

IN THE FAIR WORK COMMISSION

Matter Number: AM2016/8 – Payment of wages on termination

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION – MINING AND ENERGY DIVISION (CFMMEU – M&E)

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Introduction

1. The Fair Work Commission (**FWC**) is currently undertaking a four yearly review of modern awards (**Review**) in accordance with the transitional provisions made by the Fair Work Amendment (*Repeal of 4 Yearly Reviews and Other Measures*) Act 2018 of the *Fair Work Act 2009* (**FW Act**). One of the issues being dealt with in the Review is the payment of wages dealt with in modern awards, including the payment of amounts owing upon the termination of an employee's employment.
2. In October 2016 the FWC expressed a provisional view that there was utility in a common "payment on termination" provision across all 122 modern awards, but that each award needed to be considered on a case by case basis.¹ In July 2018 the FWC abandoned this position in respect of 36 modern awards, including the *Black Coal Mining Industry Award 2010* (**BCMI Award**). In doing so, the Full Bench observed "*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.*"
3. This submission is made in response to the decision of the Full Bench issued as part of the Review in *4 Yearly Review of Modern Award – Payment of Wages* [2019] FWCFB 5146 on 26 July 2019 (**Decision**), and the subsequent claim of Ai Group (**AIG Claim**) to vary, relevantly, the BCMI Award as set out in its submission of 21 August 2019 (**AS**).

AIG Claim

4. The AIG Claim to have clause 16.7 of the BCMI Award varied so that it be replaced with the Fair Work Commission's model term (**Model Term**) relating to payment upon termination of employment.
5. The Model Term has been drafted in the following terms:

X. Payment on termination of employment

(a) The employer must pay an employee 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 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.

¹ [2016] FWCFB 8463, [86]-[87].

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.

6. Clause 16.7 of the BCMI Award is in the following terms:

Upon termination of employment, wages due to an employee will be paid on the day of such termination or forwarded by post, within 72 hours, to the last address notified in writing by the employee.

7. It operates alongside the following, relevant provisions:

- a. clause 13.1, which requires an employee to give one week's notice of termination of employment;
- b. clause 13.4, which provides for the payment of accrued leave on termination, "*in addition to any other amounts payable*"; and
- c. clause 16.6, which requires not more than one week's pay to be kept in hand by the employer, unless otherwise agreed.

8. The BCMI Award is interpreted by AIG to require that only wages must be paid within the time frame stipulated in clause 16.7 however, in our submission, the effect of clause 13.4 is that accrued leave is also payable within that same time frame.

9. Under clause 117(2)(b) any payment to be made in lieu of notice to employees will also be payable to employees ahead of the time frame set out in the Model Term.

10. In respect of when redundancy pay is payable, that entitlement arises when an employee is made redundant. It is submitted that payment is due at the point in which it becomes payable. Under clause 13.3 of the BCMI Award an employee will receive a minimum of four weeks' notice of this occurring, unless an employer elects to pay an employee in lieu of that notice. Given this, it is submitted that redundancy pay should be taken as owed once it has been determined that it is payable, as with any other debt that an organisation may incur.

History of CFMMEU M&E submissions in this matter

11. These submissions supplement the submissions put to the Fair Work Commission (**FWC**) by the CFMMEU M & E (referred to together as the **Earlier Submissions**), including on:
- a. [20 September 2016](#), proposing an alternate clause to that which was proposed by the FWC as part of a draft determination to vary the BCMI

Award, so that payment upon termination be made within 72 hours of termination;

- b. [13 October 2016](#), opposing the reasons set out but the Ai Group and Australian Business Industrial and NSW Business Chambers on the basis that neither party had met the merit test to warrant the BCMI Award being varied;
 - c. [18 October 2016](#), in response to further submissions by the Ai Group and the Coal Mining Industry Employers Group;
 - d. [22 December 2016](#), in relation to the Full Bench decision in [2016] FWCFB 8463 and a provisional model clause dealing with, relevantly, payment of wages in the event of termination of employment; and
 - e. [30 October 2017](#), in accordance with directions issued on 19 September 2017 in relation to the model clause proposed in the Full Bench decision in [2016] FWCFB 8463, and referred to in the Full Bench Statement of [2017] FWCFB 2729.
12. The CFMMEU M&E continues to rely on these submissions where relevant, noting that much of what is presented in the AIG Claim has been previously responded to in these submissions. In particular, the CFMMEU M&E continues to advance the submission that the variation proposed in its 20 September 2016 submissions is preferable for the reasons set out at clause 12 of those submissions. To the extent that it is determined that the current payment on termination provision does not provide for the payment of redundancy upon termination, it is submitted that this matter can and should be addressed without justifying altering the current BCMI Award provision. Instead, it would be sufficient and, in our view, preferable for the clause to be varied to insert a subclause similar to inline with subclause (a)(ii) of the Model Term.
13. The CFMMEU M&E has had the opportunity to review the submissions of the CFMMEU Construction and General Division and supports those submissions in a general sense. The below addresses the application to vary the BCMI Award only.

AIG Claim

14. The AIG Claim is advanced on eleven general bases, as follows.

Unfairness to employers

15. The first basis is that the current provision is unfair to employers as it requires potentially large sums of money to be paid by the employer within a limited period of time, that there are additional costs and a “regulatory burden” attached to the need to administer an additional pay run with the current clause, and that the requirement to pay is unfair where an employee can resign with little or no notice.
16. The foundation of these submissions cannot be accepted for the following reasons.
17. Any sum of money to be paid can be separated into four distinct amounts, being:
 - a. wages owed;

- b. leave accruals;
 - c. payment in lieu of notice; and
 - d. redundancy.
18. Wages owed and leave accruals are amounts which are owed to employees. They are not sums of money which exist arbitrarily and only upon termination of employment but are, instead, liabilities which an employer must account for at all times. Their quantum is entirely predictable and already accounted. An employer need not make any adjustments to meet these financial obligations.
19. Additionally, the BCMI Award requires an employer to keep no more than a week's pay in hand.² Should clause 16.7 be amended in the manner proposed by the AIG it would create an inherent inconsistency in the way in which clauses 16.6 and 16.7 operated in circumstances where a workforce was paid in arrears, and an employee's employment was terminated on, for example, the Tuesday before a Wednesday payday, and the employer was not required to pay that employee until the following Tuesday.
20. Payment in lieu of notice is an amount which becomes payable entirely at the discretion of the employer. If payment of this amount is burdensome to the employer, it is open to them to have the employee work out the notice period. In any event, the effect of s 117(2) of the FW Act is that this amount must be paid to employees upon the termination of their employment where the required notice is not given. The AIG Claim cannot deviate from this statutory obligation.
21. In respect of the payment of redundancy pay, this is again an amount which becomes payable in accordance with timing which is entirely within the control of the employer. By definition, it is payment which is owed due to the actions of an employer. Ordinarily, if it is to be paid on the termination of the employment relationship, it will be payable with, at the very least, four weeks' after an employer has made an employee redundant. It is an amount which is only payable where the employer is not a small business employer.³ It is entirely reasonable that an employer who is not a small business employer be required to pay an employee their redundancy pay following a period of a minimum of four weeks' notice. The CFMMEU M&E submits that, in this context, adding a further week to that period is unwarranted.
22. In respect of the submission that a requirement to pay an employee the above amounts upon termination or within 72 hours creates additional costs and a regulatory burden due to it potentially requiring an additional pay run, it is submitted that this submission ought to be rejected.
23. Firstly, in circumstances where the termination of employment will most likely happen as a result of a decision by an employer, within a timeframe that is at their discretion, it is submitted that it is open to an employer to consider payroll timing in conjunction with their decisions around the termination of an employee's employment if this is a matter of such concern. A desire by employers to pay entitlements within a scheduled pay run is a desire that is already open to employers. Such a desire does not warrant variation of the BCMI Award.

² BCMI Award, cl 16.6.

³ FW Act, s 121(1)(b).

24. Secondly, the idea that a payment outside of a pay cycle is particularly burdensome on an employer cannot be accepted. Attached and marked **Attachment A** is a witness statement of Mark Watson, a Chartered Accountant with over 20 years' experience working with modern payroll systems. The evidence Mr Watson goes directly to the absence of any merit in AIG's claims in respect of impracticability and administrative cost, including the following.
25. Digital payroll systems are the standard in Australian workplaces, and the administrative burden that may have once come with paper payroll systems has been practically eliminated.⁴ Leave accruals occur in real time.⁵ Employers have access to up to date leave accruals and can calculate redundancy and payment in lieu of notice amounts with ease.⁶ Electronic transfer of funds, and the capacity to give effect to a transfer at any time is, similarly, the norm within the black coal mining industry.⁷ In circumstances where the amounts owed to an employee will almost certainly be predictable and knowable, if not known, in advance of the relevant time frame, increasing the time required to make these payments is unnecessary and is no basis to justify the variation the BCMI Award.
26. The obligation to pay wages on the day of termination has existed in this industry since around 1949,⁸ and became a fixture of terms within the industry across the late eighties and early 90s.⁹ Compliance with this term may have, at that time, warranted a concern in respect of the administrative burden attached to a payment required in a relatively short period. Despite this, it was a requirement that employers had to meet. A claim of administrative burden in the context of modern payroll systems which practically alleviate that burden ignores the relative ease concomitant with developments in modern, digital payroll systems. It is a claim that cannot be accepted.
27. Additionally, the submission made by AIG at paragraph [15](c) of the AS does not apply to the BCMI Award given employees are required to give one weeks' notice where they intend to terminate their employment.¹⁰

Unfairness to employees

28. AIG advance that there is unfairness to employees through the "regulatory gap" which does not regulate the payment of amounts other than wages.
29. In respect of entitlements, it is submitted that the BCMI Award already requires that they are to be paid along with the amounts specified at clause 16.7 of the BCMI Award.¹¹
30. Section 117(2)(b) requires payment in lieu of notice to be paid in advance of the end of employment.
31. The only possible remaining legislative gap is, therefore, concerning redundancy pay. Our primary submission on this basis is that there is no gap, as set out

⁴ Statement of Mark Watson, 25 September 2019, [5] – [9].

⁵ *Ibid*, [6].

⁶ *Ibid*, [5] – [9].

⁷ *Ibid*, [12].

⁸ *The Federated Mining Mechanics Association of Australasia and National Oil Pty Limited* [1949] ACIndT 604.

⁹ See, for example, *The Australasian Coal and Shale Employees Federation and Queensland Coal Association* [1989] ACIndT 4264; *The Amalgamated Metal Workers Union; Electrical Trades Union of Australia and Queensland Coal Association* [1989] ACIndT 4265 ; *The Australasian Coal and Shale Employees Federation and New South Wales Coal Association* [1989] ACIndT 4269;

¹⁰ BCMI Award, cl 13.1(b).

¹¹ BCMI Award, cl 13.4.

above at paragraph [10]. In the alternative, it is open to the FWC to address this gap in a manner which is consistent with the current provision of the BCMI Award, as set out at paragraph [12], above.

Balancing the interests of employees and employers

32. The FWC has recognised the interests of both employers and employees in relation to this issue.
33. In respect of the former, the submission that the delay attracts time, cost and impracticability detriments are unparticularised and unsubstantiated and should not be accepted. At worst, an employer's interest concerns a potential inconvenience which may arise in circumstances where an employer's pay cycle does not align with the relevant period in which they are currently required to provide an employee with their end of employment payments.
34. In respect of the latter, it is more than an inconvenience. Employees at the end of their employment have to contend with unemployment and an abrupt end to their income. In most circumstances, this will be unwanted. In many circumstances, the likelihood of moving on to a new job without a gap is slim. Social security benefits provided through Centrelink exist as a stopgap in these circumstances. As already considered by the FWC,¹² social security payments are subject to waiting periods. A delay in receiving final payment from a former employer amounts to a delay in knowing what the exact amount to be received is. Any delay in this knowledge necessarily delays an application to Centrelink and, with it, a delay in the receipt of those benefits.
35. Additionally, the BCMI Award requires weekly payment and not more than one week's pay to be kept in hand by the employer unless otherwise agreed.¹³ A change to clause 16.7 of the BCMI Award has the potential to extend the gap between the payment of wages in a manner which is inconsistent with these requirements, to the detriment of employees. Take, for example, an employee usually paid on a Tuesday. Where that employee is terminated on a Monday, an employer will not be obliged to pay that employee what they are owed until the following Monday, meaning that that employee will have to wait for a further period of six days before they receive their entitlements. A corollary of this will be that they are without anticipated income for six days, at a time when expenses continue. The impact that a delay in payment of six days can have on a family is significant, and when balancing the interests of employers and employees it should not be disregarded.
36. When balancing the interests of employers and employees in this context it is submitted that the detriment which comes to employees through a change to the BCMI Award can in no way be outweighed by the potential benefit that the proposed change may see for employers.

Modern payroll systems and the prevalence of payment by EFT

37. On any view, technology has made meeting the obligations of cl 16.7 easier.
38. While the original rationale for this condition may have been displaced by the advancement of EFT, as identified by AIG, the obligation within the industry

¹² [2016] FWCFB 8463, [96].

¹³ BCMI Award, cls 16.4 and 16.6.

remains relevant and services a need of employees to finalise all elements of their employment as soon as possible after the termination of employment. Contrary to AIG's submission, there is nothing inappropriate in this requirement.

39. There is an absurdity in the submission that modern payroll systems and the prevalence of payment by EFT justify a departure from a longstanding industrial term in circumstances where those advancements make it exponentially easier to meet the obligations of that term. In our view, given the burden that is removed by these systems clause 16.7 is easier to comply with and, in circumstances where it provides a material benefit to employees in contrast to a minor inconvenience to employers, the rationale for keeping the substantive provisions of the term remains.

Consistency among awards

40. The Review itself is to take place with the FWC having:

“regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue... Previous Full Benches should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”¹⁴

41. That there is a difference between industrial awards is unsurprising – the modern awards are reflective of decades of industrial bargaining and are by their nature industry specific. Each award was made by a Full Bench following consideration of the conditions of each industry. There has been no cogent reason presented to depart from the position reached by the FWC in that process, and that the clause deviates from what is provided by other awards is not a sound basis to do so.

Payment by post

42. There is no evidence that any employer within the black coal mining industry currently sends any payment of cash by post. To the extent that this may be a genuine concern held by AIG it is submitted that clause 16.7 provides an alternate, being payment on the day of termination, and does not preclude payment by cheque.
43. Further, the CFMMEU continues to advance the submission and draft determination provided to the FWC on 20 September 2016, being that payment can be made up to 76 hours following the termination of employment, alleviating any need to post cash.

Modern awards objective

44. The balance of AIG's concerns relate to the matters which the FWC is to take into account in ensuring that the modern awards meet the modern awards objective, as set out at s 134 of the FW Act.
45. In respect of the modern awards objective, the CFMMEU submits that the proposed variation has the capacity to impact relative living standards in a

¹⁴ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788, [60].

manner contrary to that which AIG suggests, for reasons set out at paragraphs [34] and [35], above. The potential benefits identified by AIG at paragraph [30] of the AS are benefits that can be facilitated through a more limited award variation, confined to clarifying that all entitlements are due within the relevant timeframe, as set out at paragraph [12], above. These benefits should not form a basis for removing a requirement to pay any amount due to an employee at the end of employment in a timely manner, designed to minimise the impact of end of employment and transition into unemployment.

46. We agree with the FWC that the proposed variation is a neutral consideration and does nothing to either encourage or discourage collective bargaining.¹⁵
47. The CFMMEU disagrees with AIG's submission that the proposed variations are consistent with the need to promote flexible modern work practices. The increased incidence of EFT payments makes it easier to process the payments contemplated by the current clause – it would be illogical to use it as a justification to vary the relevant clause in the manner proposed by AIG. Any other benefit which may arise for employers as a consequence of the proposed variation would, it is submitted, be marginal. AIG has failed to particularise or substantiate its claims, and in the face of evidence and common sense which suggests the opposite, they should not be accepted. To the extent that these benefits are accepted, it is submitted that they would not warrant the reduction in the obligations owed to employees and the concomitant detriment which would arise as a result of that reduction.
48. In respect of the submission that the proposed variation will facilitate a modern awards system that is simple and easy to understand, it is submitted that the legislative gap identified in respect of redundancy pay can be addressed directly. Variations to the required timeframe do nothing to achieve simplicity of the system. Beyond this, there is no evidence or suggestion that the current clause is unclear or has been the subject of uncertainty or disputation.

AIG Claim in respect of the BCMI Award

49. The AIG Claim as it relates specifically to the BCMI award relies on its previous assertions in light of specific BCMI Award provisions, including that the BCMI Award clause deals only with wages, requires payment on termination with an alternate of within 72 hours by post, and that it applies even where the employee terminates the employment without notice.
50. In respect of the latter, it should be noted that an employee is required to give a week's notice of termination of employment.¹⁶
51. Relevantly, these claims introduce no arguments specific to the black coal mining industry and make no attempt to address the prima facie position in respect of the making of the BCMI Award, being that it achieved the modern awards objective when it was made.¹⁷

¹⁵ [2018] FWCFB 3566, [139].

¹⁶ BCMI Award, cl 13.1.

¹⁷ 4 *Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [60].

Summary of AIG Claim and purported merits

52. The AIG Claim is made on the basis that the proposed variation will resolve the impracticability and administrative costs associated with the current provision. In accordance with the Full Bench's decision in [2018] FWCFB 3566, at [156], there is no prima facie position that supports replacing the existing term with the model term, and any variation must be justified on its merits.
53. In making this claim, AIG has failed to particularise or substantiate its claims of either impracticability or administrative costs. Similarly, there has been no attempt to address the ease with which the current provision is currently met when compared with how that provision operated historically, with the use of paper payroll systems.
54. The CFMMEU M&E submits that, for the reasons set out above and in the Earlier Submissions, in circumstances where AIG have failed to provide a sufficient merit basis to warrant the variation of the existing provisions, the application to vary the BCMI Award should be dismissed.

**Construction, Forestry, Maritime, Mining and Energy Union
Mining and Energy Division
25 September 2019**

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 – Payment of wages (AM2016/8)

STATEMENT OF MARK JOHN WATSON

On 25 September 2019, I, Mark Watson of Level 11, 215 Clarence St Sydney in the state of New South Wales, state as follows:

1. I have been working in the area of finance and accounts since 1993. I have over 26 years' experience in working with, analysing and overseeing payroll systems for a wide variety of entities. I have worked with organisations of every size, from small family businesses to large listed corporations.
2. I am a qualified Chartered Accountant and have been since 2000. I am also a graduate of the Australian Institute of Company Directors and graduated from the University of Wollongong with a Bachelor of Commerce in 1998.
3. In 2005 I began working as the Finance Manager of the Mining and Energy Division of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**). In this role, I have direct responsibility, oversight and approval of all payroll related matters for all employees of the national office of the CFMMEU Mining and Energy Division.
4. In addition to this position, I also sit on several of boards representing the Union, including Mine Super, an \$11 billion industry super fund, and Unity Bank, a \$1.2 billion mutual bank.

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Payroll systems

5. In the last 26 years, payroll has changed significantly, as employers have moved away from paper to digital systems such MYOB, Xero and others. I am not aware of any employer that would operate in the black coal mining industry who would still be using a manual paper-based system. I would be surprised if there were any.
6. The advancements in the technology of these systems have significantly changed how payroll systems operate. A lot of the administrative burden that may have previously come with paper payroll systems no longer exist, with much of the process being automated and transparent, so that employers and employees alike can track timesheets, rosters, wages paid and leave entitlements in real-time.
7. These changes have been mirrored by reporting obligations to the Australian Taxation Office (**ATO**) through Single Touch Payroll (**STP**). STP requires employers with more than 20 employees to report employees' payroll information, such as salaries, pay as you go withholding, and super, to the ATO at each pay. From 30 September 2019, all employers will be required to report through STP. Reporting is done primarily through STP enabled software, meaning that, from 30 September 2019, most employers in Australia will be required to be using STP compliant software.
8. To my knowledge, most if not all STP compliant products (and all accounting software with payroll function) have inbuilt functionality for accruing leave. The only way that leave accruals wouldn't calculate automatically is if the user had switched off that functionality intentionally.
9. These accrual systems are set up at the beginning of employment and process automatically. This software makes it extremely easy to capture what an employee's leave accruals are at any given time – including at the end of their employment.

Payment

10. One of the other changes in payroll over the last 26 years is the prevalence of payment by EFT. This has changed again in the previous 18 months, with the introduction of the New Payments Platform (**NPP**) in 2018, which enables near real-time transfer of funds electronically.
11. Even before the NPP was introduced, I had not heard of wages being paid in cash for a long time. While some small business may still do this, I would be surprised if

anyone in the black coal mining industry was not using EFT or some other electronic method for the payment of wages.

12. In my experience, there is minimal if any cost or burden in administering a one-off payment, and every organisation I have ever been involved in has had this capacity, whether they had dedicated accounts staff or not. I would be surprised if there were an employer active in the black coal mining industry who was not capable of making, and did not make, one-off payments when required.

Determining the amount payable on the termination of employment

13. Payments that are made to employees at the end of their employment consists of accrued entitlements and, in some cases, payment in lieu of notice or redundancy.
14. In the case of accruals, these are a liability which should be accounted for by an employer. There is nothing inherently unfair in requiring an employer to meet this financial obligation at the termination of an employee's employment, and I would be concerned about the solvency of an employer that had this complaint.
15. Similarly, these amounts are never unknown. The process of accrual is recorded in exact terms in software and knowing what accruals are to be paid out at the end of employment is a straightforward process for anyone with a basic understanding of payroll systems.
16. In the case of an employee being made redundant, or where their employment is terminated without the required notice, these are situations which an employer is required to plan for where the timing is in the control of the employer. In my view, planning for the payment of wages and entitlements owed is part of that end of employment planning and there is no impracticality or additional cost associated with having to pay out what is owed at the time of termination, rather than a week later in circumstances where that date is known in advance. The capacity to determine these amounts has also been simplified through the advances in digital payroll systems.
17. In any event, my experience has been that an employer will be keen to finalise all aspects of the employment at the earliest opportunity. Even where there hasn't been a requirement to pay out outstanding wages and entitlements, I know that many employers will endeavour to make these payments on the final day of employment or shortly after to finalise the employment relationship.
18. I understand there is currently an application before the Fair Work Commission to extend the period an employer has to pay an employee their wages at the

termination of their employment under, relevantly, the *Black Coal Mining Industry Award 2010*. In my view, technology has eliminated impracticality or administrative burden attached to a requirement to pay an employee what they are owed at the termination of their employment, or within a short time frame afterwards. It is simpler and faster now than it has ever been to manage payroll systems, including the payment of funds due to an employee at the end of employment.

A handwritten signature in black ink, appearing to be 'M. Watson', written over a horizontal line.

Mark Watson

Date: 25 September 2019