIG are also incorrect in their interpretation of the award. The annual leave loading of 17.5% is not calculated on the amount that includes the shift loading/allowances. The loading is not applied to the shift rate contained in clause 28.3(d). Instead it is applied to the specific minimum wage rates, loadings and allowances prescribed by clauses 18, 19, 20, 21, 22, 24.1(b),(c) and (d) as applicable, and 24.1(a) if applicable.

61. The AIG clearly acknowledge that the Commission has already determined that there may be justification for differences in the terms of individual awards and that the application of the modern awards objective may result in different outcomes between different modern awards.[23]

62. What the AIG are seeking is a reduction of the existing safety net for shiftworkers covered by the *Joinery and Building Trades Award 2010*. They have provided no evidence to support the variation sought, and there is no merit to their argument. The Commission has already accepted that the *Joinery and Building Trades Award 2010* meets the modern award objective in the 2012 Award Review. The onus thus falls on the AIG to show that there has been some

[23] [2014] FWCFB 1788 at [60]

significant change to warrant the Full Bench overturning that finding. As the AIG have failed on all accounts the proposed variation should be rejected.
