

#### 4 Yearly Review of Modern Awards – Payment of Wages

#### Submissions of the National Road Transport Association (NatRoad)

##### Introduction

1. These submissions are filed on behalf of the National Road Transport Association (NatRoad) in response to the Decision of the Full Bench dated 26 July 2019<sup>1</sup> (**the Decision**).
2. The Decision, at paragraph [33], invited Applicants to file submissions and any evidence in support of the applications by 4.00 pm on 21 August 2019.
3. NatRoad is a not for profit industry association. It represents the interests of more than 1200 contract carriers, employing contractors, owner drivers and other businesses that operate in the road transport industry throughout Australia. Most of NatRoad’s members are small businesses.
4. NatRoad welcomes the opportunity to file submissions and supporting evidence in this matter.

##### The applications

5. In accordance with the Directions at paragraph [16] of the Statement<sup>2</sup> of 21 August 2018, NatRoad submitted Applications on 20 September 2018 to vary the *Road Transport and Distribution Award 2010* [MA000038] and the *Road Transport (Long Distance) Award 2010* [MA000039] (together ‘the Transport Awards’) to insert the payment on termination of employment model term.
6. We also requested that the two Applications be joined for the purposes of the hearing as the submissions would be the same for both Applications.
7. The Transport Awards presently stipulate that the employer must pay to an employee who leaves or is dismissed all moneys due to the employee “forthwith” (cl.20.3 Distribution Award). Similarly, the employer must pay to an employee who leaves or is dismissed all money due to the employee “immediately” (cl.18.3 Long Distance Award).
8. NatRoad notes that a number of employer associations sought variations to multiple awards in respect of the payment of wages on termination as part of the current 4 yearly review of modern awards.

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<sup>1</sup> [2019] FWCFB 5146 <https://www.fwc.gov.au/documents/decisionsigned/html/2019fwcfb5146.htm>

<sup>2</sup> [2018] FWC 4935 <https://www.fwc.gov.au/documents/decisionsigned/html/2018fwc4935.htm>

<b>Filed on behalf of:</b>	Members of the National Road Transport Association
<b>By:</b>	The National Road Transport Association
<b>Address:</b>	Level 3, Minter Ellison Building, 25 National Circuit, Forrest, ACT, 2603
<b>Email:</b>	<a href="mailto:david.johns@natroad.com.au">david.johns@natroad.com.au</a>
<b>Telephone:</b>	(02) 6295 3000

9. In a Statement issued by His Honour, Justice Ross on 24 February 2016<sup>3</sup>, reference was made to the variations referred to above. At paragraph [8] of a Statement issued on 23 March 2016<sup>4</sup>, Justice Ross indicated that those claims would be referred to a separately constituted Full Bench.
10. In a Statement<sup>5</sup> issued on 14 October 2016 (the October 2016 Statement) the Full Bench expressed a provisional view that ‘each modern award should provide for the payment of wages and other amounts owing on termination of employment’. At paragraph [19] it proposed that the default term for payment of wages and other amounts due on termination of employment should be:
1. **Payment on termination of employment**  
*The employer must pay all amounts that are due to an employee under this award and the NES when the employee’s employment ends:*
    - (a) *within 7 days after the employee’s last day of employment; or*
    - (b) *on the next normal pay day.*
11. On 17 July 2018, the Full Bench issued a Decision<sup>6</sup> finalising the payment on termination of employment model term (the July 2018 Decision).
12. At paragraph [16] of the July 2018 Decision, the Full Bench summarised their provisional views from the October 2016 Statement as follows:
1. *Each modern award should provide for the payment of wages and other amounts owing to an employee on termination of employment, to ensure that employers and employees are aware of their obligations and entitlements.*
  2. *There is some utility in a common ‘payment on termination’ provision across all modern awards.*
  3. *The default term for the payment of wages and other amounts due on termination of employment should be:*
    1. **Payment on termination of employment**  
*The employer must pay all amounts that are due to an employee under this award and the NES when the employee’s employment ends:*
      - (a) *within 7 days after the employee’s last day of employment; or*
      - (b) *on the next normal pay day.*
    2. *There does not appear to be a sound rationale for retaining the current provisions that require payment of wages on termination within a short period after termination (such as one or two days, or ‘forthwith’) and the existing provisions in respect of payments on termination should be replaced by the default term.*
13. The Full Bench then went on to abandon its provisional view in the October 2016 Statement that ‘there does not appear to be a sound rationale for retaining the current provisions that require payment of wages on termination within a short period after termination (such as

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<sup>3</sup> [2016] FWC 1191 <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwc1191.htm> at para [17]

<sup>4</sup> [2016] FWC 1838 <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwc1838.htm>

<sup>5</sup> [2016] FWCFB 7455 <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwcfb7455.htm>

<sup>6</sup> [2018] FWCFB 3566 <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb3566.htm>

one or two days, or ‘forthwith’), and the proposal to replace the existing provisions in the 36 modern awards prescribing a timeframe for the payment of termination payments.

14. Hence, a variation to any of the 36 modern awards (which include the Transport Awards) would need to be justified on merit. Accordingly, this application seeks the insertion of the model payment on termination provision into the Transport Awards with the concomitant deletion of the current provisions based on the merits of the matter.

#### **Modern awards objective**

15. The modern awards objective is to ‘ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in s.134(1).
16. In *Shop, Distributive and Allied Employees Association v The Australian Industry Group*<sup>7</sup> (the Penalty Rates Review decision) the Full Court of the Federal Court considered the expression ‘a fair and relevant minimum safety net of terms and conditions’ in the modern awards objective and found:

*‘It is apparent that “a fair and relevant minimum safety net of terms and conditions” is itself a composite phrase within which “fair and relevant” are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC’s duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)–(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act...’*

...

*‘For the reasons already given it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s 134(1)(a)–(h) matters.’ (emphasis added)*

17. The notion of “fairness” in s.134(1) is not confined in its application to employees. Consideration must also be given to the fairness or otherwise of award obligations on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues: ‘It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a fair and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.<sup>8</sup>
18. The operation of the current provisions is unfair to employers. It mandates the payment of a potentially significant sum and requires an employer to make arrangements to meet this financial obligation within a very limited period of time contemporaneously with the termination of an employee’s employment. The additional costs incurred, and regulatory burden borne by an employer due to the need to administer an additional pay run pursuant

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<sup>7</sup> [2017] FCAFC 161 <https://www.judgments.fedcourt.gov.au/data/assets/.../2017FCAFC0161.docx>

<sup>8</sup> 4 yearly review of modern awards [2015] FWCFB 3177 at [109].

to the current clauses is also unfair. This much is ascertainable from the evidence of Allan Thornley filed with these submissions.

19. The termination of an employment relationship may also be brought about by an employee's decision to resign. It is not fair that an employer is required to make the relevant payment with little or no notice. Where an employee terminates the employment relationship without any prior notice or indication of his or her intention to do so, an employer is presently put to the task of making arrangements to make final payments to that employee within a very limited period of time, irrespective of the method of payment utilised. Self-evidently, this is not a fair or reasonable outcome for employers given that they are not able to plan or pre-arrange for the payment that must be made.
20. The complexity involved in calculating a terminating employee's full entitlements correctly is not a task to be done in haste. Typically, an SME does not have a dedicated payroll person with many undertaking this function as but one of many items to be undertaken to keep the business running. Many small employers that are affected by the Transport Awards are also drivers during business hours. Accordingly, the variation meets the modern award objective set out in s134(1)(d).

#### **Legislative prescription**

21. Section 323 of the *Fair Work Act 2009* (Cth) deals with the frequency of payment; however relevantly it does not impose a legislative requirement that monies due to an employee upon termination be paid on the date of termination.
22. Section 323 forms part of Part 2-9, Division 2 which is headed 'Payment of wages'. It states:

#### **323 Method and frequency of payment**

- (1) *An employer must pay an employee amounts payable to the employee in relation to the performance of work:*
  - (a) *in full (except as provided by section 324); and*
  - (b) *in money by one, or a combination, of the methods referred to in subsection (2); and*
  - (c) *at least monthly.*

*Note 1: This subsection is a civil remedy provision (see Part 4-1).*

*Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:*

- (a) *incentive-based payments and bonuses;*
- (b) *loadings;*
- (c) *monetary allowances;*
- (d) *overtime or penalty rates;*
- (e) *leave payments.*

- (2) *The methods are as follows:*

- (a) *cash;*
- (b) *cheque, money order, postal order or similar order, payable to the employee;*

- (c) *the use of an electronic funds transfer system to credit an account held by the employee;*
  - (d) *a method authorised under a modern award or an enterprise agreement.*
- (3) *Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

- 23. To the extent that s.323 deals with the timing and frequency of payment, it simply requires that an employer must pay an employee amounts payable to the employee in relation to the performance of work at least monthly. The model term is in no way contrary to s.323 of the Act.
- 24. NatRoad supports the provisional view of the Full Bench in the October 2016 Statement<sup>9</sup> that ‘there does not appear to be a sound rationale for retaining the current provisions that require payment of wages on termination within a short period after termination (such as one or two days, or ‘forthwith’).’ The Full Bench statement reinforces the requirements of ss.134(1)(f) as to ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’. The variation sought by NatRoad would meet this objective.

#### **Contemporary provision**

- 25. The Transport Awards provide that ‘The employer at its discretion may pay an employee by electronic funds transfer to a bank account nominated by an employee’ (Clause 20.3 Distribution Award) (Clause 18.4 Long Distance Award).
- 26. Where the electronic transfer of funds is contemplated, sufficient time should be provided to allow for the processing of such payments by third parties into the receiving account.
- 27. The impact of requiring an employer to pay a terminating employee their entitlements forthwith or immediately is a significant regulatory burden and is contrary to flexible modern work practices.
- 28. The rationale underpinning the relevant award terms as presently crafted can be understood in their historical context, whereby a significant proportion of employees were paid by cash. If such an employee were to be paid outstanding money due in the next pay cycle, the employee would need to attend the workplace to collect this payment, which admittedly puts the employee to some inconvenience.
- 29. With the adoption of payment by EFT, that rationale becomes far less relevant. Payment can be made by an employer via EFT on termination in the same way that wages would ordinarily be paid. EFT allows employees to access their funds at banks, other financial institutions, ATMs and online at any time. Once payment is made, the funds could be accessed by the employee within a very short period of time, if not immediately.

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<sup>9</sup> [2016] FWCFB 7455 <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwcfb7455.htm>

30. The variation proposed will remedy the archaic and inappropriate effect of the existing provision. These Applications provide a timely opportunity to modernise award terms to create fairness. The model term should be adopted as it better reflects contemporary payroll practices and the decreasing relevance of cash payments made to an employee whilst they are physically at the workplace: see the evidence of Allan Thornley.
31. The variations sought would mean that an employee is able to be paid money owing upon termination on their next usual pay day. The amount paid to the employee will not be altered. An employee cannot be paid later than the next pay cycle, which is when the employee would have been paid had they not been terminated.
32. Where money owing to an employee is paid upon termination by EFT, the current provisions require an employer to administer a separate pay run. This necessarily imposes additional costs on the employer by way of transactional fees charged by the bank or financial institution.
33. In addition, time spent by staff members responsible for payroll also comes at a cost to the business.
34. We note that in certain small or medium enterprises, payroll personnel may not be engaged on a full-time basis. An award term that nonetheless requires payment to be made upon termination (or within a very limited timeframe thereafter) in circumstances where the relevant payroll personnel is not otherwise required to work, imposes a clear operational difficulty for the business.
35. In addition, the term “forthwith” used in the Distribution Award is archaic and confusing for those who operate a small business. It is able to mean “immediately” consistent with the Long Distance Award but also means “without delay.” It is preferable for certainty that the period is, as with the model term, given a definite time period.

**National Road Transport Association**

21 August 2019

## IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards — Payment of Wages

Matter No.: AM2016/8

Applicant: National Road Transport Association Limited

### STATEMENT OF ALLAN THORNLEY

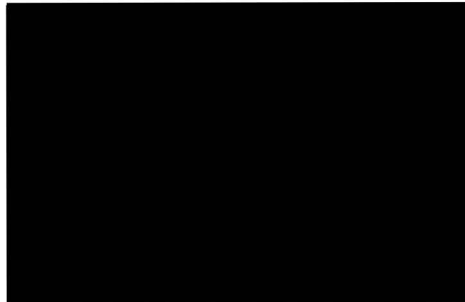
1. I am employed by Shaws Darwin Transport Pty Ltd in the position of Managing Director. I have been employed by Shaws since 1997 and I held my present position since April 2001.
2. I was a Director of the National Road Transport Association (NatRoad) from 2010 and was elected President of the Association's Board in August 2015, a position I held until I resigned in April 2019.
3. In my capacity of President of NatRoad, I authorised the making of the Applications to vary the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010 (the Transport Awards).
4. I make this statement for the purposes of the Applications to vary the Transport Awards and it is made in my personal capacity drawing upon my experience as both a Managing Director of a company and as a Board member of an industry association.
5. I have been provided with a copy of the Applications made in connection with these proceedings and I comment on the "Grounds being relied upon" where appropriate below.
6. In practice employers may, for various reasons, not always be in a position to make payments on the exact same day of the week. This may be a product of the nature of their operations, resource constraints or of unforeseen events.
7. Where money owing to an employee is paid upon termination by EFT, the current requirement for an employer to pay all moneys due to the employee forthwith or immediately require an employer to administer a separate pay run. This necessarily imposes additional costs on the employer by way of transactional fees charged by the bank or financial institution.

<b>Filed on behalf of:</b>	Members of the National Road Transport Association
<b>By:</b>	The National Road Transport Association
<b>Address:</b>	Level 3, Minter Ellison Building, 25 National Circuit, Forrest, ACT, 2603
<b>Email :</b>	<a href="mailto:david.johns@natroad.com.au">david.johns@natroad.com.au</a>
<b>Telephone:</b>	(02) 6295 3000



8. In addition, time spent by the staff member(s) responsible for payroll also comes at a cost to the business. Many road transport operators are small businesses without a dedicated payroll person. In larger medium size operators, the payroll person may not be engaged on a full-time basis. An award term that nonetheless requires payment to be made forthwith or immediately upon termination in circumstances where the person with payroll responsibility is otherwise engaged in other demands of the business or absent from work, imposes a clear operational difficulty for the business. Assuming that the person with responsibility for payroll could be required to attend work for the purposes of processing the necessary payment, this would give rise to a clear additional labour cost.
  
9. There is a need for accuracy in the calculation of a worker's final pay. This involves some intricacy to ensure that all entitlements are calculated correctly. To do this at short notice perhaps with an employee who does not normally do payroll can give rise to errors which defeats the whole purpose of an immediate payment.

Signed by Allan Thornley



20th August 2019