

# CFMEU

## CONSTRUCTION

**IN THE FAIR WORK COMMISSION**  
**Matter Number:** AM2016/8

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards – payment of wages**  
**(AM2016/8)**

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

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25<sup>th</sup> September 2019

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## Introduction

1. The Fair Work Commission (the **Commission**) is currently undertaking a 4 yearly review of modern awards (the **Review**) in accordance with the transitional provisions of Schedule 1, Part 5 – Amendments made by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018, of the *Fair Work Act 2009* (the **FW Act**).
2. One of the common issues being dealt with as part of the Review is the ‘payment of wages’ terms in modern awards. The payment of wages terms include matters dealing with the timing of payment of wages, the timing of payment on termination of employment, and the accrual of wages and other amounts.<sup>1</sup>
3. On the 17<sup>th</sup> July 2018 the Full Bench issued a Decision ([2018] FWCFB 3566) which finalised the ‘payment on termination of employment’ model clause (the **model term**). In that Decision the Full Bench expressed a provisional view that the model term should be inserted into the 86 awards which were silent in respect of the time period within which termination payments are to be made.<sup>2</sup>
4. In regard to the 36 modern awards that already contain terms which provide for the payment of wages and other amounts owing to an employee on the termination of their employment, the Full Bench decided to abandon the provisional view expressed in the *October 2016 Statement*<sup>3</sup> that the model term should replace the existing provisions, stating,

*“After further consideration, and taking account of the submissions made, we have decided to abandon the above provisional view. The review of the remaining 36 modern awards will proceed on an award by award basis and any variation will have to be justified on its merits. We do not think it appropriate to proceed from the prima facie position that existing provisions in respect of payments on termination should be replaced by the model term.”*<sup>4</sup>

5. Following this Decision conferences were convened to ascertain the views of interested parties about any variations to the existing payment on termination terms in the 36 awards. Arising from these conferences no objection was raised to the insertion of the model term in a number of awards however the term for 30 awards remained outstanding.<sup>5</sup> Directions were issued for 22 awards requiring any party wishing to press for a variation of one of the awards to insert

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<sup>1</sup> See [2017] FWCFB 2729 at [2]

<sup>2</sup> [2018] FWCFB 3566 at [137]

<sup>3</sup> [2016] FWCFB 7455 at [21]

<sup>4</sup> [2018] FWCFB 3566 at [156]

<sup>5</sup> [2018] FWC 4935 at [2] to [5]

the model term to file an application by 4pm on Friday 21<sup>st</sup> September 2018.<sup>6</sup> On the due date the Australian Industry Group (**AiG**) filed an application to vary 14 awards<sup>7</sup> and the Australian Business Industrial and NSW Business Chamber (**ABI**) filed an application to vary 12 awards<sup>8</sup>.

6. The CFMMEU (Construction and General Division) (the **CFMMEU C&G**) has an interest in, and members covered by, the following awards for which applications have been made:
  - *Building and Construction General On-site Award 2010*
  - *Manufacturing and Associated Industries and Occupations Award 2010*
  - *Mobile Crane Hiring Award 2010*

The CFMMEU C&G opposes the applications to vary these awards.

7. On 26<sup>th</sup> July 2019 the Full Bench issued a further decision ([2019] FWCFB 5146) in which they invited the applicants to file submissions and evidence in support of the applications by 4pm on 21<sup>st</sup> August 2019 and for submissions and evidence in reply to be filed by 4pm on 25<sup>th</sup> September 2019.<sup>9</sup> This reply submission is made in accordance with those directions.

### **Employer Submissions in Support**

8. Submissions in support of the applications were filed by the ABI<sup>10</sup>, AiG<sup>11</sup> and the Housing Industry Association (the **HIA**)<sup>12</sup>.
9. Both the ABI and AiG applications seek to vary the *Manufacturing and Associated Industries and Occupations Award 2010* (the **Manufacturing Award**) to replace the existing clause 34.3 - Payment of wages on termination of employment, with the model term. Only the AiG have made application to vary the *Building and Construction General On-site Award 2010* (the **On-site Award**) and the *Mobile Crane Hiring Award 2010* (the **Mobile Crane Award**) to replace the existing provisions with the model term.
10. There is fair degree of commonality between the submissions of the ABI and AiG as to why they say the applications should be granted.
11. The AiG submission refers to:

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<sup>6</sup> Ibid at [16]

<sup>7</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20168-sub-aig-200918.pdf>

<sup>8</sup> <https://www.fwc.gov.au/sites/awardsmodernfouryr/am20168-sub-abi-210918.pdf>

<sup>9</sup> [2019] FWCFB 5146 at [33]

<sup>10</sup> <https://www.fwc.gov.au/sites/awardsmodernfouryr/am20168-sub-abinswbc-210819.pdf>

<sup>11</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20168-sub-aig-210819.pdf>

<sup>12</sup> <https://www.fwc.gov.au/sites/awardsmodernfouryr/am20168-sub-hia-210819.pdf>

- the Commission’s prior consideration of the relevant issues which led to the determination of the model term;<sup>13</sup>
- the unfairness to employers which includes mandating the payment of potentially large sums in a limited period of time, the additional costs and regulatory burden of administering an additional pay run, and the requirement to make payment where an employee resigns without notice;
- the unfairness to employees to the extent that they do not regulate the payment of amounts other than wages;
- the existing provisions not striking a fair balance between the interests of employers and employees;
- the current provisions not reflecting a relevant safety net;
- that if not varied the awards would become out of step with the 86 awards that have been varied to include the model term;
- that cash exceeding \$200 in value cannot be sent by post;
- the insertion of the model term would not detract from the maintenance of the relevant living standards and the needs of the low paid;
- the variations proposed would not undermine s.134(1)(b) of the FW Act;
- the variations proposed are consistent with the need to promote flexible modern work practices and are likely to have a positive impact on business;
- the insertion of the model term is consistent with the need to ensure a simple, easy to understand modern award system; and
- the variations proposed are unlikely to have an adverse impact on employment growth, inflation or the sustainability, performance and competitiveness of the national economy.<sup>14</sup>

12. In regard to specific awards the AiG say that:

- The On-site Award provision is unfair to employers as it requires the payment of all monies, including over-award amounts, and requires payment of redundancy pay on the day of termination or within 2 working days, which may preclude an employer lodging an application under s.120 of the FW Act.<sup>15</sup>
- The Manufacturing Award and Mobile Crane Award are unfair to employers as the clauses only deal with wages (including over-award amounts), require payment on the day of termination or forwarded by post on the next working day, and the clause

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<sup>13</sup> AiG submission at paragraphs 9 to 13

<sup>14</sup> Ibid., paragraphs 14 to 36

<sup>15</sup> Ibid., paragraph 41

applies even when the employee's employment is terminated without notice by the employee or employer.<sup>16</sup>

13. The ABI submission states that the existing terms are impracticable and inconsistent with the modern awards objective because:

- the growth in EFT transactions has changed the way employees receive termination payments;
- the provisions in the awards currently apply to all terminations, including those which arise summarily;
- employers can have difficulty promptly obtaining wage information to process payments instantly;
- employers sometimes need time to make funds available for payment; and
- processing termination manually in order to comply with current award provisions imposes a time and administrative cost on employers; and
- previous Full Bench considerations.

14. The HIA submission also canvasses similar arguments and refers to:

- the current provision in the On-site Award not being fairly balanced;
- the impracticalities and difficulties in providing termination payments at, or shortly after, the time of termination;
- that the current time limitations in the On-site Award is unnecessary burdensome, particularly for small business;
- the On - site Award does not contemplate circumstances whereby termination payments may be required, other than for where notice is given.

15. Other than referring to previous decisions of the Commission, and the generic material presented in those previous matters, the employer parties provide no evidentiary material to support their applications or specific evidence in regard to the individual awards that they seek to vary.

### **The Applications Should Be Dismissed**

16. The CFMMEU C&G submits that the applications should be dismissed as the applicants have failed to provide a sufficient merit based argument to justify the removal of existing provisions

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<sup>16</sup> Ibid., see paragraphs 53 and 58 which refer back to paragraph 43.

in specific awards. Indeed when looked at more closely many of the arguments in support are clearly lacking in merit.

17. As noted in paragraph 4 above the Full Bench, in the 17<sup>th</sup> July 2018 Decision, has already determined that “*any variation will have to be justified on its merits*” and that the Full Bench does not think it appropriate “*to proceed from the prima facie position that existing provisions in respect of payments on termination should be replaced by the model term*”.

18. In the 17<sup>th</sup> July 2018 Decision the Full Bench also noted the generally acknowledged areas of agreement from earlier proceedings that:

*“(i) Clarity is important, so that those covered by an award clearly understand their obligations. **Parties also generally acknowledged that there are benefits of uniformity, but the circumstances of particular awards may mean that not all elements of common approach are appropriate in a particular award.***

*“(ii) As noted in (i) above, while it is generally acknowledged that consistency is desirable, **there is also broad support for the proposition that an award by award approach is warranted and that regard should be had to the existing terms of the award, their historical context and the circumstances pertaining to the relevant industry.**”<sup>17</sup>*

(Emphasis and underlining added)

19. Moreover, in the recent 26<sup>th</sup> July 2019 Decision<sup>18</sup> the Full Bench identified the matters that would need to be addressed in submissions to enable the Full Bench to properly consider any variation to existing terms. These matters include:

- The circumstances pertaining to the relevant industry (such as the number and size of the enterprises covered by the award; and the extent of enterprise agreement coverage and the manner in which those agreements deal with termination payments);
- Whether the existing term has given rise to any practical difficulties; and
- Whether there are any practical impediment to the employers covered by the award making termination payments within 7 days (and, if so, what are those impediment).<sup>19</sup>

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<sup>17</sup> [2018] FWCFB 3566 at [7]

<sup>18</sup> [2019] FWCFB 5146

<sup>19</sup> Ibid., at [19]

20. The CFMMEU C&G submits that in the context of the awards, the subject of the applications in these proceedings, the existing time frames should be substituted for the “7 days” in the last dot point.
21. As the applicants have failed to address these matters the applications should be dismissed on this basis alone.

### **Response to Employer Arguments**

22. In further support of the position advanced, that the applications should be dismissed, the CFMMEU C&G provides the following response to the employer arguments.
23. As stated above in paragraph 16 many of the arguments proposed by the employers actually lack merit.
24. In regard to the past decisions of the Commission, the Full Bench has previously indicated that its decision on the model term was made in regard to those awards that contained no provision at all in respect of the time period within which termination payments are to be made. In the 17<sup>th</sup> July 2018 Decision<sup>20</sup> the Full Bench stated:

*“[48] We particularly wish to comment on the ACTU’s contention that a 7 day default period would represent a derogation of entitlements for many workers. In considering the position put it needs to be born in mind that we are presently only considering the content of a model term. Further, as will become apparent, at this stage we are only proposing to insert the finalised model term into the 86 modern awards which currently make no provision at all in respect of the time period within which termination payments are to be made. We deal later with the review of the other 36 modern awards which currently contain terms that deal with termination payments.”*

25. As noted in paragraphs 4 and 17 above, the Full Bench has already decided that *“The review of the remaining 36 modern awards will proceed on an award by award basis and any variation will have to be justified on its merits”*, and in the 26th July 2019 Decision the Full Bench identified the matters that would need to be addressed (see paragraph 19 above).
26. Any suggestion by the employer parties that the past decisions support the removal of an existing term is therefore incorrect.

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<sup>20</sup> [2018] FWCFB 3566

27. A major theme of the employer arguments is that the existing award provisions, dealing with payments on termination, are impracticable and impose additional costs and regulatory burden on employers who are required to make an additional pay run. The employers however provide no evidence to back up these claims. They have not provided a single witness statement from an employer to support these claims. They haven't even attempted to do a simple survey of employers covered by the awards that they now seek to change.
28. There is no evidence from employers in the building and construction industry that they have not been able to meet the payment on termination timeframe requirements set out in clause 31.4 of the On-site Award. There is also no evidence from employers covered by the Manufacturing Award or the Mobile Crane Award that they have not been able to meet the timeframes set out in those awards.
29. This is not surprising given the advancements in technology now being used by modern payroll systems. Throughout the current and earlier proceedings the employer parties have repeatedly referred to the changes in the way that employees are paid, and that the majority of employees are now paid by EFT. Whilst the employer parties have heralded this use of "modern technology", what they have failed to mention are the other substantial technological changes impacting on pay and time records and the calculation of entitlements that employers are now required by law to comply with.
30. Attached at Appendix A is a witness statement from Hemal Patel, a Chartered Accountant who is familiar with modern payroll systems. As set out in this witness statement, modern payroll systems are now to a large degree computerised and cloud-based and are able to provide almost real-time detail on wages paid, leave accruals and other entitlements. The witness statement also refers to the new legal requirements for making superannuation contributions electronically through SuperStream and the Single Touch Payroll system for reporting wages paid to employees.
31. SuperStream legislation was passed in 2012 and came into effect for small businesses midway through 2015.<sup>21</sup> According to the ATO website:

*"SuperStream is the way businesses must pay employee superannuation guarantee contributions to super funds. With SuperStream money and data are sent electronically in a standard format.*

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<sup>21</sup><https://www.canstar.com.au/superannuation/superstream-guide/>



*It must be used by:*

- *employers*
- *self-managed super funds*
- *APRA-regulated funds*

*SuperStream transmits money and information consistently across the super system – between employers, funds, service providers and the ATO. The data is linked to the payment by a unique payment reference number.*

*This means:*

- *employers can make all their contributions in a single transaction, even if they're going to multiple super funds*
- *contributions and rollovers can be processed faster, more efficiently and with fewer errors*
- *people can be more reliably linked to their super, reducing lost accounts and unclaimed monies.*

*All employers should be SuperStream compliant.”<sup>22</sup>*

32. The introduction of SuperStream has significantly reduced the time taken by employers to pay superannuation to different funds. According to the ATO website;

*“Under SuperStream, employers are required to make super contributions electronically in a standard format. A significant benefit is the reduced time and cost it takes for employers to meet their super obligations.*

*Thousands of small employers have already made the change to SuperStream. Many employers now using SuperStream have reported they are experiencing significant benefits.*

*Accountant Peter Shonhan of Kennas Chartered Accountants said the move to SuperStream has cut down time spent on paying super considerably.*

*“We upgraded our payroll software and have been recommending our employer clients to do the same. What previously took around a day per month now takes less than an*

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<sup>22</sup> <https://www.ato.gov.au/Super/SuperStream/>

*hour. The time savings are pretty high and allows us to focus on other parts of the business,” said Mr Shonhan.*

*“SuperStream changes are much like the move to internet banking. There are a few steps to set things up, but, after that, making super contributions is so much easier and faster than before. We couldn’t imagine going back to our old methods,” he said.*

*Philip Hind, ATO National Program Manager, Data Standards and E-Commerce (SuperStream), said SuperStream is delivering real benefits for business.*

*“SuperStream is making super contributions super simple. For employers, it is cutting red tape by making all super payments electronic and introducing a standard way to pay contributions.”*

*“Previously, it has been time consuming for employers who had to make multiple super contributions to numerous funds with many also using cheques to make payments.*

*“For many employers paying super took hours. Under SuperStream, employers need now make just one electronic transaction covering all employees – and this can considerably cut the time it takes to make super contributions.”<sup>23</sup>*

33. The Single Touch Payroll System was introduced by the Federal government in 2016 and applied to employers with 20 or more employees who were required to start reporting from 1 July 2018. Legislation has been passed to extend Single Touch Payroll (STP) reporting to include all small employers (those with fewer than 20 employees) from 1 July 2019.

34. The ATO provides information for employers on the Single Touch Payroll system.<sup>24</sup> According to the ATO, the rules of reporting through Single Touch Payroll are the following:

*“Each time you send us your Single Touch Payroll (STP) report it will include minimum reporting requirements in order for you to meet your STP obligations.*

*Your updated software will capture the data we require. We have outlined these requirements below.*

*You are required to report a pay event to the ATO on or before the pay day. The pay day is either the payment date stipulated in the electronic transaction to your financial*

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<sup>23</sup> <https://www.ato.gov.au/Media-centre/Media-releases/SuperStream-starts-for-small-employers---ATO-urges-employers-to-get-ready/>

<sup>24</sup> See <https://www.ato.gov.au/Business/Single-Touch-Payroll/In-detail/Single-Touch-Payroll-employer-reporting-guidelines/>

*institution or, if you did not stipulate a date for payment, the date you intend to make the payment into your employee's bank account.*

*If you include out-of-cycle payments in your regular pay event, report the date of your regular pay day.*

*The report must include, at a minimum, each employee with an amount subject to withholding paid in that regular pay cycle. The report may include information for other employees.*

*You must report the year-to-date values of gross salary or wages, allowances or other payments (as relevant), deductions and PAYG withholding for each employee included in that pay event.*

.....

*You must report year-to-date employer super liability or ordinary time earnings (OTE) amounts for each employee in that pay event.*

*If you pay above the minimum super guarantee (SG) liability, report this higher amount if you can't separately identify these in your payroll solution.*

*Where you cannot report super liability you must report the year-to-date OTE amount.*

*You can report both OTE and employer superannuation liability if your payroll solution allows.*

*We will compare the amounts you report with information we receive from super funds. If we identify your contributions vary significantly from the liability reported, we will contact you.*

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*You may lodge multiple pay event files for the same day. Your system will generate a time stamp which is used to identify the latest record for each employee to ensure the employee's myGov display recognises the latest record.”<sup>25</sup>*

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<sup>25</sup> <https://www.ato.gov.au/Business/Single-Touch-Payroll/In-detail/Single-Touch-Payroll-employer-reporting-guidelines/?anchor=Guidanceforpayeventreporting#Guidanceforpayeventreporting>

35. The ATO provides information on free and low cost payroll software programs that are available and which meet the requirements of the ATO.<sup>26</sup> The service providers include the major payroll software companies including MYOB and Zero.

36. According to the MYOB website<sup>27</sup> their MYOB Essentials software can do the following for employers:

- Easily meet your Single Touch Payroll (STP) obligations
- Automatically calculate tax and superannuation
- Update automatically every time tax law changes
- Doing payroll for a few employees is the same effort as 20 or more
- Let your employees fill out timesheets and see payslips on their mobiles
- Run detailed reports on past pay runs, YTD activity, and more

37. Zero has a low cost product that that performs similar functions and which can:

***“Eliminate manual calculations and errors***

*Our Payroll software automatically calculates pay and tax rates, leave entitlements, helping you pay employees the right amount, every time.*

***Track working hours with built-in timesheets***

*Record employee hours and have them seamlessly appear in pay runs for automated calculation and payment.*

***Employees can self-service***

*Reduce the payroll load by giving your employees the power to apply for leave, submit timesheets and view their payslips anywhere, any time with the XeroMe mobile app (iOS and Android).”<sup>28</sup>*

38. For larger companies more sophisticated programs are available some of which are tailored for the building and construction industry. One such provider listed on the ATO website is the Construction Industry Solutions Limited (COINS) which has a case study on its website of a

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<sup>26</sup> <https://api.gov.au/productregister/>

<sup>27</sup> <https://www.myob.com/au/accounting-software/essentials>

<sup>28</sup> <https://www.xero.com/au/pricing/plan-details/#payroll-only>

large civil construction company which reduced its's payroll processing time from 30 hours to 8 hours per week, and dropped the outstanding timesheet rate by 95 per cent.<sup>29</sup>

39. The other significant development affecting payments on termination is the introduction of the New Payments Platform. According to the Reserve Bank;

*“Launched in February 2018, the New Payments Platform (NPP) is open access infrastructure for fast payments in Australia. The NPP was developed via industry collaboration to enable households, businesses and government agencies to make simply addressed payments, with near real-time funds availability to the recipient, on a 24/7 basis.”*<sup>30</sup>

40. A significant component of the New Payment Platform is the Fast Settlement Service which:

*“enables final and irrevocable settlement of individual NPP transactions in real time. Leveraging the approach employed by some stock exchanges, the FSS employs in-memory processing to enable fast settlement-processing times, with a median settlement-processing time since launch of around 50 milliseconds.”*<sup>31</sup>

41. The introduction of the technological changes referred to above, and the requirement that they now be used by **all** employers, mean that the time and administrative imposts claimed by the employer parties, of making payments on termination on the day of termination or very soon after, are illusionary.

42. The reality is that the modern payroll systems and financial payments system mean that:

- timesheets can be filled in on smart phones and approved by supervisors almost instantaneously
- employers have readily available up to date annual leave accruals
- employers have easy access to year to date payments for leave and superannuation payments
- redundancy entitlements can be calculated quickly by the payroll software
- calculation of withholding tax can be done at the press of a button
- payments between the employers account and an employee's account can be done in almost real time

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<sup>29</sup> <https://www.coins-global.com/apac/blog/case-study-coins-and-timefiler-transform-diona-s-payroll-and-timesheet-process/bp456/>

<sup>30</sup> <https://www.rba.gov.au/payments-and-infrastructure/new-payments-platform/>

<sup>31</sup> <https://www.rba.gov.au/publications/bulletin/2018/sep/the-new-payments-platform-and-fast-settlement-service.html>

- one off payments to an employee, out of the normal pay cycle, can be done quickly and efficiently in a matter of minutes

43. These changes mean that it is now much easier for employers to make payments on termination within the existing timeframes specified in the awards, and there is no justification for those timeframes to be increased.

44. In regard to those award clauses which allow payment to be sent by post the AiG complain that there is a limit of \$200 in cash that can be sent by post. Whilst this is technically correct the awards however do not say that the termination payments have to be sent in cash. They say that the wages or monies owed must be sent to the employee by post.

45. Just like the changes to payroll systems, Australia Post has also embraced new technology and money can now be sent electronically through a domestic money transfer to a specific person. According to Australia Post the benefits of domestic money transfers (which have replaced the old money orders) are:

*“Privacy: No need for your recipient to disclose their bank account details.*

*Safety: Built-in security features make Money Orders a safer option than sending cash in the mail.*

*Peace of mind: Your money can only be collected by the nominated recipient.*

*Choice: Your recipient has the option of cashing or banking your money.”<sup>32</sup>*

Payments of up to \$10,000 can be made by domestic money transfer.<sup>33</sup>

46. The other general claim by the employers goes to the issue of fairness. They submit that the existing provisions are unfair to employers. The CFMMEU C&G rejects that submission as the technological changes referred to above have removed the time and administrative imposts on employers, and points out that fairness cuts both ways. The variations sought by the employers would be unfair to employees as it would increase the time period before they received the monies owed on termination.

### **Award Specific Issues**

47. In regard to the On-site award the HIA say that the award does not contemplate circumstances whereby termination payments may be required, other than for when notice is given, and refer to paragraph [61] of the 1<sup>st</sup> December 2016 Decision ([2016] FWCFB 8463).

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<sup>32</sup><https://auspost.com.au/money-insurance/banking-and-payments/domestic-money-transfer-money-orders>

<sup>33</sup><https://auspost.com.au/money-insurance/banking-and-payments/domestic-money-transfer-money-orders#tab2>

48. The CFMMEU C&G submits that the current wording has to be read in the context of daily hire which is the predominant form of engagement under the On-site Award. Clause 11 of the On-site Award provides as follows:

*11. Daily hire employees*

*A daily hire employee means a tradesperson or labourer engaged subject to the following provisions:*

*11.1 One day's notice of termination of employment will be given on either side or one day's pay will be paid or forfeited.*

*11.2 Notice given at or before the usual starting time of any ordinary working day will expire at the completion of that day's work.*

*11.3 A tradesperson will be allowed one hour prior to termination to gather, clean, sharpen, pack and transport tools.*

*11.4 Nothing in this clause will affect the right of an employer to dismiss an employee without notice for misconduct or refusing duty.*

49. The wording of the current payment of wages clause on the On-site Award is a shortened version of that found in the National Building Trades Construction Award 1975<sup>34</sup>:

*37-PAYMENT OF WAGES*

*1. All wages, allowances and other monies due shall be paid in cash not later than the time of cessation of work on Thursday of each working week. Providing that in any week in which a holiday falls on a Friday wages accrued shall be paid on the previous Wednesday and provided further that when a holiday occurs on any Thursday wages accrued may be paid on the following Friday. Nothing shall prevent any alternative mutual arrangement between an employer and an employee. The employer shall not keep more than two days' wages in hand.*

*2. When notice is given in accordance with clause 39 Termination of this award all monies due to the employee shall be paid at the time of termination; where this is not practicable the provisions of 37.6 and/or 37.7 of this clause shall apply.*

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<sup>34</sup> Print C6006

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6. *Where an employee gives notice in accordance with clause 39 Termination of this award and monies due are not paid on termination the employer shall have two working days to send monies due by registered post provided that if the money is not posted within that time then time spent waiting beyond the two working days shall be paid for at ordinary rates, such payment to be at the rate of eight hours pay per day up to a week's pay when the right to waiting time shall terminate.*

7. *Where an employer gives notice in accordance with clause 39 Termination of this award all monies due shall be paid at termination; where this is not practicable the employer shall forward the monies due by registered post within two working days of termination and shall pay waiting time up to the time of posting at the rate of eight hours ordinary time per day up to a maximum of one week's pay.*

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#### **39-TERMINATION OF EMPLOYMENT**

1. *One day's notice of the termination of the employment engagement shall be given on either side or one day's pay shall be paid or forfeited in lieu thereof.*

2. *For the purpose of this sub-clause, notice given at or before the usual starting time of any ordinary working day shall be deemed to expire at the completion of that day's work.*

3. *A tradesman shall be allowed the one hour prior to termination to gather, clean, sharpen, pack and transport his tools.*

4. *Provided that nothing in this clause shall affect the right of an employer to dismiss an employee without notice for misconduct or refusing duty.*

50. Reading the modern award clause in the context of daily hire employment, and taking into account the history of the award clause, it is clear that the payment of all monies on termination of employment applied to situations where notice was given or not given and one days pay paid or forfeited (i.e. payment in lieu of notice). As abandonment of employment still requires notice of termination to be given by an employer the remaining situation not covered would be summary dismissal (which is a decision to terminate made by an employer). In terms of making the award simple and easy to understand it seems somewhat inappropriate to have a



different term for the payment on termination of all monies owed just for the summary dismissal of employees.

51. The AiG submission expresses a concern that the requirement to pay redundancy pay on the day of termination or within two working days is unfair to employers as it requires payment before an employer can consider making application under s.120 of the FW Act. The CFMMEU C&G is surprised at this submission and suggests that the AiG should familiarise itself better with the On-site Award and the FW Act.
52. S.120 of the FW Act is found in Subdivision B – Redundancy pay, of Division 11 – Notice of termination and redundancy pay, contained in Part 2-2 - The National Employment Standards. S.123(4)(b) of the FW Act specifically excludes an employee to whom an industry-specific redundancy scheme in a modern award applies from the coverage of Subdivision B. Clause 17 of the On-site Award is an industry-specific redundancy scheme (as is clause 12 of the Mobile Crane Award) therefore s.120 has no application to employees covered by either the On-site Award nor the Mobile Crane Award.
53. In regard to the Mobile Crane Award and Manufacturing Award the CFMMEU C&G recognises that the existing payment on termination provisions in those awards only refer to wages, and in line with the recent changes determined by the Full Bench for the Wine Award in [2019] FWCFB 5868 (see paragraph [9]), accepts that for the other monies owed the 7 day period may be appropriate.

#### **Modification of the Model Term**

54. At the mention held on 23<sup>rd</sup> August 2019 the President, Justice Ross, encouraged the parties to try and narrow the issues in dispute, and suggested that there may be an option in some of the awards to retain some aspect of an existing term and incorporate that aspect into the model term.<sup>35</sup> The CFMMEU C&G considered this suggestion and on 11<sup>th</sup> September 2019 circulated to the parties draft clauses for both the On-site Award (see Appendix B) and the Mobile Crane Award (see Appendix C).
55. In the email that was sent, the CFMMEU C&G explained to the parties that the draft clauses were based on the existing award provisions and the clause approved by the Full Bench for the Wine Award in [2019] FWCFB 5868, and that the deletion of Note 2 was required as s.123(4)(b) of the FW Act excluded employees under these awards from being covered by the redundancy provisions in s.120 of the FW Act. The CFMMEU C&G requested the parties to

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<sup>35</sup> See PN24 of transcript

indicate, by close of business on Monday 16th September 2019, whether or not they believed there was any utility in discussing the draft clauses set out above, or seeking a conciliation conference to discuss them, which may enable the parties to reach a consent position. Unfortunately the CFMMEU C&G received only negative responses from the AiG, HIA and MBA.

56. The CFMMEU C&G believes the modified model terms/draft clauses as set out in Appendices B and C are appropriate clauses which protect the existing provisions. These draft clauses also reflect the fact that s.120 of the FW Act has no application to employees to whom these awards apply (in accordance with s.123(4)(b) of the FW Act).
57. To assist the Commission, the CFMMEU C&G has drawn up a draft modified term for the Manufacturing Award (see Appendix D) which is in similar terms to that for the Mobile Crane Award (except it does not seek to remove the references to s.120 of the FW Act).

## **Conclusion**

58. The employer parties seeking variations to remove the existing time limits within which employers are to pay wages and other monies owed, upon termination of employment, have failed to provide any award specific evidence to justify the awards being varied in the manner sought. The Full Bench should dismiss the applications.
59. There is however merit, consistent with the objective of the model term, in modifying the model term to accommodate the existing award provisions. The Full Bench should therefore vary the On-site Award, Mobile Crane Award and Manufacturing Award in accordance with the draft clauses proposed by the CFMMEU C&G and set out in Appendices B, C and D.

**Appendix A – Witness Statement of Hemal Patel**

[\(See separate PDF file\)](#)

**Appendix B – Modified Model Term for the *Building and Construction General On-site Award 2010***

**31.4 Payment on termination of employment**

(a) ~~If the employment of an employee terminates, the employer must pay an employee the following amounts in accordance with this clause 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

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

~~(b) The amounts described at clause 31.4(a) must be paid to the employee at the time of termination of employment, provided that where this is not practicable, the employer will have two working days to send monies due to an employee by registered post or, where the employee is paid by EFT, transfer the monies into the employee's account.~~

~~(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 the 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 employee the required minimum period of notice or "has paid" to the employee payment instead of giving 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.

## Appendix C – Modified Model Term for the *Mobile Crane Hiring Award 2010*

### 19.5 Payment on termination of employment

(a) ~~If the employment of an employee terminates, T~~the employer must pay an employee ~~the following amounts in accordance with this clause 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 the termination; and
- (ii) all other amounts that are due to the employee under this award and the NES.

(b) ~~The amounts described at clause 19.5(a)(i) must be paid to the employee:~~

- (i) ~~on the day of termination; or~~
- (ii) ~~forwarded by electronic transfer or post on the next working day.~~

(c) ~~The amounts described at clause 19.5(a)(ii) must be paid to the employee:~~

- (i) ~~on the day of termination; or~~
- (ii) ~~forwarded by electronic funds transfer 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 paragraph (a) clause 19.5(a) is subject to further order of the Commission and the employer making deductions authorised by this award or the 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 employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

~~Note 2: Paragraph (d) allows the Commission to make an order delaying the requirement to make a payment under clause 19.3. 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.

**Appendix D – Modified Model Term for the *Manufacturing and associated Industries and Occupations Award 2010***

34.3 Payment on termination of employment

(a) ~~If the employment of an employee terminates, the employer must pay an employee the following amounts in accordance with this clause 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 the termination; and

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

~~(b) The amounts described at clause 34.3(a)(i) must be paid to the employee:~~

~~(i) on the day of termination; or~~

~~(ii) forwarded by electronic transfer or post on the next working day.~~

~~(c) The amounts described at clause 34.3(a)(ii) must be paid to the employee:~~

~~(i) on the day of termination; or~~

~~(ii) forwarded by electronic funds transfer 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 paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the 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 employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Paragraph (d) allows the Commission to make an order delaying the requirement to make a payment under clause 34.3. 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.