



Fair Work Commission  
Section 156 – Fair Work Act 2009  
4 Yearly Review of Modern Awards

(AM2016/8) – Payment of Wages

Response to Full Bench Decision [2016] FWCFB 8463  
Submission of the  
Textile Clothing and Footwear Union of Australia  
(23 December 2016)

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2014 AWARD REVIEW  
(AM2016/8)  
PAYMENT OF WAGES

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## 1. INTRODUCTION

- 1.1 The Textile, Clothing and Footwear Union of Australia ('TCFUA') files these submissions in response to matters raised in the Full Bench Decision [2016] FWCFB 8463<sup>1</sup> issued on 1 December 2016 ('*December 2016 Decision*')
- 1.2 In these proceedings, the TCFUA has a primary interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 ('*TCF Award*') and the Dry Cleaning and Laundry Industry Award 2010 ('*Dry Cleaning Award*'). The TCFUA opposes any change to current payment of wages provisions which has the effect of reducing conditions and protections for workers covered by these awards.
- 1.3 The TCFUA continues to rely on its previous written submissions (14 October 2016)<sup>2</sup> and oral submissions made at the Full Bench hearing held on 21 October 2016.<sup>3</sup> At that point in the proceedings, the TCFUA's submissions were primarily directed to the payment of termination provision in the *Dry Cleaning Award*, the AIG and ABI submissions in support of their own claims for variations, the Commission's provisional term and the further four questions asked by the Full Bench.
- 1.4 The TCFUA supports by way of general application the submissions of the ACTU and other union parties in this matter.

## 2. FULL BENCH DECISION – [2016] FWCFB 8463

- 2.1 The Full Bench in its *December 2016 Decision* proposed (i) a provisional 'Payment of wages and other amounts' model term at paragraphs [33] – [34], and (ii) a revised provisional 'Payment on termination of employment' model term at paragraph [117]. Each proposed provisional term is extracted and reproduced at Attachments A and B of these submissions.
- 2.2 The Full Bench seeks submissions in relation to:
  - the provisional 'payment of wages and other amounts' model term at paragraph [34] (and [44] and [48]) including its treatment of accrual of payments, directed to the concepts in, and wording of the provisional term; and
  - the provisional view that there would be benefit in either replacing the existing provision for payment in all modern awards with the model term (once

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<sup>1</sup> (AM2016/8) Payment of Wages - [2016] FWCFB 8463, (1 December 2016)

<sup>2</sup> (AM2016/8) Payment of Wages - TCFUA Submission (14 October 2016)

<sup>3</sup> (AM2016/8) Payment of Wages – Transcript (21 October 2016) at PN414 – PN444

finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements.; and

- the provisional ‘payment on termination of employment’ model term at paragraph [7]. The Full Bench further stated that ‘Once the model term has been settled a Statement will be issued setting out the process for considering which modern awards are to be varied to insert the model term. Interested parties will be given an opportunity to comment on whether particular modern awards should be varied to insert the model term.’<sup>4</sup>

2.3 As a general point, the TCFUA acknowledges that although there may some utility in the development of a model term dealing with payment of wages generally and payment on termination in order to clarify rights and obligations, however this should not have the effect of reducing existing conditions for employees or occur on a ‘one size fits all basis’ across all awards. The specific terms for each award should be dealt with on a case by case basis consistent with the suggestion in paragraph [49] of the *December 2016 Decision*, that ‘awards should contain a version of the model term appropriately adapted to the existing award payment arrangements.’

### 3. PROVISIONAL MODEL TERM: ‘PAYMENT OF WAGES AND OTHER AMOUNTS’

3.1 The TCFUA holds a range of concerns regarding both the concepts in, and content of various terms of the provisional ‘payment of wages and other amounts’ model term as proposed.

3.2 If adopted in its current form, particular elements of the provisional model term would represent a significant diminution of current conditions and safeguards for award dependent employees in the TCF and dry cleaning industries. These industries, are by any assessment, low paid sectors of the economy. A change in award terms which negatively impacts on the framework for the payment of wages and other amounts to low paid employees is a serious issue of fairness and equity and goes directly to the s134(1)(a) consideration, the *‘relative living standards and the needs of the low paid.’*

3.3 A number of the terms of the provisional model term are problematic both specifically, but also when considered in combination with other clauses.

#### ***Clause X.1 – Payment of wages and other amounts***

##### ***Clause X.1(a)***

3.4 In summary, **clause X.1(a)** of the provisional term obligates an employer to pay wages and other amounts due under the award and the NES for the pay period, *‘no later than 7 days after the end of each pay period.’* The TCFUA acknowledges that there may be a general benefit in providing further clarity in awards as to when an entitlement to payment accrues, inclusive of wages and other amounts due under the award and the NES. However, the TCFUA is of the view that as a general principle, payment for wages and other amounts should occur at the end of a pay period or shortly after, rather than an extended time period after the end of the pay period. For these reasons we oppose the introduction of a national standard of a 7 day period for the receipt of payments.

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<sup>4</sup> [2016] FWCFB 8463 at para [198]

- 3.5 The practical operation of the '7 day period' as proposed in clause X.1(a) would, for example, be detrimental to employees in the TCF industry who are currently entitled to be paid *'weekly and no later than Thursday of any particular week'* (which provides for a shorter period) and to employees engaged under the *Dry Cleaning Award*.
- 3.6 This detriment is potentially exacerbated when an employee is part-time or a casual engaged on less than full time hours. For example, a part-time employee may be engaged to work on a Monday and Tuesday, with the pay period ending on Thursday each week. The operation of a 7 day period for payment of wages/other amounts would effectively mean that the employee was waiting at least 9-10 days to receive payment for work already performed, not the 7 days that would apply to full-time employees. The gap in payment is potentially increased when the pay period is longer, such as fortnightly or monthly.

**Clause X.1(b)**

- 3.7 The capacity of clause X.1(a) to increase financial hardship for employees in relation to the wait for wages/other amounts due is potentially multiplied in context of the terms of clause X.1(b).
- 3.8 In summary, clause X.1(b) opens up the capacity for an employer to unilaterally determine either a weekly or fortnightly pay period, or 'to change to a pay period of one month by agreement with affected employees' (references clause x.1(e)).
- 3.9 As outlined previously, currently in the TCF Award, employees must be paid according to a pay period of one week (see clause 21). Such a term is reflective of the generally accepted characteristics of the industry as being low paid and award dependent. Non-compliance with the award and NES safety net is also widespread within the TCF industry. The TCFUA submits that there is no merit based justification for the inclusion of longer pay periods, including up to a month for award dependent, low paid workers. Monthly payment of wages has never been a feature of industrial regulation in the TCF or dry cleaning and laundry industries at either the award safety leave, or as part of bargaining.

**Clause X.1(c)**

- 3.10 Clause X.1(c) of the provisional model term provides that *'The employer must notify each employee in writing of their pay day and their pay period.'* On its face, the TCFUA is not opposed to this term, however, there may need to be further clarity as to when the obligation is triggered. For example, would the obligation apply on commencement of employment, and at the point of any change to the pay day and/or pay period? Would the employee be required to keep a record of the written notice as an employee record?

**Clause X.1(d)**

- 3.11 Clause X.1(d) of the provisional model term provides that *'Subject to paragraph (e) the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing.'* The TCFUA strongly opposes this term. We consider that any changes to pay periods should only be by genuine agreement between an employer and employees. Given the significant importance of wages/other amounts to the safety net

of award dependent employees, we submit that it is unfair that employer's would have a unilateral right to change an employee's pay period from one to two weeks or vice versa, with the only qualifier being the giving of 4 weeks' notice.

- 3.12 Unilateral employer changes to an employee's pay period or pay day could have significant consequences for that employee's budgeting and financial management, including payroll deductions for such expenses as mortgages, loan repayments, utility bills etc. Under the proposed provisional term there is nothing preventing an employer unilaterally altering an employee's pay period multiple times in any year as long as the 4 weeks written notice is given.
- 3.13 We make the observation that with the removal of late payment of wages terms from modern awards there is little, if any, consequences for employers who fail to make wages and other payments by the due date. In reality, there is no effective or practical remedy for an employee whose employer fails to make such payments in a timely way. In this context, the risk of non-payment or late payment of wages/other amounts has shifted significantly to award dependent employees. In the TCFUA's experience, disputes about the late payment of wages/other amounts is a common source of disputation in the TCF and dry cleaning and laundry industries.

**Clauses X.1(e) and X.1(f)**

- 3.14 Clauses X.1(e) and X.1(f) of the provisional model term provides:

*X.1(e)*

*'An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.'*

*X.1(f)*

*Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.*

- 3.15 The TCFUA reiterates its strong opposition to the establishment of a national model award term which permits a pay period of one month. No interested party in the 2014 Award Review has sought such a term. There has been no evidence, or merit based argument or case advanced as to why the inclusion of a model term of this nature meets the modern award objective (s134(1)), and would otherwise be considered to be necessary as required under 138 of the FW Act.
- 3.16 Specifically, in relation to the awards in which the TCFUA has an interest, we have serious concerns that the proviso that a change to a one monthly pay period be 'by agreement with affected employees' would be a totally ineffective safeguard for low paid workers. The capacity of employers to exert pressure, duress or coercion on employees to 'agree to a one pay period' is considerable. This is exacerbated when employees have English as a second language and/or may have limited English language and literacy skills. The general lack of bargaining power of award dependent employees

is also a relevant consideration and their capacity to say no to a request from their employer may be very limited.

3.17 The interaction between the availability of a one month pay period and the financial position of a particular employer may also be problematic. Employers with financial difficulties may well consider a one month period to be a temporary solution to cash flow problems and may seek/impose 'agreement' with employees in such circumstances. The TCFUA has direct experience of employers (whose solvency is in question), using a variety of tactics to delay payments of wages, leave entitlements, superannuation and other amounts owed to employees.

**Clause X.2 (Method of payment)**

3.18 Clause X.2 provides '*Payments under clause X.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee , or cash and cheque.*'

3.19 The TCFUA opposes a model term which allows for payment of wages and other amounts owed to employees by cheque. The *TCF Award* and the *Dry Cleaning Award* currently only provide for payments by cash or by EFT.

3.20 We consider that payments by cheque are problematic (and not appropriate for a model term) due to:

- the effective requirement that employees' bank the cheque in their own time;
- the delay in employees' receiving cleared funds (typically between 3- 5 days depending on the bank/financial institution);
- the potential for cheques to be dishonoured by the bank if insufficient funds are available in the employer's account; and
- the consequences to the employee of the delay in receiving cleared funds in terms of budgeting, any direct debit arrangements, costs of dishonoured cheques.

3.21 For these reasons we submit that the capacity to pay by cheque is obsolete and is not a fair and relevant term, consistent with the modern awards objective (s134(1)).

**4. PROVISIONAL MODEL TERM: 'PAYMENT ON TERMINATION OF EMPLOYMENT'**

4.1 The TCFUA relies on, and reiterates its previous submissions (written and oral) regarding the earlier provisional model term on 'Payment on Termination' and provide additional submissions below.

4.2 As a general principle we submit that an inclusion of a model term in an individual award should be separately considered, and if determined for inclusion, to be appropriately adapted to that award.

4.3 We support the submissions of the ACTU and other union parties in opposing the establishment of a national 7 day waiting period for termination payments, and submissions regarding the operation s117(2), s119 and 120 of the FW Act 2009.

Filed on behalf of:  
Textile Clothing and Footwear Union of Australia  
(23 December 2016)

**ATTACHMENT A****FWCFB PROVISIONAL MODEL TERM 'PAYMENT OF WAGES AND OTHER AMOUNTS'  
(Paragraph [34])*****X. Payment of wages and other amounts******X.1 Pay periods and pay days***

*(a) The employer must pay each employee no later than 7 days after the end of each pay period:*

- (i) the employee's wages for the pay period; and*
- (ii) all other amounts that are due to the employee under this award and the NES for the pay period.*

*(b) An employee's pay period may be:*

- (i) one week;*
- (ii) two weeks; or*
- (iii) subject to paragraph (e), one month.*

*(c) The employer must notify each employee in writing of their pay day and pay period.*

*(d) Subject to paragraph (e) the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.*

*(e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.*

*(f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.*

***X.2 Method of payment***

*Payments under clause X.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee, or by cash or cheque.*

**ATTACHMENT B****FWCFB PROVISIONAL MODEL TERM 'PAYMENT ON TERMINATION'  
(Paragraph [117])*****Payment on termination of employment***

*(a) Subject to paragraph (b), the employer must pay an employee no later than 7 days after the employee's last day of employment:*

- (i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment; and*
- (ii) all other amounts that are due to the employee under this award and the NES.*

*(b) The requirement to pay an employee no later than 7 days after the employee's last day of employment is subject to s.117(2) of the Act and to any order of the Commission in relation to an application under s.120 of the Act.*

*Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer had given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.*

*Note 2: Section 120 of the Act provides that in some circumstances an employer can apply to the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES. In dealing with an application, the Commission could make an order delaying the requirement to make payment until after the Commission makes a decision on the application.*