

**BEFORE THE FAIR WORK COMMISSION
FAIR WORK ACT 2009**

s.156 - 4 YEARLY REVIEW OF MODERN AWARDS – PAYMENT OF WAGES

AM2016/8 – PAYMENT OF WAGES COMMON ISSUE

TIMING OF PAYMENT OF WAGES ON TERMINATION OF EMPLOYMENT

SUBMISSION OF MASTER BUILDERS AUSTRALIA (MBA)

1. This submission is filed pursuant to the Statement of 8 September 2016 and deals with matters raised therein regarding timing of payment of wages on termination of employment.
2. Attached to the Statement were draft variation determinations including one to vary clause 31.4 of the *Building and Construction On-Site Award 2010* (On-Site Award) in which Master Builders Australia (MBA) maintains an interest.

Background

3. MBA has filed a number of claims with regard to the payment of wages for both the On-Site Award and the *Joinery and Building Trades Award 2010* (Joinery Award). These are being dealt with in the 4C Construction Group Award Stage proceedings and relate to:
 - a. The removal of clause 31.2 requiring employees paid by cheque to be given paid time to attend the nearest bank branch to cash the cheque; and
 - b. The simplification of clause 31.3 to allow payment frequency to be either weekly or fortnightly.
4. Some of the above claims were originally included in these proceedings (AM2016/8) however the Commission, at the request of relevant construction parties, agreed that they be dealt with in the Construction Group Award Stage proceedings and have been so referred.
5. These submissions, with the exception of matters relating to the Joinery Award dealt with at paragraphs 21 to 25 hereunder, deal specifically with the draft variation determination and are made pursuant to paragraph [10] of the Statement.

Existing clause 31.4 – On-Site Award

6. Current clause 31.4 of the On-Site Award is attached hereto marked **Annexure A**.
7. The clause has the following effects:
 - a. Provided requisite notice is given, all monies due to the employee must be paid at the time of termination (the last day of employment); and
 - b. When payment at the time of termination is not practicable, the employer has two working days in which to send monies due to the employee; and
 - c. If the circumstances above occur, the employer must pay the monies sent by registered post, or, via EFT but only where the employee is usually paid using this method.
8. The clause does not:
 - a. Allow for termination monies to be paid on the employees' usual pay day if paid via EFT; or
 - b. Reference clause 16 of the On-Site award that deals with notice of termination requirements.

Draft Variation Determination

9. The draft variation determination attached to the Statement relating to the On-Site Award (a copy of which is also attached hereto marked **Annexure B**) seeks to delete clause 31.4 and insert the following provisions in its place:

31.4(a) *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.*

31.4(b) *Despite 31.4(a) if the employee is normally paid by electronic funds transfer, wages due may be transferred into the employee's account in accordance with the usual pay cycle.*

Differences between Current clause and Draft determination

10. The practical differences arising from the draft variation determination as attached to the 8 September Statement, when compared to the existing award clause, would be to:
 - a. create a new option allowing termination monies to be paid on the employees' usual pay day if paid via EFT in addition to the existing approach which is restricted to being payable at the time of termination; and
 - b. *remove the existing option* for termination monies to be paid within two working days where it is not practicable for payment to occur at the time of termination.
11. In addition, the draft variation determination uses differing terminology being '*monies due to the employee*' at draft clause 31.4(a) and '*wages due to the employee*' at draft clause 31.4(b). The existing clause 31.4 uses the phrase '*monies*' consistently.

MBA Alternative Variations

12. MBA has prepared an alternative clause to replace existing clause 31.4 that retains all the existing elements of the current clause 31.4 while concurrently incorporating new elements contained in the draft variation as attached to the Statement of 8 September 2016.
13. The MBA alternative clause is attached hereto and takes two forms which are marked **Annexure C** and **Annexure D**.
14. While there are two versions of this alternative, they are consistent in effect and without any substantive, operative or material differences between them. The two alternatives differ in presentation only, with **Annexure C** representing a version that is *stylistically consistent* with the existing Award whereas **Annexure D** represents a different stylistic layout with a greater focus on clarity and reader certainty.
15. We submit that an MBA alternative should be preferred over that as attached to the Statement of 8 September 2016 as it contains elements that would provide award users clarity and better meet the modern award objectives.
16. These elements are:

- a. Reference to clause 16: The inclusion of a reference to clause 16 alerts both employers and employees to the requirements for notice of termination and its related effect on monies payable on termination.
 - i. This reference does not alter the effect of the existing provision or have a material impact and is instead a signpost to a provision located elsewhere in the Award that is directly relevant to payment of wages on termination.
- b. Retention of 'practicability': The MBA alternative retains the existing clause concept allowing an employer to pay monies due within two working days where it is not practicable to do so on termination of employment.
 - i. We submit it is necessary to retain this concept due to the existence and prevalence of 'Daily Hire' as a method by which employees are engaged in the building and construction industry. Under clause 11, Daily Hire employees are employed "by the day" and the notice requirement (both employer and employee) is one day (see clauses 11.1 and 11.2).
 - ii. This means a Daily Hire employee can give notice at the start of a day and the effective termination of their employment would occur at the end of that same day. In those circumstances, it is not practicable for the employer to calculate and arrange the monies due to an employee and is the basis for the existing 'where practicable' concept in existing clause 31.4.
- c. Alternatives by agreement: The MBA alternative allows for an employer and employee to agree on an alternative method by which monies due will be paid, in the event circumstances contemplated in the existing clause 31.4 exist. This option is intended to provide flexibility, requires agreement between the employer and employee, and provides an alternative in the event other existing options were not practicable.
- d. Nomenclature: The MBA alternative retains consistency in terminology used by adopting the term 'monies' rather than 'wages' (or a combination of both).

17. It should also be noted that the MBA alternative (both versions) are not inconsistent with other existing subclauses within clause 31 nor would they be inconsistent with our proposed variations to amend other related clauses as advanced in the Construction Group Award Stage proceeding.

Response to question raised in the 8 September Statement

18. At paragraph [8](ii)(a) of the Statement, the Commission also posed the following question with reference to the On-Site Award:

'Ten awards provide for termination payments to be made by post – is it envisaged that such payments would only be by cheque or is intended that cash could be sent by post?'

19. MBA is unable to identify any members who pay employee wages and entitlements by cash or cheque. While this does not rule out the possibility that payment by cheque or cash does occur, we would submit that the overwhelming payment method used by MBA members is EFT and the proportion of those using other methods would be almost indiscernible.
20. MBA consulted with officers within our national network who take enquiries from building and construction employers on a daily basis and none were able to recall any who pay by cash or cheque.

Other common issue claims

21. Australian Business Industrial together with the NSW Business Chamber (ABI), and the Australian Industry Group (AIG) have, in the context of this proceeding, filed separate draft variation determinations affecting the Joinery Award.

ABI claim

22. Notwithstanding the matters raised earlier herein at paragraphs 3 to 5, MBA supports the position advanced by ABI with respect to provisions imposing penalties for late payment of wages which reflects the June 2015 decision involving the *Timber Industry Award 2010* (Timber decision) [2015] FWCFB 2856.
23. As noted earlier herein at paragraphs 3 to 5, MBA has filed draft variation determinations in the Construction Group Award Stage proceeding to amend the Joinery Award at clause 26. A copy of the relevant draft variation determination is attached hereto marked **Annexure E**.
24. In the context of this proceeding, MBA submits that the draft variation determination (**Annexure E**) should be preferred over that as proposed by ABI. While both versions seek to vary clause 26 to reflect the Timber decision, the MBA version provides greater

flexibility in terms of frequency of payment and is consistent with that as filed in the Construction Group Award Stage proceeding.

AIG claim

25. MBA supports the position and draft variation determination advanced by AIG addressing an anomaly at clause 32 of the Joinery Award involving annual leave loading. It is consistent with the Commission's decision of October 2015 regarding the Exposure Draft of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award) [2015] FWCFB 7236.

Master Builders Australia

20 September 2016

Lodged by: Shaun Schmitke, Master Builders Australia Ltd	Telephone: 02 6202 8888
Address for Service: Level 1, 16 Bentham Street, Yarralumla, ACT 2600	Fax: 02 6202 8877
Email: shaun.schmitke@masterbuilders.com.au	

Building and Construction General On-site Award 2010

- (b) All other disability and expense related allowances provided for in this award will be payable to trainees from time to time, if applicable, but no other allowances will apply.

29. School-based apprenticeship

[Varied by [PR988410](#)]

See Schedule D

30. Higher duties

An employee engaged for more than two hours, during one day on duties carrying a higher rate than the employee's ordinary classification, must be paid the higher rate for the whole day. Otherwise the employee must be paid the higher rate for the time so worked.

31. Payment of wages

[Varied by [PR995980](#), [PR503624](#)]

- 31.1** All wages, allowances and other monies must be paid in cash, or by cheque, bank cheque, electronic funds transfer (EFT) or similar transfer or any combination.
- 31.2** An employee paid by cheque must be allowed reasonable time, as agreed between the employer and the employee, to attend the branch of the employee's bank nearest the workplace to cash cheques during working hours.

[31.3 substituted by [PR995980](#), [PR503624](#) ppc 01Jan11]

- 31.3** Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week. Where an employer made payment less frequently in compliance with a relevant award or award-based transitional instrument, prior to the making of this award on 1 January 2010, or where an employer made payment less frequently in compliance with a Division 2B State award, prior to 1 January 2011, the employer may continue to make payment at that frequency, subject to the agreement of employees and/or a majority of employees if required by the relevant award, award-based transitional instrument or Division 2B State award.
- 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).
- 31.5** If an employee is paid wages by cash or cheque and is kept waiting for their wages more than a quarter of an hour after the usual time of finishing work on pay day (for reasons other than circumstances beyond the control of the employer), the employee is to be paid at overtime rates after that quarter of an hour for the period they are kept waiting, with a minimum payment of a quarter of an hour.

MA000020 PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Payment of wages (AM2016/8)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010 [MA000020]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payments of wages common issue – payment of wages on termination of employment.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 31.4 and inserting the following:

31.4

- (a) 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.
- (b) Despite 31.4(a) if the employee is normally paid by electronic funds transfer, wages due may be transferred into the employee's account in accordance with the usual pay cycle.

B. This determination comes into operation from XX Month 2016. 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 XX Month 2016.

PRESIDENT

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Award Stage

(AM2016/8)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

[MA000020]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payment of wages common issue – payment of wages on termination of employment

A. Further to the decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 31.4 and replacing it with the following:

31.4 (a) When notice is given (in accordance with the provisions of clause 16) all monies due to the employee must be paid at the time of termination of employment, or, the employees normal pay day if they are usually paid by electronic funds transfer.

31.4 (b) Where this is not practicable, or where an employee is usually paid by a method other than electronic funds transfer, the employee will be paid any outstanding monies within two working days either by registered post, electronic funds transfer, or any other method as agreed between the employer and employee.

B. This determination comes into operation from XX Month 2016. 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 XX Month 2016.

PRESIDENT

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Award Stage

(AM2016/8)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

[MA000020]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payment of wages common issue – payment of wages on termination of employment

A. Further to the decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 31.4 and replacing it with the following:

31.4(a) *When notice is given (in accordance with clause 16), all monies due to the employee must be paid either:*

- (i) at the time of termination, or*
- (ii) if the employee is usually paid by electronic funds transfer, on the employee's normal pay day.*

31.4 (b) *Where it is not practicable for the employee to be paid within the times specified in clause 31.4(a)(i) or (ii), or the employee is usually paid by a method other than electronic funds transfer, the employee will be paid any outstanding monies within two working days by:*

- (i) registered post,*
- (ii) electronic funds transfer, or*
- (iii) any other method agreed between the employer and employee.*

B. This determination comes into operation from XX Month 2016. 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 XX Month 2016.

PRESIDENT

MA000029 PR

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards - AM2014/274

JOINERY AND BUILDING TRADES AWARD 2010

[MA000029]

Building, metal and civil construction industries

PRESIDENT ROSS

SYDNEY, XX XX 2016

A. Further to the decision issued by the Fair Work Commission on [XXX], the above award is varied as follows:

1. By deleting clause 26 and replacing it as follows:

26. *PAYMENT OF WAGES*

26.1 *Payments must be paid and available to employees not later than the end of ordinary hours of work on Thursday of each working week or each working fortnight. Provided that in any week or fortnight in which a public holiday falls on a Thursday or a Friday mutually acceptable alternative arrangements must be made.*

26.2 *All such monies must be paid by cash, cheque or direct credit to the account at an approved financial institution nominated by the employee, provided that payment other than by cash creates no undue financial burden to the employee.*

26.3 *If an employee is paid wages by cash or cheque and is kept waiting for their wages more than a quarter of an hour after the usual time of finishing work on pay day (for reasons other than circumstances beyond the control of the employer), the employee is to be paid at overtime rates after that quarter of an hour for the period they are kept waiting, with a minimum payment of a quarter of an hour.*

B. This determination comes into operation from XXXX.

PRESIDENT