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24 July 2020

The President, Justice Ross
Fair Work Commission
Level 4, 11 Exhibition St
Melbourne VIC 3000

By email: chambers.ross.j@fwc.gov.au

Your Honour,

4 yearly review of modern awards- Payment of Wages (AM2016/8) - payments on termination

HIA refers to the Fair Work Commission (**Commission**) Report dated 17 July 2020 (**Report**) in relation to the abovementioned matter for the *Building and Construction General On-site Award 2010 (Onsite Award)*.

In the Full Bench Decision of 20 May 2020 (**May Decision**)¹, the Commission rejected the Ai Group application to insert the model payment of wages on termination term into the Onsite Award.

Given the outcome of the May Decision, it is HIA's view the existing payment of wages on termination provisions under Clause 31.4 should remain in current form.

Draft Determination proposal

Notwithstanding this view, HIA acknowledges that within the May Decision, the Commission directed parties to consider an alternative to the model term proposal of the CFMMEU (as per paragraph 5 of the Report), specifically considering both the expansion of both the class of termination payments, and the circumstances to which the payment of wages on termination clause applies.

The Report at paragraph 6 notes that on the 10 July 2020, the Ai Group provided the Commission a draft determination reflecting the outcome of discussions between the parties. As noted at the conference on the 10 July 2020 (**conference**), the Ai Group draft determination was circulated to parties shortly prior to the conference. The Ai Group draft determination was not a result of any discussions involving HIA, and HIA understands was provided by the Ai Group to assist the parties in the conference.

HIA has reviewed the Ai Group and CFMMEU (G&G) Draft Determination proposal (**Draft Determination**) for the Onsite Award as referred to in paragraph 7 of the Report.

In accordance with the Directions as set out in paragraph 8 of the Report, HIA provides the following comments in relation to the Draft Determination.

¹ [2020] FWCFB 1131

It is HIAs view that the proposed wording in Clause 31.4(c) of the Draft Determination does not meet the views as expressed by the Commission in the May Decision:

[240] We do not propose to make the variation proposed. The proposed amendment appears to seek to expand both the class of termination payments to be subject to the clause (to include all other amounts due to the employee under the award and the NES) and the circumstances to which the clause applies. As to the latter point, the current term only applies to termination by notice and the CFMMEU (C & G) proposed variation would extend the term to termination without notice.

[241] In our view where the scope of a current termination payment term is extended in the manner the 7-day period in the model term should apply to the areas to which the clause is extended. Hence, in this instance, in circumstances of summary dismissal a 7-day payment period would apply. Similarly, a 7-day payment period would apply to NES payments and 'other amounts due' under the award.

Proposed Clause 31.4(c) expands the scope of the termination payment term, to include payments for other amounts due under the Onsite Award and under the National Employment Standards (NES), expressing the payment should be made on termination, or in the case of electronic funds transfer no later than 7 days after the day on which the employee's employment terminates.

Further, proposed Clause 31.4(c) also seeks to expand the circumstances where the Clause applies, to include circumstances where notice is not given, expressing an employee's wages should be paid on termination, or in the case of electronic funds transfer no later than 7 days after the day on which the employee's employment terminates.

It is HIAs view that the payments for other amounts due under the Onsite Award and NES, and employee wages in circumstances where notice is not given, should be confined to a 7 day period in all circumstances, regardless of the method of payment.

HIA is also of the view that the manner in which the proposed Clause 31.4(c) is drafted by combining a class of payments, and a set of circumstances, to a defined payment period, would be confusing to the modern award reader.

HIA has provided a revised version of the Draft Determination as **attached**.

Other than the redrafting of provisions as mentioned above, HIA has suggested a few grammatical and referencing changes for consistency with the Onsite Award.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED



Laura Regan
Assistant Director- Industrial Relations

ATTACHMENT A

MA000020 [insert print number]



DRAFT DETERMINATION

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of Wages (AM2016/8)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE
COMMISSIONER HUNT

SYDNEY, [INSERT DATE]

4 yearly review of modern awards – payment of wages common issue – payment on termination – Building and Construction General On-site Award 2010.

A. Further to the decision issued on [insert date] it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Building and Construction General On-site Award 2010* be varied by:

1. Deleting clause 31.4 and inserting in lieu:

31.4 Payment on termination of employment

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

(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) Where notice of termination is given by an employer or employee in accordance with **clause 16** ~~the terms~~ of this award ~~or the NES~~, the amounts ~~depre~~scribed at clause 31.4(a)(i) must be paid to the employee:

(i) on the day of termination; or

(ii) 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 amounts described at clause 31.4(a)(ii), and~~ Where notice is not given by an employer or employee in accordance with the terms of this award or the NES, the amounts ~~de~~prescribed at clause 31.4(a)(i), 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 amounts prescribed at clause 31.4(a)(ii), must be paid to the employee no later than 7 days after the day on which the employee's employment terminates.

(e) The requirement to pay wages and other amounts under clause 31.4(a) is subject to 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: 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.

2. Updating the table of contents and cross-references accordingly.

B. This determination comes into operation from [insert date]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT

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