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Chamber of Commerce

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10 March 2020

The Hon. Justice Ross, President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

Dear Justice Ross

Common issues – payment of wages on termination model clause: AM 1016 /8 Notice of listing

Your Honour issued a statement [2020] FWC 1205 on 5 March 2020 regarding this common award claim and notification of the listing for mention on 12 March 2020 of a number of awards where submissions had been received regarding the model clause.

The Motor Trades Organisations had filed submissions on the model clause being inserted in the Vehicle Manufacturing, Repair, Services and Retail Award on 7 September 2017 and 25 September 2019, (refer attachment).

This award is not listed as one of the awards for consideration on Thursday, 12 March, however the Motor Trades Organisations would like to attend the listing to find out how our submissions on the model clause are to be programmed. The AMWU also filed a submission on 25 September 2019.

Yours faithfully

WJ Chesterman
Industrial Relations Manager

For and on behalf of:

Motor Trades Organisations – VACC, MTA NSW, MTA SA & MTA WA

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

Sent: Wednesday, 25 September 2019 9:07 AM

To: AMOD <AMOD@fwc.gov.au>

Subject: 4 yearly review of modern awards payment of wages AM2016/8 submission sent 24 September 2019.pdf Vehicle Manufacturing, Repair, Services and Retail Award 2019 (VMRSR Award)

Good Afternoon

I have attached a submission on behalf of the Motor Trades Organisations in relation to the Full Bench matter AM2016/8 relating to the payment of wages clause. This matter was recently the subject of a Full Bench decision on 23 August 2019, (FWCFB5868). The Full Bench decision referred to the VMRSR Award as one of nine awards which contained specific issues which required further consideration by the Full Bench, however although the Full Bench set out directions for the filing of submissions for some of the nine awards, the VMRSR award was not included in the deadline for the filing of submissions on 25 September 2019.

As the Motor Trades Organisations have previously presented submissions on the payment of wages clause in the VMRSR award we have filed the attached submission which covers some of the specific issues in the clause which were previously raised in our 7 September 2018 submissions. These submissions have been modified in the attached submission. The Motor Trades Organisations have spoken to the AiGroup regarding the issues raised in this submission. Ai Group do not oppose the amendments identified to the VMRSR payment of wages clause in this submission.

Kind Regards,

William Chesterman
Industrial Relations Manager
Industrial Relations OHSE Department

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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

24 September 2019

PRELIMINARY COMMENTS

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

1. We refer to the recent Full Bench decisions of the Fair Work Commission (FWC) on 26 July 2019 ([2019] FWCFB5146 and 23 August 2019 [2019] FWCFB 5868 in relation to the above matter. We also refer to earlier written submissions filed by the Motor Trades Organisations on 7 September 2018 on this matter in relation to the Vehicle Manufacturing, Repair Services and Retail Award 2010, (the Vehicle Award). A copy of the Motor Trades Organisations submission is attached in Annexure 1.
2. The Full Bench decision of 26 July 2019 set out the model term for payment of wages on termination of employment. Paragraph [6] of this decision identified a total of 33 modern awards that remained outstanding and were yet to be dealt with. Attachment A of this decision identified the Vehicle Award as one of those 33 awards.
3. Paragraph [7] of the 26 July 2019 Full Bench decision confirmed that submissions were received from the Motor Trade Organisations amongst other submissions. Paragraph [8] identified the Vehicle Award as one of nine modern awards with award specific issues.
4. The Full Bench decision of 23 August 2019 confirmed in paragraph [24] that the Vehicle Award was one of nine awards that contained award specific issues that required further consideration by the Full Bench. The Full Bench went on to provide directions to interested parties in dealing with eight of the nine awards. There were no directions issued in relation to the Vehicle Award.
5. As 25 September 2019 is the latest date by which submissions are to be filed in two of the nine awards, the Motor Trades Organisations has filed this submission in relation to the Vehicle Award.
6. The Motor Trade Organisations have also had recent discussions with the AMWU and the AI Group. The AMWU will file a separate submission on the composition of the Payment of Wages clause. AiGroup do not oppose the amendments set out in this submission.

THE MOTOR TRADES ORGANISATIONS POSITION

7. The current '*Payment of wages on termination*' clause is contained in clause 24.4 of the Vehicle Award.
8. In the written submissions of 7 September 2018, the Motor Trades Organisations sought an amendment to Clause (a) (i) of the model term as follows:
 - (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' as set out in our submissions of 7 September 2018.
9. It would appear that no other party sought a similar change to this subclause. On that basis, the Motor Trades Organisations will not press this amendment any further.
10. At paragraph [4] of the Full Bench decision of 26 July 2019, the Full Bench referred to conferences held in August 2018 by the FWC to ascertain the views of interested parties in relation to the following:
 - (i) 'whether there was any opposition to inserting the model term into the particular awards which were the subject of the conferences ; and
 - (ii) if varying awards to insert the model term was opposed , any award specific amendments proposed by the parties'.
11. 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.
12. While the Motor Trades Organisations largely support the model term, we submit that there is a justification for 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.
13. The Motor Trades Organisations previously also made earlier written submissions on this matter on 3 November 2016.

PROPOSED AMENDMENTS TO THE MODEL TERM

14. The Motor Trades Organisations propose the following amendments to the final version of the model term as set out in paragraph [2] of the 26 July 2019 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 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 under clause 44.9 of the award where such payments may become payable at a later date in relation to a person employed to perform vehicle sales related duties.*
 - (iii) *The commission payment referred to in clause 44.9 (vi) is to be made payable within 14 days of the delivery of the vehicle.*
- (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).

REASONS IN SUPPORT OF VARIATION TO THE MODEL CLAUSE

15. Further to our written submissions of 7 September 2018, the justification for the amendments sought to the model term is as follows:

- (i) **Amendment to (a)(ii) of the Model Payment of Wages Clause (commission payments)**
 - (a) As submitted by MTA NSW on behalf of the Motor Trades Organisations at the 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 and consequently the sale of the vehicle may not be finalised at the time of termination.

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

(ii) Amendment to model clause - new subclause (a) (iii)

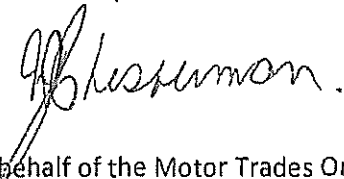
- (a) The Motor Trade Organisations has become aware that under clause 44.9(vi) of the Vehicle Award, there is some ambiguity in relation to when commission payments are to be paid to an ex-employee when the delivery of the vehicle occurs within three months of the termination of their employment.
- (b) Accordingly, we have attempted to provide such clarity in the proposed new subclause (iii) by stipulating a 14 day period of payment that is consistent with the period of payment in existing provisions of the award in clause 44.9 (vii).
- (c) The Motor Trade Organisations submit that there have been no issues raised by any party in the past on the 14 day period of payment and consequently there is no reason to amend this.

(iii) Amendment to model clause -- new clause (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.

- (e) Employers accede to such requests where they have the capacity to carry short term debt and employees save considerably on interest otherwise incurred. These arrangements build mutual respect, arguably staff retention and job satisfaction.
- (f) 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.
- (g) It is submitted that the proposed subclause is consistent with s. 324(1) (a) of the Fair Work Act on the basis that the deduction is authorised in writing by the employee and is principally for the employee's benefit.
- (h) 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

Filed: 24 September 2019



On behalf of the Motor Trades Organisations

ANNEXURE 1

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.

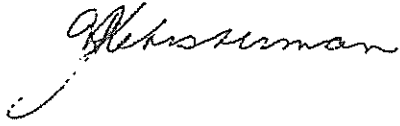
- (d) Accordingly, Motor Trades Organisations have proposed an amendment to (a) (ii) to exclude commission payments from amounts to be paid to *an employee on termination in relation to employees engaged in vehicle sales related duties*.

(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. Suman". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

On behalf of the Motor Trades Organisations