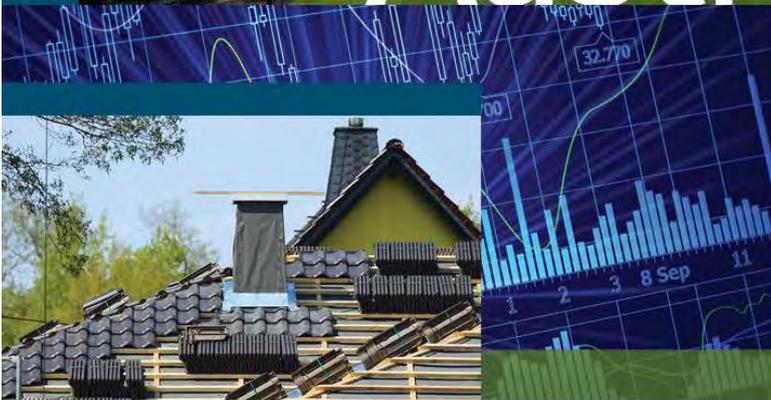




HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Fair Work Commission

AM2016/8
Common Issue - Timing of Payment of Wages

20 September 2016



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1. INTRODUCTION

- 1.1.1 By way of Statement dated 15 June 2016, the Fair Work Commission (**Commission**) confirmed the matters to be dealt with in AM2016/8 – Payment of Wages Common Matter.
- 1.1.2 HIA expresses an interest in the following issues determined to form part of the Payment of Wages Common Matter:
- Timing of the payment on termination of employment;
 - Penalty for late payment of wages; and
 - Annual leave loading issues.
- 1.1.3 The matters above and those outlined in the Statement of 6 July 2016 (**6 July Statement**) were referred to conciliation held on 27 July in accordance with the Schedule set out at Attachment A to the 6 July Statement.
- 1.1.4 The Statement of 2 August (**2 August Statement**) reported back on the outcomes of those conciliations, indicated the issuing of draft variation determinations in relation to the timing of payment on termination of employment.
- 1.1.5 At paragraph 17 of the 2 August Statement it was confirmed that claims by Master Builders Australia (**MBA**) relating to the *Building and Construction General Onsite Award 2010* and the *Joinery and Building Trades Award 2010 (Joinery Award)* as outlined in their correspondence dated 20 July 2016 would be dealt with during the award stage (**MBA Correspondence**).
- 1.1.6 On 15 August 2016, the Commission issued directions in relation to the filling of submissions and hearing of this matter (**15 August Directions**).
- 1.1.7 On 8 September 2016 (**September Statement**), the Commission issued a further statement and draft determinations in relation to the issue of the timing of payment on termination of employment. HIA expresses an interest in those draft determinations as they seek to vary the *Building and Construction General Onsite Award 2010 (Onsite Award)* and the *Timber Industry Award 2010 (Timber Award)*. Parties were directed to comply with the 15 August Directions in relation to this matter.
- 1.1.8 As such HIA makes these submissions in accordance with the 15 August Directions.

2. NATURE OF THE REVIEW

- 2.1.1 Section 156 of the Fair Work Act 2009 (**FWA**) requires that the Commission conduct a review of Modern Awards once every 4 years (**4 Yearly Review**).
- 2.1.2 The decision of the Full Bench of the Commission of 17 March 2014 outlined the scope of this 4 Yearly Review (**Jurisdictional Decision**).
- 2.1.3 Notably, the Jurisdictional Decision identified that *'this Review is broader in scope than the Transitional Review of modern awards completed in 2013'*.
- 2.1.4 The Jurisdictional Decision also highlighted the need to ensure that, in accordance with the considerations dictated by Section 134 of the FWA, *'modern awards, together with the NES, provide a fair and relevant minimum safety net'*.



2.1.5 HIA address the Modern Awards Objectives below.

3. THE PROPOSED VARIATIONS

3.1 TIMING OF THE PAYMENT ON TERMINATION OF EMPLOYMENT

- 3.1.1 As outlined above, the September Statement attached draft determinations across a number of Modern Awards in relations to provisions that dealt with the timing of the payment of wages on termination of employment.
- 3.1.2 HIA notes that the draft determinations do not represent the concluded (or provisional) view of the Full Bench and the issuance of the draft determinations is to facilitate the review of those particular clauses.
- 3.1.3 Predominately the purpose of the variation is to allow termination payments be made to employees paid by Electronic Funds Transfer (**EFT**) in accordance with the employees usual pay cycle.
- 3.1.4 HIA supports the draft determinations as they apply to the Onsite Award and the Timber Award.

Award Modernisation

- 3.1.5 HIA submits that the current provisions of both the Onsite Award (being clause 31.4) and the Timber Award (being clause 25.3) were not fully canvassed or considered during Award Modernisation.
- 3.1.6 To that end, the following comments of the Full Bench in the *Stevedoring Industry Award 2010*¹ are particularly relevant:

‘[73] As a result of the award modernisation process, approximately 1,560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards by the award modernisation Full Bench of which I was a member. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers. As the Full Bench explained on a number of occasions, the general approach was as follows:

“[3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have

¹ [2015] FWCFB 1729



considered the impact of the provisions based on the information provided by the parties as to current practices.”

3.1.7 Notably, the provision included in the Exposure Draft Onsite Award of 23 January 2009 and the subsequent version of 3 April 2009 is broadly reflective of the current provision. The only change between the two drafts was the removal of a reference to the NES.

3.1.8 The evolution of the provision within the Timber Award commenced with the issuance of the 22 May 2009 Exposure Draft² which included the following provision:

25.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be paid on the day of termination or forwarded to the employee by post on the next working day.

3.1.9 Subsequent to this, the 4 September 2009 Exposure Draft Timber Award³ included the provision currently within the Timber Award which is reflective of clause 26.8 of the *Timber and Allied Industries Award 1999* which provided:

26.8 Payment of wages upon termination

26.8.1 Upon termination of the employment after the prescribed period of notice of termination has been given by either the employer, or the employee or where the period of notice is dispensed with in accordance with the provisions of 21.1 of this award, all moneys which are legally due shall be paid to the employee at the usual place of payment within fifteen minutes of the ceasing time on the day of termination of the employment, provided that if the usual place of payment be at the work in the bush, then such payment shall be made within 30 minutes of the usual ceasing time on the day of the termination of the employment at the usual place of payment.

26.8.2 Should the employment be otherwise terminated the employer may retain any moneys legally due to the employee no later than the expiration of the pay period.

3.1.10 At the time only the Timber Industry Alliance opposed the above provision.⁴ Notwithstanding this, HIA submits that the provision was not expressly considered in any decisions of the Australian Industrial Relations Commission during the Award Modernisation process. It would seem that the 4 September Exposure Draft simply adopted the abovementioned clause which was also reflective of the provision contained in a submission of the CFMEU.⁵

3.1.11 Considering the limited attention received by this provision during award modernisation in relation to both the Onsite Award and the Timber Award and the need to ensure the Modern Awards remain reflective of modern work practices, HIA supports the Commissions rationale for the issuing of these draft determinations and agrees that a review of these provisions is desirable and appropriate.

² <http://www.airc.gov.au/awardmod/databases/timber/Exposure/timber.pdf>

³ <http://www.airc.gov.au/awardmod/databases/timber/Modern/timber.pdf>

⁴ http://www.airc.gov.au/awardmod/databases/timber/Submissions/TIA_timber_ED.pdf

⁵ http://www.airc.gov.au/awardmod/databases/timber/Submissions/CFMEU_paper_timber_ED2.pdf



Payment by EFT

3.1.12 The timing of the payment of wages when paid by EFT is a matter that has previously been considered by the Commission during this 4 Yearly Review of Modern Awards.

3.1.13 In granting the claim by employers to vary Modern Awards to enable annual leave payments to be made to employees, paid by EFT, during their usual pay cycle (**Annual Leave Decision**)⁶ evidence provided by employer parties substantiating the proliferation of payment by EFT and the additional burden and cost of having to facilitate a wages payment outside of the ordinary pay cycle was found to be persuasive:

‘Questions 18–21 of the Employer Survey are directed at this claim. Question 18 provided as follows:

“18. Do you pay any of your permanent employees by cash or cheque (or some other non-electronic transfer method) on a regular basis?”

Some 3166 employers (about 85 per cent of all responses) answered no to this question (528 answered yes and 19 were unsure). Hence a substantial majority of respondents pay their employees by EFT. It is also apparent from the responses to Question 20 that a significant number of survey respondents said that they were charged extra fees for processing payroll outside their usual pay period—as may be the case if leave was paid at the commencement of the leave as opposed to during the usual pay cycle.’⁷

3.1.14 HIA submits that the rationale evidenced in the Annual Leave Decision in granting the employer claim is equally applicable in relation to the timing of the payment of wages on termination of employment.

3.1.15 Under the Onsite Award, the requirement that the termination payment be made at the time of termination, or alternatively within two working days and under the Timber Award, the requirement that an employee must be paid within 15 minutes of the ceasing time of the day of termination (or 30 minutes when working in the bush) imposes a similar administrative burden and cost that requiring the payment of wages prior to the taking of annual leave imposed.

3.1.16 In the case of both Modern Awards the termination payment is likely to be outside of the usual pay cycle and, as such, the same costs identified in the Annual Leave Decision flow.

3.1.17 Further and in contrast to the provision of the Onsite Award, the current provision of the Timber Award does not even recognise the ability to make a termination payment by EFT. This would seem at odds with clause 25.2 which does in fact enable wages payment by EFT. Arguably, the current provision is premised on the outdated notion that the employee was required to be at the workplace to receive this termination payment, where obviously payment by EFT does not require this. HIA notes that the draft determination seeks to remedy this anomalous situation.

3.1.18 HIA also submits that there is added complexity in determining termination payments. Particularly under the Onsite Award where there may be, for example, additional redundancy payments⁸, the

⁶ [2015] FWCFB 3406

⁷ [2015] FWCFB 3406 at paragraph 438-439

⁸ See clause 17



calculation of payments for any banked Rostered Days Off⁹ payable and any additional tax implications for such payments.

- 3.1.19 HIA submits that the current timeframe within both the Onsite Award and the Timber Award provides insufficient time to finalise the calculations for monies owed, particularly in the case of small businesses who may not have their administration or payroll staff available every day.

Termination Payments by Post

- 3.1.20 At paragraph 6 (ii)(a) of the September Statement the Commission seeks views on clause 31.4(a) of the draft determination of the Onsite Award, specifically whether it is envisaged that payments made by post are to be by cheque only or also by cash.

- 3.1.21 Clause 31.4(a) of the Draft Determination provides:

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

- 3.1.22 Based on the current provision of the Onsite Award which facilitates payment *'by cash, or by cheque, bank cheque, electronic funds transfer (EFT) or similar transfer or any combination'*¹⁰, HIA submits that payments made by cash, cheque or bank check are envisaged to be payments that could be made by registered post.

3.2 PENALTY FOR LATE PAYMENT OF WAGES

- 3.2.1 HIA refers to the correspondence dated 19 July 2016, from Australian Business Industrial and the NSW Business Chamber (**ABI Correspondence**) to the Commission.
- 3.2.2 HIA supports the draft determination in relation to the *Joinery and Building Trades Award 2010* attached to the ABI Correspondence.
- 3.2.3 For completeness HIA notes the proposed variation to the Joinery Award by the MBA mentioned at paragraph 1.1.5 of these submissions which also seeks to remove the penalty for late payment of wages when paid by EFT. Whilst as noted above, this matter has been refer to the award stage Full Bench HIA supports the draft determination seeking to vary the Joinery Award as attached to the MBA Correspondence.

3.3 ANNUAL LEAVE LOADING ISSUES

- 3.3.1 HIA refers to the correspondence dated 24 August 2016, from Ai Group to the Commission (**Ai Group Correspondence**).
- 3.3.2 HIA supports the draft determination in relation to the *Joinery and Building Trades Award 2010* attached to the Ai Group Correspondence.

⁹ See Clause 33.1(a)(iii)
¹⁰ See Clause 31.1 of the Onsite Award



4. MODERN AWARDS OBJECTIVES

4.1.1 It is well settled that a balanced approach must be taken when considering the Modern Awards Objectives¹¹ and that some objectives may be of more relevance than others. Despite this the Commission must turn its mind to a consideration of each objective in light of the matters before it. As observed by Lawler VP, Watson SDP and Hampton Commissioner:

*'...the modern awards objective is ultimately concerned with the existence of modern awards which, together with the National Employment Standards, provide "a fair and relevant minimum safety net of terms and conditions". While it is true that in any case that requires a consideration of the modern awards objective Fair Work Australia must take account of all of the matters specified in paragraphs (a) to (h) of s.134(1), this does not mean that each of those factors will be applicable or relevant to a particular application or that a single criterion in s.134(1) can never be a sufficient basis for a variation to a modern award as necessary to achieve the modern awards objective.'*¹²

4.1.2 For the purposes of the claims currently before the Full Bench, specifically the draft determinations in the Onsite Award and the Timber Award in relation to the timing of payment on termination of employment, HIA submits that the Modern Awards Objectives of particular relevance include:

'the need to promote flexible modern work practices and the efficient and productive performance of work;

the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.'

4.1.3 HIA submit that in creating Modern Awards that provide a fair and relevant safety net current modern day practices must be taken into account.

4.1.4 Further, the ability of an employer to continue to maintain a pre-existing pay cycle for termination payments made by EFT also provides added administrative relief for employers.

4.1.5 In granting the employer claim in the Annual Leave Decision¹³ the Commission noted that:

'The variation of modern awards to incorporate the model term¹⁴ will ensure that each modern award provides a fair and relevant minimum safety net. In so deciding we have taken into account the s.134 considerations, insofar as they are relevant, and we are satisfied that such a variation is necessary to achieve the modern awards objective.'

¹¹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* known as the *Australian Manufacturing Workers' Union (AMWU)* and *Australian Business Industrial* [2013] FWCFB 580 at paragraph 9

¹² *Shop, Distributive and Allied Employees Association* [2011] FWAFFB 6251 at paragraph 18

¹³ [2015] FWCFB 3406

¹⁴ The Model Term being a term enabling annual leave payments to be made during the normal pay cycle when paid by EFT



The variation of the relevant modern awards will ensure that each of these modern awards provides a “fair and relevant minimum safety net”. The variations will ensure that these modern awards are “relevant” to the needs of the modern workplace.

We are also satisfied that the model term reflects flexible modern work practices and, accordingly, the insertion of such a term in modern awards will promote such practices, consistent with s.134(1)(d).

Section 134(1)(f) is also relevant in that the variations will reduce employment costs and the regulatory burden on business.’¹⁵

- 4.1.6 HIA submits that as was the case in the Annual Leave Decision the predominance of payment by EFT and the need for awards to be reflective of modern day practices should continue to be recognised within the Modern Awards as should the need to provide relief for businesses, particular small businesses of the administrative burden and cost associated with payments outside of the usual pay cycle.

¹⁵ [2015] FWCFB 3406 at paragraphs 444-447

