

IN THE FAIR WORK COMMISSION

AM2016/8

4 yearly review of modern awards - Payment of wages – Response to Full Bench decision [2016] FWCFB 8463

Submissions of the National Road Transport Association (NatRoad)

Background

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to some of the matters raised by the Full Bench in its decision dated 5 December 2016 [2016] FWCFB 8463 (**the Decision**).
2. NatRoad is a not-for-profit industry association. It represents the interests of more than 1000 contract carriers, (including employing contractors, and owner drivers, working within the road transport industry throughout Australia. Most of NatRoad's members are small business owners and operators.
3. In addition to coverage by other modern awards, NatRoad's members are typically covered by either or both of the *Road Transport and Distribution Award 2010* (**Distribution Award**) and the *Road Transport (Long Distance Operations) Award 2010* (**Long Distance Award**) (together the **Transport Awards**).
4. NatRoad filed a submission dated 17 October 2016 in these proceedings (**the First Submission**) which responded to a Statement of the Full Bench dated 14 October 2016.¹
5. This submission is filed in response to the matters raised in the Decision where the Full Bench seeks written submissions on a number of matters. Some of those matters were canvassed in the First Submission but are revisited here.

Provisional 'Payment of Wages and Other Amounts' Model Term: two Matters

6. As noted at paragraph 30 of the Decision, the Transport Awards regulate the payment of 'all earnings, including overtime' per clause 20 Distribution Award and clause 18 of the Long Distance Award. Both provisions require payment "on a day to be fixed by the employer, but not later than Thursday of each week." Clause 18.2 of the Long Distance Award requires that all earnings, including overtime, "must be paid within two days of the expiration in the week in which they accrue." Clause 20.2 of the Distribution Award permits this period to be "four business days."
7. We have discussed the frequency of payment with a number of NatRoad members. One means of complying with the current requirement to pay within two days as

¹ <https://www.fwc.gov.au/documents/decisionssigned/html/2016fwcfb7455.htm>

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expressed in the prior paragraph is to have a Saturday to Friday pay period with processing on Monday for a payday of Tuesday. This is of course one variant of a number of ways to comply but the provision does lead to inflexibilities in administration. The flexibility offered by the provisional model term of 7 days from the end of the pay period where that period may be weekly, fortnightly or monthly is supported. However, a change from the current strictures surrounding weekly pay to monthly pay in the terms set out in the provisional model term is likely too large a change having regard to the industry's current practices. More is said on this issue in paragraph 13 below.

8. The provisional model term is supported on the basis of the modern awards objective. In formulating this view we have had regard to the matters set out in section 134(1) (a) to (h) of the *Fair Work Act, 2009 (Cth)* (the **FW Act**), especially 134(1) (d) in relation to flexible work practices and the efficient and productive performance of work and 134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia. On the basis of the advancement of these two objectives, NatRoad supports the wording and the substance of the provisional model term.
9. It is also noted that the provisional model term uses the notion of an employee's wages for the pay period together with "all other amounts that are due to the employee under this award and the NES for the pay period" rather than the expression "all earnings, including overtime" currently adopted in the Transport Awards. We note the explanation at para 36 of the Decision as to the use of different expressions adopted in modern awards concerning how the payment of wages entitlement is expressed. We have no concerns with the proposed expression in the provisional model term. In that regard, it is clear that the usual, plain English definition of earnings is not the definition used in the Transport Awards as it is necessary to add the words, "including overtime" in the relevant provisions. Were it not for the exclusion of overtime in the statutory definition of earnings in s332 FW Act, the phrase "all earnings from employment" would be a simpler phrase than appears in the provisional model term. However, given the statutory definition of earnings, we submit that the wording proposed by the Full Bench should be adopted.

Method of Payment

10. Subsection x.2 of the provisional model term provides the permissible methods of payment which can be made by EFT, cash or cheque. This provision is supported.
11. The Full Bench has raised whether the provisional model term should reflect that the timing of payments per the methods set out in x.2 reference the law as contained in s36(2) of the *Acts Interpretation Act 1901 (Cth)*. That provision says that when a thing to be done under an Act, which includes a modern award,² requires something to be done on a Saturday, Sunday or a public holiday, the thing may be done on the next day that is not a Saturday, Sunday or public holiday. This provision has led to the distinction between "days" and "business days" in many legal instruments, the latter definition reflecting the substance of s36(2). This is the expression used in Clause 20.2 of the Distribution Award as set out in paragraph 6 above. Rather than include a note or change the substance of the payment of wages provision, the Commission could introduce a distinction between "days" and "business days" for a number of

² See s46(1)(a) *Acts Interpretation Act 1901(Cth)*

purposes under modern awards. This is the NatRoad first preference. The second preference is to include an award note that reflects the substance of s36(2).

Payment on Termination of Employment

12. As expressed in the First Submission, NatRoad supports the draft default term previously published by the Commission as an improvement on current provisions in the Transport Awards albeit that the ABI/AiG application is supported as the optimal outcome in these proceedings. As expressed at paragraph 63 of the Decision, if the ABI/AiG claim were to be granted, the Transport Awards, amongst others, would be varied to enable employers who pay by EFT to make termination payments in accordance with the normal pay cycle. For the reasons advanced by ABI/AiG and summarized as the "impracticability" and "administrative costs" arguments from paragraph 89-93 of the Decision, we support that position over the alternative proposed in the Decision. That alternative is for termination payments to be made "no later than 7 days after the employee's last day of employment." Despite our preference for the outcome advanced by ABI/AiG, we indicate that this latter provision would be preferable to the current situation under the Transport Awards.
13. If the Full Bench considers that providing monthly pay periods would unduly prejudice employees in the transport industry in the context of payment on termination then we would have no objection to limiting the Transport Awards so that this option was not available. That step would be linked to the termination payment being able to be made in accordance with the normal pay cycle.
14. The current provisions in the Transport Awards are:
 - a. Clause 18.3 of the Long Distance Award states that: *"Notwithstanding anything contained in this clause, the employer must pay to an employee who leaves or is dismissed all money due to the employee immediately; and*
 - b. Clause 20.3 of the Distribution Award uses the same terms except that the word "forthwith" is used rather than the word "immediately."
15. The terms "forthwith" and "immediately" are synonyms and, in practice, the difference in wording shown in the prior paragraph is immaterial, though replacing 'forthwith' with 'immediately' would make for simplicity.
16. The question of the entitlement raised by s117(2)(b) of the FW Act is referred to in the Decision following being raised in the Statement to which we initially responded. We have no objection to the solution proposed at paragraph 115 of the Decision i.e. the provisional default term should be modified so that it is read as subject to s117(2)(b) and that a note explaining the operation of the provision be included

National Road Transport Association

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