

From: Bill Chesterman [<mailto:bchesterman@vacc.com.au>]

Sent: Tuesday, 11 September 2018 9:34 AM

To: AMOD

Subject: Payment of wages clause submissions by the Motor Trades Organisations 07 Sept sent to FWC (am2016/8 - [Vehicle Manufacturing, Repair, Services and Retail Award 2010 MA000089])

Good Morning

Please find enclosed a submission prepared by the Motor Trades Organisations which was not attached to the letter forwarded to His Honour, Justice Ross on Friday 7 September. The letter sent on behalf of the Motor Trades Organisations opposed the inclusion of the model payment of Wages Clause in its entirety in the Vehicle Manufacturing, Repair Services and Retail Award 2010. I apologise for the oversight.

Yours sincerely

Bill Chesterman

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IN THE FAIR WORK COMMISSION

Matter: AM2016/8

4 yearly review of modern awards – Payment of wages

Submission filed by the Motor Trades Organisations

Preliminary Comments

This submission is made on behalf of MTA SA, MTA-NSW, MTA-WA, MTA Q'LD and the VACC, (the Motor Trades Organisations).

1. We refer to the Statement issued by His Honour, Mr Justice Ross, President of the Fair Work Commission (the Commission) issued on 21 August 2018. In particular, we refer to the Directions as contained in paragraph 16 of the Statement, requiring interested parties to confirm whether they oppose a variation to include the model payment of wages clause in nominated awards, by 4pm on 7 September 2018.
2. The Vehicle Manufacturing Repair Services and Retail Award 2010 (the Vehicle Award) (MA 000089) is one of the 22 nominated Awards referred to in paragraph 16 of the Statement.
3. The current 'Payment of wages on termination' clause is contained in clause 24.4 of the Vehicle Award and is set out in **Attachment A** of the Statement.
4. The final version of the model term on **Payment on termination of employment** is set out in para 119 of a Full Bench decision handed down on 17 July 2018 [2018] FWCFB 3566.
5. In the above decision, at para 156 the Full Bench indicated that a review of the remaining awards that contain terms which provide for the payment of wages and other amounts to an employee on termination of their employment will be dealt with on an award by award basis and any variation (to the model term) will have to be justified on its merits.
6. At a Conference held on 2 August 2018, Mr. Albert Baumgartner of MTA NSW appeared before the Commission on behalf of Motor Trades Organisations and made submissions on this matter.
7. While the Motor Trades Organisations largely support the model term, we submit that there is a justification in seeking certain variations to the model term based on the requirements and provisions of the current Vehicle Award which reflect the circumstances that prevail in the automotive industry.

8. The Motor Trades Organisations previously made written submissions on this matter on 3 November 2016.

Motor Trades Organisations' Position

1. Proposed amendments to the model term:

Motor Trades Organisations propose the following amendments to the final version of the model term as set out in para 119 of the 17 July 2018 Full Bench decision:

X. Payment on termination of employment

- (a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:
 - (i) the employee's wages under this award for any complete or incomplete pay period *worked by an employee* 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 *but excluding commission payments that may become applicable at a later date for a person employed to perform vehicle sales related duties.*
- (b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.
- (c) *An employer may deduct from monies due to an employee under paragraph (a) such amount as is authorised in writing by the employee for a lawful purpose specified in the authority.*

Note1: (insert as per model term)

Note 2: (insert as per model term)

Note 3: (insert as per model term).

2. Justification for the amendments to the model term:

(i) Amendment to paragraph (a)(i)

- (a) In relation to the amendment sought in paragraph (a) (i), we refer the Commission to paragraph 92 of the Full Bench decision of 1 December 2016 [2016]FWCFB 8643 which reflects the Commission's following views on termination payments:

*"If termination payments are made, part of an employee's termination payment is likely to be **in respect of work that the employee has already performed and leave that has already accrued** It is appropriate that such payments be made in a **timely way**". **(our emphasis)***

- (b) The Motor Trades Organisations agree with the Full Bench's views expressed above. It would appear that in constructing paragraph (i) of the provisional model term, the Commission intended to ensure that wages accrue under the award in

respect of any complete and incomplete pay period **worked by the employee**, (refer paragraph 118 of the Full Bench decision of the 1 December 2016). This view is further discussed by the Full Bench in subsequent [paragraphs 129 – 134].

- (c) Paragraph 134 of the Full Bench decision again reiterates that the wording of paragraph (i) of the provisional model 'payment on termination' provision *is intended to ensure that wages accrue under the award in respect of any incomplete pay period worked by the employee prior to the employee's employment ending*. **(again our emphasis)**.
- (d) Para 134 goes on to indicate that the *'wording does not seek to clarify whether an employee is to be paid wages for a part of a day or part of an hour worked in an incomplete pay period.'* The rationale here is that it *'may depend on the wording of the minimum wage provisions of the particular award concerned'*.
- (e) Absent of any express wording in an award to clarify this, paragraph (i) of the final version of the model term appears to indicate that wages are to be calculated and paid *'up to the end of the day of termination'*.
- (f) If this understanding is correct, wages will be required to be paid for the whole day even though an employee walks off the job and terminates their employment after working a few hours. Employers in this industry have generally only paid wages for work performed on the day in such circumstances.
- (g) The model term appears to be a departure from the existing provisions and at odds with the views expressed by the Commission as referred to above.
- (h) The Vehicle Award does not appear to have any minimum wage provisions to clarify such payment. Accordingly, we have proposed an amendment to paragraph (a) (i) to include the words *'worked by an employee'* to maintain the status quo.

(ii) Amendment to (a)(ii)

- (a) As submitted by MTA NSW on behalf of the Motor Trades Organisations at a recent hearing on 2 August 2018, the requirement to pay accrued wages and all other amounts due to the employee within a 7 day period under the Vehicle award will present difficulties in relation to the payment of commission payments for persons engaged in vehicle sales related duties.
- (b) The Victorian Automobile Chamber of Commerce (VACC) also made submissions at a hearing of 21 October 2016 on this matter to raise the issue of commission payments under the Vehicle Award in relation to persons engaged in Vehicle sales related duties.
- (c) These commission payments may not crystallise for two or three months after the employee's employment has in fact terminated. Commissions are paid on the delivery of the vehicle to a customer. In some cases vehicles have to be ordered as the dealership does not have the stock readily available.

A vehicle may also need to be imported from overseas which can create considerable delays in the delivery of the vehicle.

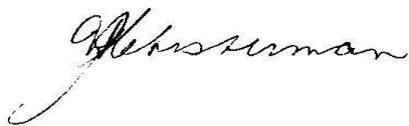
- (d) Accordingly, Motor Trades Organisations have proposed an amendment to (a) (ii) to exclude commission payments from amounts to be paid to *an employee on termination in relation to employees engaged in vehicle sales related duties*.

(iii) Amendment re new subclause (c)

- (a) The Motor Trades Organisations seek to retain the current clause 24.4 (b) of the Vehicle Award.
- (b) We acknowledge that subclause (b) allows employers to make deductions from monies due to an employee on termination for such amounts authorised by this award or the Act.
- (c) The proposed new subclause (c) allows for the deduction of any residual monies owed by an employee to an employer at the point of the employee's termination of employment. The deduction as authorised in writing by the employee is for a lawful purpose.
- (d) In this regard, it is submitted that motor trade businesses frequently grant requests for personal loans from their employees, book automotive parts and expenses on monthly accounts and even purchase second hand vehicles or other goods, usually at trade/internal prices. Employers accede to such requests where they have the capacity to carry short term debt and employees save considerably on interest otherwise incurred. These arrangement builds mutual respect, arguably staff retention and job satisfaction.
- (e) This practice is relatively common and arguably unique to the industry. To this extent, it is submitted that the proposed new subclause be approved as part of the model term in this award.
- (f) It is submitted that the proposed subclause is consistent with s 324(1) (a) of the Act on the basis that the deduction is authorised in writing by the employee and is principally for the employee's benefit.
- (g) The proposed subclause will also provide a clear understanding to an employer, especially a small business, on such deductions and lessens the need to have to refer to relevant sections of the Act

MTA Organisations have had discussions with the AMWU & the SDA on the model clause. While there appears to be broad agreement on the changes we seek, and the Unions will no doubt file their own submissions in this regard, they have also indicated that they will be seeking a payment to the employee within 2 days after the day on which the employee's employment has terminated in clause X (a). The Unions have been advised that this is not agreed by the MTA Organisations.

Filed: 7 September 2018

A handwritten signature in black ink, appearing to read "A. H. S. Suman". The signature is written in a cursive style with a long, sweeping tail that loops back under the main text.

On behalf of the Motor Trades Organisations