



HOUSING INDUSTRY ASSOCIATION



Submission to the

Fair Work Commission

AM2016/8- Payment of Wages

Payment on termination of employment

21 August 2019

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1. INTRODUCTION

- 1.1.1 HIA refers to the Fair Work Commission (**Commission**) Full Bench Decision (**Decision**) dated 26 July 2019¹, relating to payment of wages terms in modern awards, specifically payment of wages on termination, a common issue in the 4 yearly review of modern awards.
- 1.1.2 The Decision notes that the model term (**model term**) for payment of wages on termination of employment has been finalised by the Full Bench².
- 1.1.3 HIA makes this submission in response to paragraph 33 of the Decision.

1.2 PROCEEDINGS TO DATE

- 1.2.1 HIA understands the model term has been inserted into numerous modern awards which were silent on the time period in which termination payments are made, and modern awards whereby there was agreement for the model term to be inserted.
- 1.2.2 Modern awards which currently contain provisions regarding the payment of wages on termination of employment are also under examination, including the *Building and Construction Onsite Award 2010* (**Onsite Award**), of which HIA continues to maintain an interest.
- 1.2.3 The Commission has received applications to insert the model term into 17 modern awards, including the Onsite Award.
- 1.2.4 As noted in the Decision³, HIA provided correspondence to the Commission dated 28 September 2018 which supported the AiGroup variation application (**AiGroup application**).⁴
- 1.2.5 The AiGroup application seeks to insert the model term, and delete Clause 31.4 of the Onsite Award (**Onsite Award payment of wages on termination clause**), as follows:

31.4 When notice is given, 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 (or where paid by EFT the monies are transferred into the employee's account).

- 1.2.6 It is noted that the Full Bench of the Commission holds the provisional view that a case by case assessment is required in the context of the insertion of the model term into modern awards:

“...there is utility in common ‘payment on termination’ provisions across all 122 modern awards. But we accept that each modern award is to be reviewed in its own right and there

¹ [2019] FWCFB 5146

² Ibid at paragraph 2

³ Paragraph 30

⁴ AiGroup, Payment of Wages Submission, 21 September 2018



may be sound reasons for departing from a model term in a particular modern award. A case by case assessment is required”⁵

- 1.2.7 For reasons as outlined below, HIA continues to support the AiGroup application and the insertion of the model term into the Onsite Award.

1.3 OUTSTANDING APPLICATION

- 1.3.1 In submissions to the Commission dated 16 December 2016, HIA proposed a variation to the Onsite Award in relation to the frequency of the payment of wages. We note that this matter is outstanding.
- 1.3.2 HIA understands that the Construction Group of Awards Full Bench has noted that a number of claims relating to payment of wages under the Onsite Award are before the Payment of Wages Full Bench for determination.⁶
- 1.3.3 In a Statement of the Commission of 6 February 2019, relating to substantive issues the Commission stated the following in relation to the outstanding claim:

“The HIA filed a submission on 16 January 2019 drawing the Commission’s attention to an outstanding claim in relation to payment of wages in the Building and Construction Onsite Award 2010. The claim in question forms part of the payment of wages common issue.”⁷

- 1.3.4 HIA awaits further directions in relation to the consideration of this matter.

2. MODERN AWARDS OBJECTIVE

- 2.1.1 The Full Bench has expressed a view in relation to the need for fairness in respect to termination payments:

“We turn next to the content of the provisional default term. The modern awards objective is to ‘ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions’. Fairness in this context is to be assessed from the perspective of employees and employers covered by the modern award in question. A ‘fair’ model term in respect of termination payments appropriately balances the issues raised on behalf of employees and those raised on behalf of employers.”⁸

⁵ [2016] FWCFB 8463, paragraph 87

⁶ [2018] FWCFB 6019, paragraph 465

⁷ [2019] FWC 717, paragraph 6

⁸ Ibid at paragraph 88



2.1.2 HIA submits this view is undeniably relevant to the AiGroup application. It is HIAs position the current Onsite Award payment of wages on termination clause is not fairly balanced and, it is accordingly appropriate to vary the Onsite Award to ensure the achievement of the modern awards objective.

2.1.3 When considering the modern awards objective, it is appropriate to contemplate the observations of the Full Bench in the *4 Yearly Review of Modern Awards – Annual Leave*:

“The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’ taking into account the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.”⁹

2.1.2 HIA submit that the following considerations of the modern awards objective support the insertion of the model term into the Onsite Award:

- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (FW Act s134(1)(f)); 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 (FW Act s134(1)(g)).

2.2 THE LIKELY IMPACT OF ANY EXERCISE OF MODERN AWARD POWERS ON BUSINESS, INCLUDING ON PRODUCTIVITY, EMPLOYMENT COSTS AND THE REGULATORY BURDEN

2.2.1 The Full Bench has acknowledged the impracticalities and inherent difficulties in providing termination payments at, or shortly after, the time of termination:

“The impracticability arguments point to the inherent difficulty in providing termination payments at, or shortly after, the time of termination. We accept that this would be so in some instances, particularly in cases of summary dismissal and where an employee resigns their employment without giving notice. In such cases it may plainly take some time to calculate accrued leave payments. In cases of redundancy the applicable taxation arrangements may depend upon the particular circumstances and employers (particularly small businesses) may have to obtain advice externally before processing termination payments. We also accept that



on the available data, the majority of terminations are not initiated by the employer so that the timing of the termination of employment is not within the employer's control.”¹⁰

- 2.2.2 In the case of the Onsite Award, where notice is given, the employee must be paid at the time of termination of employment, or where impracticable two working days from the time of termination. These time frames are manifestly inappropriate.
- 2.2.3 In the residential building industry, many employers, particularly small business, rely upon book-keepers or external providers to provide payroll processing and assistance. This would also include advice as to owing entitlements generally under the Awards from industry associations such as HIA, or advice from the Fair Work Ombudsman.
- 2.2.4 Often it is not known up until the day of termination what payments may be owing to an employee (e.g. - applicable allowances, overtime, etc.). The complicated nature of the application of allowances within the Onsite Award, coupled with accruals owed on termination (accrued RDO's, Annual leave, and Long Service Leave), require appropriate time in order to accurately calculate owing termination payments.
- 2.2.5 The current Onsite Award payment of wages on termination clause, requires that an employer do such calculations, and potentially carry out an out of cycle pay run, for the terminating employee on or within two days of termination.
- 2.2.6 This expectation is unreasonable. Not only is it time limiting, it has the potential to attract additional costs to business.
- 2.2.7 The Full Bench has acknowledged the unfair nature of a short period of time for termination payments:

“But we also accept that there is considerable force in the ‘impracticability’ argument advanced by ABI and Ai Group. It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter.”¹¹
- 2.2.8 HIA submits the current time limitations in the Onsite Award payment of wages on termination clause is unnecessarily burdensome, particularly for small business. The insertion of the model term is warranted to appropriately balance the needs of employers and employees.

¹⁰ Ibid at paragraph 90

¹¹ Ibid at paragraph 93



2.3 THE NEED TO ENSURE A SIMPLE, EASY TO UNDERSTAND, STABLE AND SUSTAINABLE MODERN AWARD SYSTEM FOR AUSTRALIA THAT AVOIDS UNNECESSARY OVERLAP OF MODERN AWARDS

- 2.3.1 The Full Bench has expressed a view that termination payments in modern awards should be expressed in clear and simple terms:

“The obligations and entitlements of employers and employees in respect of termination payments (and the time within which they are to be paid) should be expressed in clear and simple terms. The modern award system should be simple and easy to understand.”¹²

- 2.3.2 Addressing existing gaps in modern awards, such the Onsite Award, assists with achieving the objective of ensuring that modern awards are ‘simple and easy to understand’.

- 2.3.3 As noted by the Full Bench, the Onsite Award does not contemplate circumstances whereby termination payments may be required, other than for ‘where notice is given’:

“Further, some of the existing terms do not cover all of the circumstances resulting in termination of employment. For example, clause 31.4 of the Building and Construction General On-Site Award 2010 provides:

‘When notice is given, 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 (or where paid by EFT the monies are transferred into the employee’s account).’

Clause 31.4 does not make provision for termination without notice, abandonment or payment in lieu of notice.”¹³

(our emphasis added)

- 2.3.4 HIA agrees with this assessment and highlights the inadequacy of the Onsite Award payment of wages on termination clause. The current clause fails to account for circumstances of termination other than for where notice is given. This leaves a gap in understanding the requirements when administering termination payments in such circumstances.
- 2.3.5 HIA submits that the insertion of the model term is warranted in order to ensure that the Onsite Award is ‘simple, easy to understand’, as well as providing a fair and balanced minimum safety net of terms and conditions.

¹² Ibid at paragraph 85

¹³ Ibid at paragraph 60 and 61

