

4 yearly review of modern awards

Matter No. AM2016/8 – timing of payment of wages

NATIONAL FARMERS' FEDERATION

SUBMISSION

Date: 20 September 2016

1. The National Farmers' Federation (NFF) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. The NFF makes this submission in accordance with the Statement and Directions of 15 August 2016 in the above matter.

The modern awards objective

3. Section 134 of the Fair Work Act 2009 (FW Act) contains the modern awards objective.
4. Modern awards must provide a 'fair and relevant minimum safety net of terms and conditions' of employment, taking into account the various criteria listed in subsections 134(1)(a) – (i).
5. Under section 136, a modern award can, and can only, include terms that are permitted or required by:
 - a. Subdivision B of Part 2-3 (terms that may be included in modern awards)
 - b. Subdivision C of Part 2-3 (terms that must be included in modern awards)
 - c. Section 55 (interaction between the NES and modern awards or enterprise agreements); or
 - d. Part 2-2 (National Employment Standards).
6. Section 138 of the FW Act indicates that a modern award may include terms that it is permitted to include and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and the minimum wages objective.

7. The following table summarises the content that can be included in modern awards, as well as the content that must not be included in modern awards, reflecting the terms of Part 2-3 of the FW Act.

The content of modern awards – Part 2-3 of the FW Act

Must be included	May be included	Must not be included
<ul style="list-style-type: none"> • coverage; • individual flexibility arrangements; • dispute settlement; • ordinary hours of work; • rates of pay for pieceworkers; and • automatic variation of allowances; and • superannuation. 	<ul style="list-style-type: none"> • minimum wages, skill-based classifications and career structures and incentive-based payments; • type of employment and flexible working arrangements; • arrangements for when work is performed; • overtime rates; • penalty rates; • certain annualised wage arrangements; • allowances; • leave, leave loadings and arrangements for taking leave; • superannuation; • procedures for consultation, representation and dispute settlement; • outworker terms; • industry-specific redundancy scheme terms; and • incidental and machinery terms. 	<ul style="list-style-type: none"> • objectionable terms; • terms about unreasonable deductions; • certain right of entry terms; • discriminatory terms; • State-based difference terms; • terms about long service leave; • certain superannuation terms.

8. Modern awards may also include any terms permitted by the NES or by section 55 (for example, terms that are ancillary to, or supplement, the NES).
9. Modern award terms must not exclude the NES, or any provision of the NES (subsection 55(1)).

Most employees are paid by EFT

10. Payment of wages via electronic funds transfer (**EFT**) is common practice in Australia. Ordinarily, payments are made on a weekly, fortnightly or monthly basis in accordance with the relevant modern award. Payment of wages by EFT reduces the regulatory burden on business, while providing certainty for employees as to when they will be paid each pay period so they can budget accordingly.
11. In the *Annual Leave case*¹, a Full Bench of the Fair Work Commission (**Commission**) recognized this position. Granting a claim for annual leave payments to be made by EFT in the usual pay cycle, the Full Bench cited and relied upon “evidence that a substantial majority of respondents pay their employees by EFT and data showing a trend away from cash based transactions towards either credit usage or direct transfer and BPAY methods.”²
12. The variation to enable employees to be paid by EFT while on paid annual leave was held to be consistent with the modern awards objective and objects of the FW Act, by ensuring that awards remain relevant to the needs of the modern workplace and promote flexible work practices, consistent with s.134(1)(d) and reducing employment costs and the regulatory burden on business (s.134(1)(f)).³
13. There is a strong parallel between the findings in the *Annual leave case* and the claim in these proceedings. Accordingly, the NFF supports changes to payment of wages terms in the following modern awards to accommodate payment of wages by EFT:
 - a. Pastoral Award 2010 (clause 16.3);
 - b. Horticulture Award 2010 (clause 19.3);
 - c. Wine Industry Award 2010 (clause 26.3); and
 - d. Silviculture Award 2010 (clause 21.3).
14. The NFF has reviewed the draft determinations prepared in connection with these proceedings as they affect the above modern awards.
15. In our view, payment of wages terms in each of these modern awards should provide for payment on termination of employment, either:

¹ 4 yearly review of modern awards—Annual leave (AM2014/47) [2016] FWCFB 3177

² [2016] FWCFB 3177 at [38].

³ [2016] FWCFB 3177 at [177] and [296].

- a. on the day of termination; or
 - b. by post on the next working day; or
 - c. by EFT into the employee's bank or other recognized financial institution account in accordance with the usual pay cycle.
16. This approach will preserve the status quo for employees paid by cash or cheque, and allow EFT payments to be made on termination of employment for employees who are usually paid in that manner.
17. The attached draft determinations set out our preferred approach to accommodating these changes.
18. The draft determination for the Silviculture Award 2010 published by the Commission on 8 September 2016 removes the ability of employers to pay wages by EFT on termination of employment. This may have been an unintended omission. Consistent with the views outlined in this submission, the capacity to pay by EFT should be maintained.

Permitted matters and the penalty for late payments

19. The NFF does not support provisions dealing with penalties for late payment of wages where no work is performed, or required to be performed (a **late payment penalty term**). In this respect, we note the comments of the Full Bench in relation to the Timber Award 2010 that late payment penalties are not appropriate in circumstances where employees are paid by EFT, as well as the comments of Mayo J in *Cranford-Webster v McFarlane*⁴ that waiting time is time actually spent waiting for wages at the workplace:

“... 'waiting time' seems to me inappropriate to the present circumstances. I think it means time which the employee spends at the employer's establishment actually waiting for his pay, and the penalty reckoned at so much per quarter-hour is intended to compensate him for possible loss of other work. I do not agree that it contemplated anything so extravagant as the claim put forward ...

'Waiting time' would mean in its ordinary sense the time that an employee spent and wasted in loitering about whilst payment of wages to him was not forthcoming. The appropriate meaning to be given to 'waiting' would seem to be staying in expectation, stopping, or remaining stationary, or inactive till the happening of the event, holding over departure.”

⁴ (1974) SASR 162.

20. In the Silviculture Award 2010, the late payment penalty term envisages time spent waiting other than at the workplace. It provides as follows:

When notice is given in accordance with the NES, all money due to the employee pursuant to this award must be paid at the time of termination. Where this is not practicable, the employer must, within two clear working days of the termination, transfer all money due by electronic funds transfer or by registered post to the employee's home address. If the money is not posted within that time then any time spent waiting beyond the two working days must be paid for at ordinary rates at the rate of eight hours per day for up to one week. When this time expires, the right to waiting time will cease.

21. To the extent that the term creates an obligation on employers to compensate employees for late payment, where employees are not kept waiting at the workplace for their wages, it is not a term that is appropriate for inclusion in modern awards.

22. In any event, we doubt whether late payment penalty terms are about matters that may be included in modern awards under section 139.

23. A late payment penalty term is not about a matter that must be included in modern awards under Subdivision C of Part 2-3 of the FW Act (sections 143 – 149D), because it does not deal with any of the following subject matter:

- a. coverage;
- b. individual flexibility arrangements;
- c. dispute settlement;
- d. ordinary hours of work;
- e. rates of pay for pieceworkers; and
- f. automatic variation of allowances; and
- g. superannuation.

24. A late payment penalty term is also not about a matter that may be included in modern awards under Subdivision B of Part 2-3 of the FW Act (sections 139 – 141). It is not about any of the following subject matter:

- a. minimum wages, skill-based classifications and career structures and incentive-based payments;
- b. type of employment and flexible working arrangements;

- c. arrangements for when work is performed;
- d. overtime rates;
- e. certain annualised wage arrangements;
- f. leave, leave loadings and arrangements for taking leave;
- g. superannuation;
- h. procedures for consultation, representation and dispute settlement;
- i. outworker terms; or
- j. industry-specific redundancy scheme terms.

25. Nor is a late payment penalty term about penalty rates, which in our submission are additional rates of pay for time actually worked by an employee.

26. A late payment penalty term is not an allowance. The term ‘allowance’ is defined by the Oxford Dictionary⁵ as follows:

“A sum of money paid regularly to a person to meet needs or expenses.”

27. A late payment penalty term is more appropriately characterised as a penalty, defined by the Oxford Dictionary⁶ as:

“A punishment imposed for breaking a law, rule, or contract; ...

A disadvantage suffered as the result of an action or situation.”

28. A late payment penalty term effectively punishes an employer if they fail to pay all outstanding monies due to the employee on, or soon after, termination of employment, as specified in the modern award. The punishment is the requirement to pay an additional (and not insignificant) amount to the employee with no reciprocal obligation on the employee to provide their labour.

29. A late payment penalty term is not incidental to any of the subject matter listed in Subdivision B of Part 2-3 and nor is it essential for the purpose of making the term operate in a practical way (section 142 of the FW Act). Strong compliance and enforcement provisions in Chapter 4 of the FW Act provide the mechanism through which employees can enforce compliance of relevant modern award conditions.

⁵ <https://en.oxforddictionaries.com/definition/allowance>

⁶ <https://en.oxforddictionaries.com/definition/penalty>

30. Payment of wages terms can, and do, operate practically and effectively in most modern awards without any additional penalty on the employer for failure to pay final wages on termination immediately, or very soon thereafter.
31. A late payment penalty term is more than a machinery term, as it creates a substantive and significant entitlement to payment.

Conclusion

32. Payment of wages by EFT is a common practice in Australia.
33. Changes proposed to modern awards to reflect that position will promote the modern awards objective including by ensuring that modern awards remain relevant to the needs of the modern workplace, promote flexible work practices, and reduce employment costs and the regulatory burden on business.
34. Provisions containing penalties for late payment where no work is performed, and where no employee is actually kept waiting at the workplace, are inappropriate and inconsistent with the modern awards objective. They are also unlikely to be permitted matters under the FW Act.
35. The Pastoral Award 2010, the Horticulture Award 2010, the Wine Industry Award 2010 and the Silviculture Award 2010 should be varied accordingly.

Sarah McKinnon
General Manager, Workplace Relations & Legal Affairs
20 September 2016

DRAFT DETERMINATION

Fair Work Act 2009

S 156 - 4 yearly review of modern awards



4 yearly review of modern awards – Payment of wages

(AM2016/8)

PASTORAL AWARD 2010

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payments of wages common issue – payment of wages on termination of employment.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 16.3 and inserting the following:

16.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be either:

- (a) paid on the day of termination; or
- (b) forwarded to the employee by post on the next working day; or
- (c) paid by electronic funds transfer into the employee's bank or other recognised financial institution account in accordance with the usual pay cycle.

B. This determination comes into operation from XX Month 2016. In accordance with s 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first pay period that starts on or after XX Month 2016.

VICE PRESIDENT

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DRAFT DETERMINATION

Fair Work Act 2009

S 156 - 4 yearly review of modern awards



4 yearly review of modern awards – Payment of wages

(AM2016/8)

HORTICULTURE AWARD 2010

[MA000028]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payments of wages common issue – payment of wages on termination of employment.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 19.3 and inserting the following:

19.3 Payment of wages on termination of employment

On termination of employment, wages due to an employee must be either:

- (a) paid on the day of termination; or
- (b) forwarded to the employee by post on the next working day;
- (c) paid by electronic funds transfer into the employee's bank or other recognised financial institution account in accordance with the usual pay cycle.

B. This determination comes into operation from XX Month 2016. In accordance with s 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first pay period that starts on or after XX Month 2016.

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DRAFT DETERMINATION

Fair Work Act 2009

S 156 - 4 yearly review of modern awards



4 yearly review of modern awards – Payment of wages

(AM2016/8)

WINE INDUSTRY AWARD 2010

[MA000090]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payments of wages common issue – payment of wages on termination of employment.

A. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

1. By deleting clause 26.3 and inserting the following:

26.3 On termination of employment, wages due to an employee must be either:

- (a) paid on the day of termination; or
- (b) forwarded to the employee by post on the next working day; or
- (c) paid by electronic funds transfer into the employee's bank or other recognised financial institution account in accordance with the usual pay cycle.

B. This determination comes into operation from XX Month 2016. In accordance with s 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first pay period that starts on or after XX Month 2016.

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DRAFT DETERMINATION

Fair Work Act 2009

S 156 - 4 yearly review of modern awards

4 yearly review of modern awards – Payment of wages (AM2016/8)

SILVICULTURE AWARD 2010 [MA000040]

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT CLANCY
COMMISSIONER CRIBB
COMMISSIONER HUNT

MELBOURNE, XX SEPTEMBER 2016

4 yearly review of modern awards – payments of wages common issue – payment of wages on termination of employment.

B. Further to the Full Bench decision issued by the Fair Work Commission on XX Month 2016, the above award is varied as follows:

2. By deleting clause 21.3 and inserting the following:

21.3 Payment on termination

When notice is given in accordance with the NES, all money due to the employee pursuant to this award must be paid at the time of termination. Where this is not practicable, the employer must, within two clear working days of the termination, transfer all money due by electronic funds transfer into the employee's bank or other recognised financial institution account or forward it by registered post to the employee's home address.

B. This determination comes into operation from XX Month 2016. In accordance with s 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first pay period that starts on or after XX Month 2016.

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