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30 June 2016

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

Dear Justice Ross,

Re. AM2016/8 Payment of wages on termination of employment

We refer to the above matter and a statement issued by Your Honour on 15 June 2016 ([2016] FWCFB 3737).

The Australian Industry Group (**Ai Group**) has a relevant interest in four of the issues that have been referred to the Full Bench as presently constituted. For the purposes of facilitating the efficient conduct of the proceedings listed before the Fair Work Commission (**Commission**) later today, we write to address certain matters raised at paragraph [25] of the aforementioned statement in respect of those four issues.

Timing of payment of wages

Ai Group has a relevant interest in the SDA's claim regarding the timing of payment of wages.

1. **Ai Group's position:** The variations proposed are opposed.
2. **Conciliation:** Ai Group considers that there would be merit in listing the SDA's claims for conciliation.
3. **Scope of Ai Group's case:** We do not anticipate calling witness evidence in response to this claim.
4. **Directions to be issued:** If the matter is to be listed for conciliation, consideration as to whether the issue of directions is required and if so, the form of those directions, should be deferred until after the conciliation has been conducted.

Timing of payment on termination of employment

1. **Position of the parties:**

As identified in Your Honour's statement, on 26 April 2016, Ai Group filed correspondence and draft determinations in respect of our claim to vary nine awards such that where an employee's employment is terminated, the employee may be paid moneys owing by EFT in the usual pay cycle. Those nine awards are:

1. the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);
2. the *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award**);
3. the *Storage Services and Wholesale Award 2010* (**Storage Services Award**);
4. the *Road Transport and Distribution Award 2010* (**RTD Award**);
5. the *Road Transport (Long Distance Operations) Award 2010* (**Road Transport (LDO) Award**);
6. the *Business Equipment Award 2010* (**Business Equipment Award**);
7. the *Horticulture Award 2010* (**Horticulture Award**);
8. the *Wine Industry Award 2010* (**Wine Award**); and
9. the *Food, Beverage and Tobacco Manufacturing Award 2010* (**FBT Award**).

On 2 March 2016, ABI and the NSW Business Chamber indicated that it sought a variation to the *Supported Employment Services Award 2010* (**SES Award**) “to increase the timeframe for an employer to pay termination payments to employees”.

In correspondence dated 27 June 2016, ABI and the NSW Business Chamber advised that it seeks a variation of the same effect as that proposed by Ai Group in respect of the following six awards which, apart from the SES Award, also form part of Ai Group’s claim:

1. the Manufacturing Award;
2. the Storage Services Award;
3. the Business Equipment Award;
4. the Horticulture Award;
5. the FBT Award; and
6. the SES Award.

ABI and the NSW Business Chamber also confirmed that it supports the Ai Group claim in respect of the remaining four awards; those being:

1. the Graphic Arts Award;
2. the RTD Award;
3. the Road Transport (LDO) Award; and
4. the Wine Award.

Your Honour’s statement also refers to award variations sought by Business SA. We understand, based on discussions we have since had with Business SA, that it no longer proposes the introduction of a term that is similar to that found at clause 24.4(a)(iii) of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**Vehicle Award**). Rather, Business SA supports the variation sought by Ai Group.

2. **Conciliation:** Ai Group is of course willing to participate in discussions with interested parties. We note, however, that our claim in respect of the Manufacturing Award, the Graphic Arts Award and the Storage Services Award has previously been the subject of such discussions. We understand that the relevant unions are fundamentally opposed to our proposal. Should that remain their position, there may be little utility in undertaking a further process of conciliation.
3. **Scope of Ai Group’s case:** We anticipate that the case we will mount in support of our claim will include comprehensive written submissions and documentary material. Ai Group may seek to call 1-2 witnesses in support of our claim.
4. **Directions to be issued:** Ai Group seeks a period of at least four weeks to file material in support of our claim. We propose that responding parties be given an equivalent time period to reply and that the matter thereafter be listed for mention, in order to discuss

when the matter should be listed for hearing and any relevant procedural issues (for instance, if there are any witnesses to be called, whether they are required for cross examination).

Penalty for late payment of wages

We firstly address the HSU's claim to introduce penalties for the late payment of wages in three awards.

1. **Ai Group's position:** The variations proposed are opposed.
2. **Conciliation:** Should other interested parties and/or the Commission form the view that conciliation would be beneficial, Ai Group would not oppose this course of action.
3. **Scope of Ai Group's case:** We do not anticipate calling witness evidence in response to this claim.
4. **Directions to be issued:** We intend to address this issue during the upcoming proceedings, once we better understand the scope of the HSU's case.

Your Honour's statement identifies that earlier in this Review, consideration was given by a Full Bench of the Commission to a claim made by the CFMEU to insert a penalty for the late payment of wages in the *Timber Industry Award 2010*. The claim was unsuccessful.

In addition to those paragraphs of the decision ([2015] FWCFB 2856) that are extracted in Your Honour's decision, we seek to bring the following passage to the attention of the HSU and the Commission, as it relates to an important jurisdictional issue that will likely be relevant to the HSU's claim. It deals with the employer parties' contention that the clause there sought by the CFMEU could not, by virtue of s.139(1), be included in a modern award. The CFMEU relied on s.139(1)(e), which permits the inclusion of a term about "penalty rates" and, as a secondary position, it relied on s.142. In this regard, the Full Bench stated:

[100] In our view, the payment of wages provision in the elements of clause 25 as varied to give effect to the CFMEU's proposal is not a "penalty rate" provision within the meaning of s.139(e) of the Act. Reflecting common industrial usage, "penalty rate", for the purpose of s.139(e) of the Act is a higher rate of pay to which an employee is entitled in compensation for the inconvenience or disabilities associated with performing work at a particular time, consistent with the non-exhaustive examples within s.139(e). We are not persuaded that a provision of the character of clauses 25.7 and 25.8, as proposed by the CFMEU – a payment an employer is required to make to an employee as a penalty for the late payment of wages – is a "penalty rate" within the meaning of s.139(e) of the Act.

...

[102] Accordingly, the power to include the term contained in the CFMEU's proposal must, if it exists, be found in s.142(1) of the Act.

[103] Section 142 of the Act, which permits the inclusion in modern awards of incidental and machinery terms, provides:

"(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award;
and

(b) essential for the purpose of making a particular term operate in a practical way.”

[104] We accept that an award provision for the payment of wages is incidental to those elements of s.139 dealing with payments to employees: minimum wages, overtime rates, penalty rates and allowances. The issue which then arises is whether or not the terms resulting from the variation to clause 25 of the Timber Award proposed by the CFMEU are essential for the purpose of making the terms operate in a practical way and are the terms necessary to achieve the modern awards objective.

Self-evidently, s.142 poses a significant hurdle for the proponent of an award variation.

The Full Bench went on to conclude, at paragraph [128], that the CFMEU’s case did not establish that the variation proposed was essential for the purpose of making the relevant award terms operate in a practical way and that the term sought was necessary to achieve the modern awards objective.

Ai Group supports the MBA’s claim to delete the penalty for late payment of wages in the awards identified at paragraph [16] of Your Honour’s statement.

Annual leave loading

1. **Ai Group’s position:** As identified in the statement, Ai Group seeks to vary five modern awards to address an anomaly relating to the payment of annual leave and annual leave loading. In respect of this claim, we note the following:

- A similar issue was identified by Ai Group in the Manufacturing Award and was addressed by a Full Bench of the Commission during an earlier stage of the Review, noting the agreement of other interested parties ([2015] FWCFB 7236 at [78]).
- A similar issue was identified by Ai Group in respect of the Vehicle Award. A Full Bench of the Commission (Vice President Hatcher presiding) has reserved its decision in respect of our claim.
- It is our understanding that during recent conferences before Commissioner Roe in respect of the *Contract Call Centres Award 2010* and the *Telecommunications Services Award 2010*, the issue we have raised was resolved by way of an agreement reached between the relevant interested parties that were present. This is reflected in the most recent version of the relevant exposure drafts, published on 1 June 2016.

2. **Conciliation:** Ai Group respectfully requests that the remaining awards relevant to our claim be listed for conferences before a member of the Commission; those being:

- the *Electrical, Electronic and Communications Contracting Award 2010*;
- the FBT Award; and
- the *Joinery and Building Trades Award 2010*.

We observe that the specific terms of the current clauses found in each of these awards vary somewhat. The application of the relevant provisions as well as their industrial history associated with the current provisions also appears to potentially vary. Accordingly, the resolution of the issue we have identified will also differ. Furthermore, it is our expectation that the awards will attract interest from differing parties. Therefore, it is

our view that the efficient progress of this matter will be best achieved by listing each of the awards separately (albeit before a single member of the Commission).

3. **Scope of Ai Group's case:** We anticipate that the case we will mount in support of our claim will include comprehensive written submissions and documentary material.
4. **Directions to be issued:** Consideration as to whether the issue of directions is required and if so, the form of those directions, should be deferred until after the relevant conferences have been conducted.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'S. Smith', written in black ink.

Stephen Smith

Head of National Workplace Relations Policy