

CFMEU

21 December 2016

Fair Work Commission
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East Sydney 2010

By email: amod@fwc.gov.au

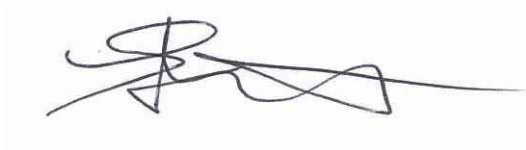
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Dear Associate,

4 Yearly Review of Modern Awards - AM2016/8

In accordance with the Statement of 14 October 2016 and the decision of 1 December 2016, in the above matter, the CFMEU – Forestry, Furnishing, Building Products and Manufacturing Division (CFMEU-FFPD) makes the following submissions **enclosed**.

Yours faithfully



Liz Dooley
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Construction, Forestry, Mining and Energy Union
Forestry, Furnishing, Building Products and Manufacturing Division

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Stand up. Speak out. Come home.

Construction, Forestry, Mining & Energy Union – Forestry, Furnishing, Building Products & Manufacturing Division



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ABN: 34 183 611 895

IN THE FAIR WORK COMMISSION

Matter Number: AM2016/8

Fair Work Act 2009

s.156—4 yearly review of modern awards - Payment of wages


**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (FORESTRY, FURNISHING,
BUILDING PRODUCTS AND MANUFACTURING DIVISION)**

21 December 2016

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AM2016/8 Payment of Wages

CFMEU Forestry, Furnishing, Building Products and Manufacturing Division (CFMEU (FFPD)) Submissions

1. The CFMEU (FFPD) filed a submission in this matter on 13 October 2016.
2. The Fair Work Commission ('the Commission') issued a statement on 14 October 2016 ('the Statement') expressing a provisional view that each modern award should provide for the payment of wages and other amounts owing on termination of employment, to ensure that employers and employees are aware of their obligations and entitlements.¹ This Statement also invited parties to respond to four questions in oral submissions at a hearing then listed for 21 October 2016. The CFMEU (FFPD) was unable to attend the 21 October 2016 hearing. 
3. The Commission issued a decision on 1 December 2016 ('the Decision') confirming its provisional view that each Award should provide for the payment of wages and other amounts owing to an employee on termination of employment, that term should prescribe a timeframe for payments, and that there is utility in a common 'payment on termination' provision across all 122 modern awards, subject to an award by award assessment.²
4. The Commission's Decision also expressed the provisional view that all modern awards should contain a term providing for the method and frequency of payment of entitlements as well as placing a limit on payment in arrears, and that there would be benefit in either replacing existing provision for payment in all modern awards with a model term, or alternatively with a version of a model term appropriately adapted to existing award arrangements.
5. The CFMEU (FFPD) has only now had capacity to make further submissions, both in response to the Statement and the Decision. We note that the decision has superseded the statement in some respects (i.e. the terms of the provisional payment on termination term), and where this has occurred, we will endeavour to respond in a consolidated manner. We apologise for the lateness and respectfully hope these submissions may assist the Commission.

Payment on termination of employment

General comments

6. The CFMEU (FFPD) does not support the provisional default term, in its original or revised³ form. It amounts to the removal of a longstanding right for employees, in all circumstances except summary dismissal, to be paid on termination under the *Timber Industry Award 2010*.
7. Under the *Timber Industry Award 2010*, where employment has terminated with notice, employees are entitled to payment on the day of ceasing their employment. If employment is otherwise terminated, monies owed are payable by the expiration of the pay period (clause 25.3).

¹ [2016] FWCFB 7455, [19].

² [2016] FWCFB 8463, [86]-[87]

³ [2016] FWCFB 8463, [117].

8. The provisional term would extend the period for those terminated otherwise than summarily to up to 7 days after the employee's last day of employment.
9. We note the *Timber Industry Award 2010* provides for notice of termination in accordance with the NES. The minimum notice period under the NES is one week. This means under the current Award provision, where a notice period is worked, employers would have at least one week to take measures to process the final termination pay for an exiting employee.
10. The Commission's Decision stated at [93], "It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter". (my emphasis). In our submission, the *Timber Industry Award 2010* does not presently require *all* termination payments to be made either at the time of termination or within a few days.
11. The provisional default term may create a dual obligation for employers with respect to accrued leave payable under some State long service leave Acts and render the provisional term otiose. The *Long Service Leave Act 1955* (NSW) provides for payment of accrued long service leave on termination "forthwith...in full"⁴. Similarly, the Victorian *Long Service Leave Act 1992* provides for payment of accrued long service leave on termination 'on [the day the employment ended]'.⁵ Further, the South Australian *Long Service Leave Act 1987* provides that payment in lieu of long service leave on the termination of a worker's service "must be made to the worker immediately on the termination..."⁶.
12. Given that the provisional default term does not appear to apply to State long service leave entitlements, except to the extent that they are provided under Division 9 Part 2-2 of the FW Act, in our submission all such Acts dealing with long service leave, including the abovementioned Victorian, New South Wales and South Australian Acts, continue to apply in their entirety.
13. If the provisional default term were adopted and inserted into modern awards, a Victorian employer would potentially have a dual obligation: to pay relevant long service leave entitlements *on the day* of termination, and to pay any other monies owing under the Award or NES within 7 days of the termination.
14. Based on the employer groups' submissions in respect to the administrative burden and resources required to effect termination pay, it would appear unlikely that an employer would do two separate pay runs. Therefore, assuming a Victorian employer sought to comply with the relevant State long service leave Act, it is more likely in our submission that the employer would pay all monies owing on the day of termination, thereby making the payment of a potentially large sum within a short period unavoidable, but also obviating the need for a further additional pay run.

⁴ *Long Service Leave Act 1955* (NSW) s 5(a).

⁵ *Long Service Leave Act 1992* (VIC) s 72.

⁶ *Long Service Leave Act 1987* (SA) s 8(4)(b).

The purpose of current award provisions and how these particular provisions meet the modern award objective.

15. The CFMEU (FFPD) seeks to retain the current award provision in respect to payment on termination of employment. The purpose of the provision is to ensure that in circumstances of a planned termination of employment (where notice has been given) employees are paid all outstanding entitlements at the time of termination. The purpose of the provision appears to also be to allow employers some extra time (until the expiration of the pay period), where termination has occurred unexpectedly or without notice, to comply with their obligations to pay all outstanding entitlements.
16. This provision is fair as it reflects common and accepted best practice that employees be paid all outstanding monies on termination, whilst also providing some breathing space for employers to comply when faced with unexpected terminations. In that regard, it may be characterised as a fair provision, accommodating both employee and employer needs, in accordance with s 134(1) of the *Fair Work Act 2009* (Cth).
17. We note a predecessor Award to the *Timber Industry Award 2010*, the *Forest and Building Products, Manufacturing and Merchandising (General) (SA) Award* contained a term dealing with payments on termination, in arguably a more generous manner to the current Award provision. In addition to being substantially identical to the current Award provision, it contained an additional subclause, relevantly:

5.6.12.2 Where electronic funds transfer is the usual means of payment of wages and where the employee's day of termination of employment is prior to payday, the employee will be entitled if requested to direct payment by cash or cheque within 15 minutes of the ceasing time on that day of termination.
18. It is apparent that through the process of modernisation, this subclause was not included in the *Timber Industry Award 2010*. In our submission the effect of this omission was to remove a benefit for employees, and relieve employers of a burden. In our view the proposed provisional default term would push the pendulum further in favour of employer and as such would be unfair.
19. We note the Commission's Decision indicates⁷ that there will be a further process in relation to the questions of which modern awards should be varied to insert the model term, and interested parties will be given an opportunity to comment on whether particular modern awards should be varied.

Terms of the provisional model term

20. We have had the opportunity to review the ACTU's draft submissions in response to the Decision, and support and adopt the submissions of the ACTU in respect to the drafting of this provisional model term. However we object to the inclusion of any reference to s 120 of the *Fair Work Act 2009*.
21. Unlike s 117, s 120 does not prohibit termination unless the requirements of s 120 are satisfied. We are concerned that explicit reference to s 120 may incentivize s 120 applications and provide rogue employer with a clear path to delay or avoid their NES obligations. Even if an employer makes a section 120 application, there is no guarantee that the FWC will make any order delaying the requirement to make payment. There is

⁷ [2016] FWCFB 8463, [120].

also a question of what remaining entitlements would still be payable within the relevant (7 days) timeframe if the employer made a section 120 application. It is not clear whether the FWC could make orders effectively staying the payment of *all* outstanding NES/Award entitlements on the basis that *one* NES entitlement may not ultimately be payable in full or at all.

22. Further, we submit that, for clarity, any model term referring to a time frame ought to refer to **calendar** days.

Provisional model term ‘payment of wages and other amounts’

23. The *Timber Industry Award 2010* currently provides for how frequently wages must be paid (weekly or fortnightly or otherwise by agreement) as well as the method by which they must be paid (cash, cheque, EFT).
24. We note the provisional model term has a wider scope encompassing wages ‘and other amounts that are due’ which may provide greater clarity in relation to employers’ obligations to pay award entitlements.
25. We note that the *Timber Industry Award 2010* does not currently provide for a limit on payment in arrears. Whilst this may be a useful addition, we submit that 7 days is too long for an employee to wait to be paid after the end of a pay period. This issue requires further thought and discussion in respect to how such a concept may usefully be adopted for the *Timber Industry Award 2010* and so express no concluded view on it at this stage.
26. In relation to clause X.1(c), we accept that the *Timber Industry Award 2010* does not currently provide for notification to each employee of their pay day and their pay period. However an employee’s first question is generally, ‘when will I be paid?’, and the FW Act and Regulations⁸ require employers to record employees’ pay period on their pay slips. For this notification to have practical benefit beyond what is already available in employee records, in our submission, “Prior to the commencement of the pay period”, or similar, should be added to clause X.1(c), so as to read:
27. This addition would have benefits particularly where employers unilaterally change pay periods or pay days, should such a right be afforded to them.
28. Clause X.1(d) and (e) are deeply concerning, as they give employers carte blanche to change employees’ pay cycles from weekly to fortnightly and back again at will provided four weeks’ notice is given. This has the potential to disrupt and disadvantage workers. For example, if a pay period changes and an employee does not have adequate money in their bank account to service a direct debit arrangement that is due, the employee may suffer fines and penalties for failing to pay or overdrawing an account. Four weeks’ notice may be considered adequate time to change any such direct debit arrangements, but such changes may require multiple extended telephone calls, and or personal visits to banks, which may be difficult to arrange in work time. Would employees be expected to take leave to sort out such administrative arrangements, or to otherwise do this in work time?
29. In our submission, any changes to pay periods (and pay days) must require agreement between the employer and the majority of employees, or otherwise an agreement

⁸ *Fair Work Regulations 2009* (Cth) r 3.46.

between the employer and an individual employee, as the *Timber Industry Award 2010* currently provides.

30. If the Commission is minded to adopt a provisional term containing a unilateral right for employers to change pay days and pay periods, in our submission the term must have safeguards built into it so that some of the risk carried by employees is shifted. For example, employers could be required to consult with employees before giving notice of a change, employees would have the right to be represented in any discussions in relation to changing pay days or pay periods. For changes requiring agreement, a note could be included, similar to that recently inserted into award annual leave provisions, to the effect that 'Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to agree, or not agree, to an arrangement under clause X.1(e).'
31. We oppose the replacement of existing provisions with a model term wherever this results in detriment to workers.

Treatment of accrual of payments

32. We accept that awards should deal with the issue of when wages accrue, and support Irving and Stewart's proposed amendments to both the provisional 'payment of wages and other amounts' model term, and the provisional 'payment on termination of employment'. Specifically, that:

Clause x.1(a)(i) (at para [34]) be amended to read: 'the employee's wages **accrued during** the pay period'

Clause (a)(i) (at para [117]) be amended to read: 'the employee's **accrued** wages for any complete or incomplete pay period ...

33. We also support Irving and Stewart's proposal to insert a model clause in respect to the basis upon which wages accrue, however we take issue with the unit of a 'day', and instead propose that the relevant unit be determined on an a case by case basis. This is for a number of reasons which require further consideration:
- We support the ACTU's submission in regards to the popular payroll practice of hours worked being rounded to 15 minute intervals;
 - The *Timber Industry Award 2010* currently provides for hourly minimum rates of pay;
 - The *Timber Industry Award 2010* currently provides that wages must be paid, either according to "actual ordinary hours worked...or the average number of ordinary hours worked";
 - The NES entitlement to annual leave, "...accrues progressively...according to the employee's ordinary hours of work";
 - The implications for time off in lieu and flexi-time arrangements;
 - "Day" is not defined in the FW Act or the *Timber Industry Award 2010*, and may have different meanings for different categories of employees