

4 YEARLY REVIEW OF MODERN AWARDS

Fair Work Act 2009

COMMON ISSUES – PAYMENT OF WAGES

(AM2016/8)

SUBMISSION BY CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION,
MINING AND ENERGY DIVISION ON MATTERS RAISED IN A DECISION OF THE
FULL BENCH, DATED 1 DECEMBER 2016

1. On 1 December 2016, the Full Bench dealing with a review of the payment of wages provisions in modern awards issued a decision on the matter.¹
2. The decision discusses the requisite provisions applicable to the payment of wages clauses in modern awards and, for the purposes of this submission, specifically considers the payment of wages during employment and the payment of wages on termination of employment. As part of that consideration the Full Bench drafted separate provisional model clauses for payment of wages in the event of current employment and in the event of termination of employment.
3. The decision seeks comment on the concepts and wording of the provision model clause for payment of wages whilst currently employed, including whether there would be a benefit in replacing the “existing provision in all modern awards with the model term (once finalised) or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements.”² Further, the decision seeks

¹ [2016] FWCFB 8463

² [2016] FWCFB 8463 @ PN [49]

comment on the provisional model clause on payment on termination, including any comment on the treatment of accruals.³

4. The Construction, Forestry, Mining and Energy Union, Mining and Energy Division ('CFMEU') has made 2 submissions to date on the payment of wages issue.⁴ The CFMEU continues to rely on those submissions.
5. With respect to the payment of wages during a period of the employment relationship, the CFMEU notes the range of provisions applicable to the timing of payment and the composition of the payment. It is acknowledged the points raised are relevant to the payment of wages. In that regard it is submitted that whether each or some or all of those points and the content of those provisions are necessary for inclusion in a modern award is a matter for consideration in the context of the relevant modern award. It is submitted that the current provisions in a modern award should not be disturbed in the absence of a need to do so or in the absence of agreement by the relevant parties. This reflects a need to pay heed to the custom and practice as reflected in a modern award or in an industry in which the current modern award is silent on the issue. Addressing the issue on an award-by-award basis is, in our submission, conducive of a proper outcome.
6. In our submission this position is consistent with the view expressed by the Full Bench in the Preliminary Issues Decision on the need for a party seeking change to advance a merit argument; the requirement for probative evidence, with the nature and degree depending on the issue at hand; and the observation that there is no one set of provisions in a particular award that provide a fair and relevant safety net of terms and conditions.⁵ It is also consistent with the position in the December Full

³ [2016] FWCFB 8463 @ PN [118]

⁴ 20 September 2016 and 18 October 2016

⁵ [2014] FWCFB 1788 @ PN [60]

Bench Decision regarding the raising of award specific issues if and when a draft determination is issued.⁶

7. With respect to the payment of wages on termination of employment, the CFMEU adopts the same position as set out in paragraphs 5 and 6 above. What occurs with any particular modern award needs to be considered in light of the existing provisions and any other relevant consideration, including the requirement to advance a merit argument, together with probative evidence. In particular, we note that whilst the provisional model clause refers to a 7-day period for the making of the final payment, we do not support a 7-day period as a general standard to apply where a current award currently provides of a lesser period or an award where there are grounds for a lesser period. For example, as set out in our earlier submissions, the Black Coal Mining Industry Award 2010 currently provides for payment within 72 hours of the termination of employment and with an appropriate amendment that period can be applied to payment by electronic funds transfer. There is no evidence to which we are aware that addresses the need for a change in that term of the Black Coal Mining Industry Award 2010.

8. The CFMEU agrees with the need to ensure that all due payments for the relevant period are made, including on termination of employment and that modern awards are clear and enforceable on this score. The Full Bench's discussion reveals the technical side of the 'accrual' situation and shows that the wording necessary to ensure due payment may vary between awards. With advice being sought from the Fair Work Ombudsman, this issue may need to be addressed further.

Construction, Forestry, Mining and Energy Union
Mining and Energy Division
22 December 2016

⁶ [2016] FWCFB 8463 @ PN [50]