Submission on Standardising Payment of Wages Provisions in Modern Awards

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This submission is made in our personal capacities, as a barrister and academic respectively, in response to the Full Bench's decision in *4 yearly Review of Modern Awards—Payment of Wages* [2016] FWCFB 8463.

We are in general agreement with the approach adopted by the Full Bench. In particular, we support the notion of standardising payment provisions in modern awards, except where there are cogent reasons for industry-based variations. We also agree that it would be desirable for the issue of the accrual of wages to be dealt with by a standard clause in modern awards. However, what we propose is a slightly different approach to that adopted by the Full Bench. We also suggest some other changes to the wording of the model clauses set out in paras [34] and [117] of the decision.

Accrual of Wages and Other Amounts

Summary of proposal

We propose that a default clause be included in modern awards that 'Wages accrue on a day to day basis.' This should be modified where industry circumstances demand, for example to provide that wages accrue on a hour to hour basis instead.

We also propose that:

- Clause x.1(a)(i) (at para [34]) be amended to read: 'the employee's wages ~~for~~ ***accrued during*** the pay period'

- Clause (a)(i) (at para [117]) be amended to read: 'the employee's ***accrued*** wages for any complete or incomplete pay period …'

Our reasons for advancing this proposal are that:

- It alleviates the injustice caused by the operation of the common law entire obligations rule. It has been widely recognised for over 140 years that the common law rule, in the absence of award or statutory modification, is too harsh.

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- It largely reflects the legislative scheme applying under the Apportionment Acts in each State and Territory that are discussed below and removes any uncertainty about their operation.

- It accords with common industrial practice.

- It is fair, reasonable, and clear.

To be clear, adopting such a provision would *not* mean abandoning the Full Bench's proposal to require wages to be paid within 7 days after the end of each pay period or after the termination of employment. Determining when wages *accrue* does not necessarily dictate how soon they must be *paid*.

The common law rule and its unjust operation

An understanding of the operation of our proposal and the reasons for it requires a brief explanation of the common law rule regulating how wages are earned and the current State and Territory legislative schemes regulating that matter. The common law governing the payment of wages can be summarised as follows:[1]

1. Wages are earned by the performance of either an entire obligation or a divisible obligation.

2. An entire obligation to serve is one in which the wages payable to the employee is indivisible, not severable and is not apportioned against a part of the performance by the employee of the service.[2] An obligation to serve is entire when the contract requires it to be *completely* performed for a specified period before the employer is obliged to pay wages. For example, 'an employee is entitled to a weekly wage of $800.'

3. A divisible obligation to serve is one in which different parts of the wages may be apportioned to different parts of the performance. Divisible obligations can either be divisible into further discrete portions or infinitely divisible. An example of an infinitely divisible obligation is the obligation under the *Fair Work Act 2009* to pay accrued annual leave on termination that 'accrues progressively during a year of service'.[3] For each day the employee serves, the amount of the pro rata benefit increases.

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1. See A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, *Creighton and Stewart's Labour Law*, 6th ed, Federation Press, 2016, [15.58]–[15.59]; M Irving, *The Contract of Employment*, LexisNexis Butterworths, 2012, [9.29]–[9.30].
2. *Steele v Tardiani* (1945) 72 CLR 386 at 401; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 350; E Peel, *Treitel's Law of Contract*, 13th ed, Sweet & Maxwell, 2013, p 916.
3. See ss 90(2) and 87(2) of the Fair Work Act; see also s 96(2) concerning personal/carer's leave. The phrases 'at the rate of' and 'pro rata' allow for infinite divisibility; see eg *Salton v New Beetson Cycle Co* [1899] 1 Ch 775. See further G Williams, 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373 at 374.

4. The common law entire obligation rule is that when a contract or award contains an entire obligation to serve for a specified period (such as an hour, a week or a month) as a condition precedent to the earning of wages, then an employee does not earn wages if he or she fails to serve for the specified period. [4]

5. There are some exceptions to the common law rule. For example, substantial performance equates to entire performance: an employee who serves for 29 days in a month may be considered to have earned wages for the whole month.[5]

6. The common law rule operates in an 'all or nothing' fashion.[6] It is notoriously and patently unjust. For example:

    a) Assume an employee is engaged on monthly wages, serves for 3 weeks and is stood down for disciplinary reasons. She has not earned wages for the 3 weeks or the month as she has not substantially served for a month. Under the common law she is entitled to nothing for that month.

    b) Assume an employee is paid monthly and serves for 3 weeks. Due to insufficient work, the employer stands him down for a week in circumstances in which there is no right to do so under the Fair Work Act. Under the common law the employee is not entitled to any wages for the 3 weeks that he served the employer.[7]

    c) Assume a worker is engaged on fortnightly wages on probation, terminable without notice. She serves for 5 days and is dismissed (or resigns). She has not earned wages for the fortnight as she has not substantially served for that period. She cannot sue for wrongful dismissal as the contract was terminated in accordance with its terms. Under the common law she receives no wages.

    d) Assume an employee is paid monthly and serves for 3 weeks. He is then justifiably dismissed. He is not entitled to any wages for the 3 weeks that he served the employer. Under the common law he receives no wages.

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4. *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 233–6; *State Superannuation Board v Criminale* (1988) 26 IR 13 at 18; *Re Waterside Workers Awards* (1957) 1 FLR 119 at 123–4, 127–9; *Cutter v Powell* (1795) 6 TR 320; 101 ER 573. For criticism of the rule, see S Stoljar, 'The Great Case of Cutter v Powell' (1956) 34 *Canadian Bar Review* at 300–2.
5. *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 246–7; *Steele v Tardiani* (1945) 72 CLR 386 at 401; *Gapes v Commercial Bank of Australia Ltd* (1979) 41 FLR 27 at 32, 33; *Csomore v Public Service Board of New South Wales* (1986) 10 NSWLR 587 at 595–7; *Welbourn v Australian Postal Commission* [1984] VR at 267.
6. G Williams, 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373 at 375.
7. It is arguable, however, there may be a right to have such a dispute about unpaid wages arbitrated under s 526 of the Act.

e) Assume an employee is engaged on monthly wages, serves for 2 weeks and his employer becomes insolvent. He has not earned wages for the month. Under the common law he receives no wages.

f) Assume an employee is engaged on monthly wages, serves for 2 weeks and then dies. She has not earned wages for the month. Under the common law her executor is not entitled to the wages.

Our proposal would entitle the worker to be paid wages for the period of work served in each of the examples above. In contrast, in the first two examples mentioned above, under the payment of wages clause at para [34] there would be not be any wages payable. This is because, on the face of it, the wages for the relevant pay period would have not been earned. By contrast, the proposed clause for payment on termination at para [117], read with [118], is intended to deal with the final four examples, though our proposed changes would put the matter beyond doubt.

An imperfect solution: the Apportionment Act

The problems identified by the application of the common law rule have been apparent for over 140 years. At paras [126]–[131], the Full Bench has identified this as a regulatory gap. However, what is not mentioned is that this gap is potentially filled in each Australian State and Territory by statutory provisions that replicate the *Apportionment Act* 1870 (UK).[8]

These provisions have two broad effects. First, they partly answer the question – when do wages accrue? The second is they partly answer the question – when are accrued wages payable?

On the first question, in Victoria s 54 of the *Supreme Court Act 1986* (Vic) states:

> All rents, annuities,[9] dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) are to be considered as accruing from day to day and are apportionable in respect of time accordingly.

Similar provisions apply in other jurisdictions. The phrases 'are to be considered as' and 'shall be treated as' are used in some of the Apportionment Acts. They operate as deeming provisions.[10] The parties can expressly stipulate that this

8. *Apportionment Act 1905* (ACT); *Conveyancing Act 1919* (NSW) ss 142–144; *Law of Property Act* (NT) ss 211–213; *Property Law Act 1974* (Qld) ss 231–233; *Law of Property Act 1936* (SA) ss 63–68; *Apportionment Act 1871* (Tas); *Supreme Court Act 1986* (Vic) ss 53–54; *Property Law Act 1969* (WA) ss 130–134. These Acts are referred to below as 'the Apportionment Acts'.
9. A word defined in s 53 to include salaries.
10. *Item Software (UK) Ltd v Fassihi* [2004] IRLR 928 at [91] ; *Sim v Rotherham Council* [1987] Ch 216 at 255; (under the Act salaries are 'deemed' to accrue day by day).

provision does not apply.[11] The effect of this provision is that wages (if they are periodical payments in the nature of income) accrue day to day.

There are uncertainties about the operation of these provisions. The first is their obscurity. This is partly illustrated by the fact that the parties interested in this matter do not appear to have drawn them to the attention of the Fair Work Commission. They are little understood by many practitioners, never mind employers and employees. It should not be necessary for employers or practitioners to have to refer to these provisions to have to answer the simple question – have wages accrued?

The second uncertainty arises from their language. It is for good reason that the Apportionment Acts were once described as 'one of the worst drawn, if not perhaps the worst drawn, in the statute book'.[12] We agree with the observation at [132] of the Full Bench decision that:

> The obligations and entitlements of employers and employees in respect of wages and other amounts payable under modern awards (and when they become payable) should be expressed in clear and simple terms. The modern award system should be simple and easy to understand.

On a matter as important as the entitlement to wages, clarity and simplicity is important.

The third uncertainty about the operation of the Apportionment Acts is their scope. Although the Acts apply to 'annuities', 'salary' and 'other periodic payments in the nature of income',[13] it is not clear if they apply to employees who are paid wages as opposed to merely salary. Some judges have suggested they are not.[14] Most have suggested they are.[15] However, courts rarely consider these provisions.

As noted above, the second effect of the Apportionment Acts is that they partly answer the question – when are accrued wages payable? Section 55 of the *Supreme Court Act 1986* (Vic), as with similar provisions in all Australian jurisdictions, provides:

> The apportioned part of any payment referred to in section 54 is payable or recoverable

11. See eg s 53 (3) of the *Supreme Court Act 1986* (Vic).
12. *Wardroper v Cutfield* (1864) 33 LJ Ch 605 at 607, said in relation to the relevantly identical predecessor of the *Apportionment Act* 1870 (UK) .
13. See the definitions in *Apportionment Act 1905* (ACT) s 2; *Conveyancing Act 1919* (NSW) s 142; *Law of Property Act* (NT) s 211; *Property Law Act 1974* (Qld) s 231; *Law of Property Act 1936* (SA) s 63; *Apportionment Act 1871* (Tas) s 5; *Supreme Court Act 1986* (Vic) s 53; *Property Law Act 1969* (WA) s 130.
14. See eg *Moriarty v Regent's Garage and Engineering Limited* [1921] 1 KB 423 at 429–30, 444 (reversed on other grounds [1921] 2 KB 766).
15, See the cases discussed in M Freedland, *The Personal Employment Contract*, OUP, 2003 at 203–4 and M Irving, *The Contract of Employment*, at 9.32.

(a) in the case of a continuing payment, when the entire portion of which the apportioned part forms part becomes due and payable; and

(b) In the case of a payment determined by reentry, death or otherwise, when the next entire portion of the payment would have been payable if it had not been so determined.

Again, we repeat what we said above about the importance of clarity. Using the examples referred to above, the effect of these two limbs is as follows:

1) In examples (a) and (b) discussed above. the apportioned part is payable under s 55(a) 'when the entire portion of which the apportioned part forms part becomes due and payable'. That is, the three weeks served (being the part apportioned under s 54) becomes payable when the month expires. There is some authority, albeit somewhat weak, that the three weeks' salary is not payable because the one month's salary is never 'due and payable'.[16] The argument runs: the 'entire portion' is one month; the employee never serves the whole month; the entire portion therefore never 'becomes due and payable'. Consequently, there is never any salary earned to apportion.

2) In examples (c) - (f) discussed above the apportioned part is payable under s 55(b) as it is a payment 'determined by death or otherwise'. The employee is entitled to proportionate payment, notwithstanding that the employee did not perform the entire obligation by serving for a month.[17]

In the circumstances governed by the Apportionment Acts, they operate to reverse the common law rule so far as that rule applies to an entire obligation in a divisible contract.[18] The analysis described above has considerable academic support.[19]

Clarity, fairness and balance

What our proposal would do is to lay down a clear rule in modern awards about the accrual of wages, to complement what the Full Bench is already proposing about the time of payment. These provisions would override any application the

16. This argument appears to have found favour in *Salton v New Beetson Cycle Company* [1899] 1 Ch 775 and *Inman v Ackroyd & Best Limited* [1901] 1 QB 613, although in both cases the judgments addressed the issue so briefly it is difficult to discern the basis of the reasoning. It also finds some support in the dicta in *Lowndes v Earl of Stamford* (1852) 18 QB 425; 118 ER 160. An alternative and restrictive interpretation of the Act, articulated in P Matthews, '"Salaries" in the Apportionment Act 1870' (1981) 2 *Legal Studies* 302 was rejected in *Item Software (UK) Ltd v Fassihi* [2004] IRLR 928 at [80], [115].
17. *Item Software (UK) Ltd v Fassihi* [2004] IRLR 928 at [71]–[82], [112]–[115], [122]; *Treacy v Corcoran* (1874) IR 8 CL 40; *Sim v Rotherham Council* [1987] Ch at 255.
18. *Item Software (UK) Ltd v Fassihi* [2004] IRLR 928 at [91].
19. G Williams, 'Partial Performance of Entire Contracts' (1941) 57 *Law Quarterly Review* 373 at 382; M Freedland, *The Personal Employment Contract*, pp 203–4; J Carter, *Contract Law in Australia*, 6th ed, LexisNexis Butterworths, 2013, pp 652-3; E Peel, *Treitel's Law of Contract*, pp 926-7.

Apportionments Act might otherwise, given the primacy of federal laws under ss 109 and 122 of the Constitution (and also s 29(1) of the Fair Work Act).

We advance six reasons to support our proposal. First, it accords with common industrial practice. No reasonable employer would deny wages to employees in the six examples cited above.

Second, it is fair. In each of these cases the employer has gained the benefit of work but may have incurred no obligation to pay for any of it. It might be true that few employers exploit the flaw in the law enshrined by the common law rule. But there is no reason any employer should be allowed to do so.

Third, it is balanced. It does not require the employer to pay for every minute the employee performs work. It does not require, for example, payment for 1 hour when a full day's work is not done, or payment for several minutes in an industry where wages traditionally accrue by the hour. It involves a compromise of interests.

Fourth, it is modest. Our proposal largely reflects the current law in the Apportionment Acts, shorn of their complexities and removing the uncertainties identified above.

Fifth, it is preferable to the current proposed clauses. It provides a right to payment in the first two examples when neither of the proposed clauses would confer that right. Further, clause (a)(i) (at para [117]) on its face *might* give rise to an argument that there are no 'wages' for an incomplete pay period. As noted above, there is some authority to support a similar argument under the *Apportionment Acts*.[20] Our proposal would avoid such an argument.

Sixth, without the clause we advance the relationship between the operation of the clauses at [34] and [117] and the *Apportionment Acts* is unclear, just as the relationship between those Acts and s 323 of the Fair Work Act is unclear. Ideally, this is a matter that should be addressed in the Fair Work Act itself. But in the absence of any statutory clarification we see no reason why the Commission could not or should not clarify the matter in modern awards.

Payment in Advance

There is a range of issues with the payment in advance clause that may need to be addressed.

The relevant part of the payment of wages clause at para [34] is clause x.1(f): 'Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.'

20. As noted above, a similar argument appears to have found favour in *Salton v New Beetson Cycle Company* [1899] 1 Ch 775 and *Inman v Ackroyd & Best Limited* [1901] 1 QB 613. We appreciate that para [118] makes it clear this is not the intention.

We propose that clause x.1(f) be amended to read:

> 'Where an employee's pay period is one month:
>
> (i) at least two weeks' wages must be paid in advance; and
>
> (ii) the balance of the wages, and all other amounts that are due under this award and the NES for the pay period, are to be paid in arrears.'

The reasons for this change are as follows. First, most months do not have 4 weeks.

Second, the amounts payable to an employee may not be certain until the end of the pay period. The current clause x.1(f) raises the question – two weeks of *what* must be paid in advance? Presumably not the amounts mentioned in clause x.1(a)(ii), as they may not yet be 'due'. It should be clear. We suggest it is wages that should be paid in advance, as they will be the certain component of the remuneration payable.

Third, the current clause x.1(f) raises a problem in the application of clause x.1(a)(ii) payments by linking the arrears payment with 'two weeks'. Assume, for example, an employee works unscheduled overtime for 5 hours in the first fortnight and 10 hours in the rest of the month. Under the current clause x.1(f), it would seem that:

a) The employee gets a payment in advance which won't include any payment for the 5 hours of unscheduled overtime, since that work would not have been anticipated.

b) At the end of the pay period the employee receives a payment for 'two weeks in arrears'. This clearly picks up the 10 hours of overtime in the second half of the month. But what about the 5 hours of overtime in the first half of the month? Is that payment within the 'two weeks in arrears'?

The proposed amendment deals with that problem.

Fourth, we have divided clause x.1(f) into sub-paragraphs because the current clause x.1(a) requires a payment at the end of the pay period. The current clause x.1(f) requires payment in the middle of or at the start of the monthly pay period. This creates a tension that is best resolved by clarity.

Further, and as noted earlier, we propose that clause x.1(a)(i) refer to 'wages ***accrued during*** the pay period'. The current clause x.1(a)(i) speaks of wages 'for' a pay period. As is clear from para [38] (and to an extent paras [26] and [27]), for weekly and fortnightly employees the amounts in clause x.1(a)(i) are assumed to be accrued, due and payable. This accords with the usual rule that the performance of service is the condition precedent to the obligation to pay

wages. That is, the employee earns the wages by performing the service. They are wages accrued during the pay period. In contrast, the wages paid in advance in clause x.1(f) are slightly different. Though it is for wages, the right to payment in advance here is not for past service. And the right to payment in advance is not, on one view, for wages accrued during the pay period. To avoid unnecessary arguments about whether the payment in advance is 'wages for the pay period', or 'wages accrued during the pay period,' we have divided clause x.1(f) into sub-paragraphs and not replicated the potentially confusing terms.

Other Suggested Changes

Clause x.1(e) (at para [34]) contains a savings provision to cover the situation where 'employees … were paid monthly' prior to the commencement of the new clause. This is presumably not intended to cover a situation where employees were in fact being paid monthly, but *should* have been paid on a different basis. We suggest that 'paid monthly' be changed to 'paid monthly ***in accordance with this award***'.

The proposed clause on payment on termination (at para [117]) refers three times to 'the employee's last day of employment'. This is not a phrase that appears in the Fair Work Act itself. The context suggests that it is meant to signify the date on which the relevant employment *terminates,* in a legal sense. But we think that some readers might also take it to mean the last day the employee is *at work*, even though for a further period they still (for example) have leave to take, or are not required to attend work. We suggest that it would be safer to refer instead to 'the day on which the employee's employment is terminated' (first instance) or 'the day of the termination' (second and third instances). This has the virtue of aligning the clause with the language used by s 117 of the Fair Work Act.