



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.158 - Application to vary or revoke a modern award

Simpson Personnel Pty Ltd

(AM2010/22)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

(AM2008/15) [MA000020]

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT WATSON

MELBOURNE, 16 APRIL 2010

[1] This decision concerns an application by Simpson Personnel Pty Ltd (the applicant), pursuant to ss.157-160 of the *Fair Work Act 2009* (the Act), to vary the *Building and Construction General On-site Award 2010*¹ (the 2010 Modern Award) to include in clause 31 - Payment of wages, a provision for payment of wages on a weekly or fortnightly basis by mutual agreement.

[2] Clause 31 of the 2010 Modern Award provides:

“31. Payment of wages

- 31.1** All wages, allowances and other monies must be paid in cash, or by cheque, bank cheque, electronic funds transfer (EFT) or similar transfer or any combination.
- 31.2** An employee paid by cheque must be allowed reasonable time, as agreed between the employer and the employee, to attend the branch of the employee’s bank nearest the workplace to cash cheques during working hours.
- 31.3** Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week.
- 31.4** When notice is given, all monies due to the employee must be paid at the time of termination of employment. Where this is not practicable, the employer will have two working days to send monies due to the employee by registered post (or where paid by EFT the monies are transferred into the employee’s account).

31.5 If an employee is paid wages by cash or cheque and is kept waiting for their wages more than a quarter of an hour after the usual time of finishing work on pay day (for reasons other than circumstances beyond the control of the employer), the employee is to be paid at overtime rates after that quarter of an hour for the period they are kept waiting, with a minimum payment of a quarter of an hour.”

[3] The applicant is a generalist labour hire firm, operating in Western Victoria. The company employs eight permanent employees as consultants and administrative staff, rather than labour hire employees working in the field. The company on-hires, on average, 200 employees to employers, 60 of whom are covered by the 2010 Modern Award, principally in the civil construction industry. The company is covered by the 2010 Modern Award by virtue of clause 4.6, which states:

“**4.6** This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.”

As a result, the applicant has standing, under s.158, item 1, to make its application.

[4] The grounds advanced in the application were:

- “1. This would allow my company and I am sure many others to continue with their current practice of paying fortnightly. A weekly payment of wages only means more work for a small labour-hire company such as ours with no benefit.
2. The AWU Construction and Maintenance Award and the Building and Construction Award, which are, I believe, the main pre-cursor awards to the modern award, both allowed for fortnightly payment by mutual agreement.”

[5] The application was made on 24 February 2010. The application was heard on 26 March 2010, subject to directions for interested parties to file submissions, which were available on the Award Modernisation section of the Fair Work Australia web-site.

[6] The application relied on s.157 of the Act, which provides for variation to achieve the modern awards objective. Section 157 provides that:

- “(1) FWA may:
- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

(2) FWA may make a determination varying modern award minimum wages if FWA is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and
- (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.”

[7] Section 157 provides for a limited ability to vary modern awards outside the 4 yearly reviews of all awards. In order to make a variation Fair Work Australia must be satisfied that the variation is necessary to achieve the modern awards objective. This objective, contained in s.134 of the Act, provides:

“134 The modern awards objective

What is the modern awards objective?

(1) FWA must 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:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the **modern awards objective.**”

Submissions

Simpson Personnel Pty Ltd

[8] The applicant submitted that it is a generalist labour-hire company, which has paid its staff fortnightly since January 2000, under numerous Awards and without any issues. The granting of the application would enable it to continue with its current practice of paying fortnightly and avoid doubling the work in processing pays, at an estimated cost of \$1,100 per week.

Business SA

[9] Business SA submitted that clause 31 of the 2010 Modern Award restricts employers from paying either weekly or fortnightly, requiring payment must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week. It submitted that relevant pre-modern awards – the *Building and Construction Workers (State) Award* NAPSA,² the *AWU/CFMEU Construction and Maintenance Award (South Australia) 1989* NAPSA³ and the *Australian Workers’ Union Construction and Maintenance Award 2002* (AWU Construction and Maintenance Award),⁴ whilst providing for payment no later than the cessation of ordinary hours of work on Thursday of each working week, each provide for “any alternative mutual arrangement between an employer and an employee”.

[10] It submitted that clause 31.1 should be amended to read:

“Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week or fortnight.”

Master Builders Australia Limited (MBA)

[11] The MBA submitted that provisions within a number of predecessor awards of the 2010 Modern Award upon which it believes clause 31 is based, permitted fortnightly payments and clause 31 imposes new restrictions not be known to a large number of employers, especially small businesses. It submitted that clause 31 is overly prescriptive, imposing draconian consequences on an employer who does not pay in strict accordance with its terms, with clause 31.5 providing a penalty where “wages are not paid bang on time”. Although this subclause was not addressed in the application by Simpson Personnel Pty Ltd, the MBA submitted that penalty provisions, such as this, have long been excluded from commercial contracts by operation of law⁵ and the subclause should be removed.

[12] The MBA submitted that not being able to pay fortnightly wages, especially where that is mutually agreed, is contrary to the modern awards objective set out in s.134 of the Act as it is linked to the factor of promoting “flexible modern work practices and the efficient and productive performance of work,” per s.134(1)(d) of the Act and “the likely impact of any

exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden” per s.134(1)(f) of the Act. It submitted that clause 15 of the modern *Mining Industry Award 2010*,⁶ which it sought be included in the 2010 Modern Award in place of clause 31, and clause 34 of the *Manufacturing and Associated Industries and Occupations Award 2010*,⁷ better fit with the aims of the modern awards objective. The MBA submitted that the continuation of fortnightly pay is not detrimental to employees. If the cycle of wages has been fortnightly, it should be able to be maintained.⁸

[13] The MBA submitted that the origins of the payment of wages provision is found in the case of *Amalgamated Society of Carpenters and Joiners of Australia v. Thomas William Anthony (trading as T. Anthony & Co Pty Ltd) and others*,⁹ a case from the 1920s. It related the punitive amount only to non-payment after cessation of work; but appears to have changed over time to encompass normal payments. The MBA noted that the Full Bench in its decision of 3 April 2009,¹⁰ determined that wages could be paid either weekly or fortnightly stating:

“We have included a payment of wages provision which simplifies the current, overly prescriptive provision, although not to the full extent suggested by the AiGroup/CICA.”

Australian Federation of Employers and Industries (AFEI)

[14] AFEI supported the application. It submitted that the 2010 Modern Award now applies to many employers who were previously covered by federal awards or NAPSAs that allowed for greater flexibility in the frequency of the payment of wages, citing the *NSW Plant, &c., Operators on Construction (State) Award*¹¹ and the *NSW General Construction and Maintenance, Civil and Mechanical Engineering, &c. (State) Award*,¹² and applies to some industry sectors where on-site work was previously covered by other industry awards which included more flexible arrangements for payment of wages.

Housing Industry Association Ltd (HIA)

[15] The HIA supported the application because:

- the current clause 31.3 is inconsistent with s.323 of the Act; and
- requiring employers to pay on a weekly pay cycle is contrary to many of the objects of the modern award by:
 - detracting from the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - having a negative impact on productivity, employment costs and unnecessarily adding to the regulatory burden for employers.

[16] The HIA submitted that the 2010 Modern Award should be amended by deleting the current clause 31.3 and replacing it with:

“31.3 Payments must be paid to the employee at least monthly.”

or, in the alternative:

“31.3 Payments must be paid and be made available to the employee not later than the end of ordinary hours of work on Thursday of each working week or fortnight as determined by the employer, or monthly if mutually agreed.”

[17] The HIA submitted, as a “threshold issue”, that s.323 of the Act is silent on the issue of frequency of payment and that may be attributed to the fact that, potentially, there is no ability to override that provision of the Act.

“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)

[18] The AMWU submitted that clause 31 of the Modern Award replicates parts of clause 23 in the now superseded *National Building and Construction Industry Award 2000* (NBCIA). It submitted that during the consultation period leading up to the making of the 2010 Modern Award any and all interested parties had ample opportunity to express their views and to have them heard and considered. The applicant appears to be seeking to re-argue a matter which was only recently determined and which interested parties addressed in submissions during Stage 2 of the award modernisation process. It submitted that the application is misconceived and the applicant has failed to meet the requirements of s.157 of the Act and accordingly the application should be dismissed.

Construction, Forestry, Mining and Energy Union (CFMEU)

[19] The CFMEU opposed the application and submitted that taking into account the requirements of the Act and the merits of the case the application should be refused. It submitted that for an application under s.158 of the Act to succeed there is an onus on the applicant to show how the variation would meet the requirements of s.157 and demonstrate that the variation is necessary to achieve the modern awards objective.

[20] The CFMEU addressed each ground in the application, submitting that:

- If the applicant currently pays its employees on a fortnightly basis, it would appear to be in breach of the award for any employees covered by the 2010 Modern Award and the pre-existing NBCIA and, in any case, that practice appears to be a unilateral decision of the employer and not an arrangement reached by “mutual” agreement; and
- The claim that the AWU Construction and Maintenance Award and the NBCIA both allowed for fortnightly pay by mutual agreement is incorrect. The CFMEU submitted that by and large the majority of pre-existing awards had a common payment of wages clause that provided for wages being paid weekly, as set out in extracts from relevant awards attached to its submission.

[21] The CFMEU submitted that the provision stating “Nothing shall prevent any alternative mutual arrangement between an employer and an employee”, as contained in clause 23.3 of the NBCIA, does not allow for fortnightly pay. It only allows for alternate pay arrangements in those weeks where a public holiday falls on a Thursday or Friday, as demonstrated by the clauses in the *AWU Commercial Landscaping Award 2001*,¹³ *Building and Construction Industry (ACT) Award 2002*,¹⁴ NBCIA,¹⁵ *Building and Construction Industry (State) Award (NSW)*,¹⁶ *Building Construction Industry Award - State 2003 (QLD)*,¹⁷ *Building and Construction Industry (SA) Award*,¹⁸ *Building and Construction Workers’ (State) Award (SA)*,¹⁹ *Building Trades (Construction) Award 1987 (WA)*²⁰ and the *Building and Construction Industry Award (TAS)*.²¹ The CFMEU submitted that the allocation of this provision into a separate subparagraph in some awards is a result of the numbering of those awards rather than any change in the intent of the provision.

[22] The CFMEU further submitted that Fair Work Australia should take into account the deliberations of the Australian Industrial Relations Commission (AIRC) in the making of the 2010 Modern Award. In the award modernisation proceedings, the CFMEU’s initial draft award contained the clause taken from the NBCIA, with The Australian Workers’ Union draft being filed in almost identical terms. During the whole of the award modernisation proceedings relating to the 2010 Modern Award, no party made any submissions in support of fortnightly pay. It submitted that the CFMEU was the only party to mention the payment of wages clause during the pre-exposure draft consultations for the 2010 Modern Award. When the Full Bench released the exposure draft on 23 January 2009, the payment of wages clause only provided for weekly payment. Following its release, the only written submission to mention fortnightly pay was that of the HIA, but that was only by way of inclusion in their proposal for fortnightly pay with one week in arrears and one week in advance. The CFMEU was the only party to make any oral submissions on the payment of wages clause for the proposed 2010 Modern Award during the post-exposure draft stage.

[23] The CFMEU submitted that the lack of support for fortnightly pay was unsurprising given fortnightly pay is not and never has been a prominent feature of the building and construction industry, as demonstrated by the provisions in the pre-existing awards, especially for those workers engaged on a daily hire basis.

[24] The CFMEU submitted that in considering this application Fair Work Australia should be guided by the decision of the AIRC Full Bench on variations to modern awards made on 26 June 2009.²²

[25] In response to the MBA submission concerning the *Mobile Crane Hiring Award 2010*, the CFMEU noted that the old mobile crane hiring award already provided for weekly or fortnightly pay.

[26] The CFMEU submitted that there is a cost for employees who are currently paid by weekly pay, if they are then paid fortnightly pay, in the form of a loss of interest on earnings, and costs of re-arranging their billing arrangements and so forth. It further submitted that the construction industry has a significant problem with companies going into administration and receivership and a delay in payment arrangements would exacerbate possible unpaid entitlements.

[27] The CFMEU dismissed the HIA objection reliant on s.323 of the Act, noting that paragraph 1279 of the Explanatory Memorandum to the Act notes that “A modern award, enterprise agreement or contract of employment may provide for more frequent payment.”

Consideration

[28] The statutory test for the making of a determination varying a modern award in s.157 of the Act, otherwise than to vary modern award minimum wages, is satisfaction that making the determination outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective. In considering such variations, Fair Work Australia is required to “balance the considerations contained in the modern awards objective to determine whether it is necessary to exercise the power outside the system of 4 yearly reviews”.²³

[29] Given the application is made so soon after the making of the 2010 Modern Award, and given that award was made in accordance with an award modernisation request, the objects of which, drawn from s.576A of the *Workplace Relations Act 1996*, reflect those elements of the modern awards objective now relied upon by the employers in support of the application - regulatory burden on business and the promotion of flexible modern work practices and the efficient and productive performance of work, regard should be had to the 26 June 2009 comment of the Full Bench of the AIRC that:

“Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration.”²⁴

[30] Further, regard should be had to the approach of the AIRC in award modernisation to give effect to the award modernisation objectives in the *Workplace Relations Act 1996* by paying particular regard to the content of pre-existing instruments.

The HIA “threshold issue”

[31] The HIA submitted that, potentially, there is no ability to override s.323 of the Act. There is no substance to this point. The Act permits modern award provisions for the payment of wages as a s.142/s.576M incidental and machinery term²⁵ related to various payments which are matters that may be dealt with by modern awards.²⁶ Section 323 does not prevent the prescription of a modern award provision for the payment of wages provided it is no less beneficial than that prescribed in it. This is evident from the inclusion of such provisions in the modern awards made by the Full Bench and the Explanatory Memorandum to the Act which, having explained the terms of s.323(1),²⁷ notes that “A modern award, enterprise agreement or contract of employment may provide for more frequent payment”.²⁸

The modern awards objective

[32] The applicant, and others supporting the application, relied on s.134(1)(d), (f) and (h): “the need to promote flexible modern work practices and the efficient and productive

performance of work”, “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden” and “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.” It was not suggested that other matters in s.134(1) were relevant and none appear to be.

[33] Section 134(1)(d) in my view relates to “flexible modern work practices and the efficient and productive performance of work” of employees covered by a modern award. The frequency of the payment of wages would not impact on the performance of work of building employees. To the extent that it impacts on the work of administrative staff, covered by another modern award, it will affect the volume of work, rather than the efficiency and productiveness associated with the work or work practices. Further, I am not satisfied that the payment of wages will invoke considerations under s.134(1)(h), which is directed to the impact of modern awards on “the national economy”.

[34] I am, however, satisfied that the payment of wages and the frequency thereof will impact upon employment costs and the regulatory burden, a consideration required by s.134(1)(f) of the Act. A greater frequency of payment will increase administrative costs of employing labour and impose a greater regulatory burden, which should be avoided, particularly in circumstances where employees have been subject to less frequent payment under previously applicable award-based transitional instruments.

[35] In relation to s.134(1)(f), if the applicant, and other employers, have paid wages fortnightly in compliance with relevant pre-modern awards or award-based transitional instruments, there is force in an argument that a requirement to now pay weekly would conflict with the modern awards objective in relation to employment costs and regulatory burden in circumstances where relevant employees would suffer no detriment through continuation of fortnightly payment. If, as the CFMEU suggested, the applicant was making fortnightly payment in breach of relevant pre-modern awards or award-based transitional instruments, there would be little basis for varying the award to legitimise such a breach.

The 26 June 2009 Full Bench comments²⁹

[36] The approach to variation applications made soon after the making of modern awards stated by the Full Bench requires some consideration of the circumstances around the payment of wages provision in the processes leading to the making of the 2010 Modern Award. In this regard the CFMEU contended, as summarised in paragraph 22 above and, in my view, accurately, that the payment of wages provision in clause 31 was the subject of consideration during the Stage 2 consultation process and was contained in the exposure draft published on 23 January 2009, without comment from any party other than itself and the HIA to the extent that it proposed fortnightly pay with one week in arrears and one week in advance. It submitted that there is no significant change in circumstances, which would warrant a reconsideration of its terms.

[37] The CFMEU contentions as to the circumstances of the making of the 2010 Modern Award were not challenged, save to the extent that the MBA submitted that in its 10 February 2009 submission³⁰ and more generally during the Stage 2 process,³¹ it labelled clause 31 as unduly prescriptive and the HIA submitted that submissions from the employer parties, during

the Stage 2 process, reflected an underlying opposition to inflexible prescriptive provisions.³² In those circumstances, the comments of the 26 June 2009 Full Bench resonate.

The weight of regulation in pre-modern awards and award-based transitional instruments

[38] Clause 31 of the 2010 Modern Award was made by the Full Bench of the AIRC paying particular regard to the content of pre-modern award instruments. The payment of wages provisions of those instruments are predominantly in the terms of clause 31, in respect of both the frequency of payment and payment for periods in which employees are kept waiting for their wages.

[39] A re-examination of pre-modern awards and award-based transitional instruments confirms that position.

[40] Many awards provide for only weekly payment, with variations in arrangements by agreement explicitly limited to the provision for payment where the normal pay day falls on a public holiday:

AWU Commercial Landscaping Award 2001 - AP806077
Building and Construction Industry (ACT) Award, 2002 - AP817145
National Building and Construction Industry Award 2000 - AP790741
Building and Construction Industry (State) Award NSW - AN120089
Building Employees Mixed Industries (State) Award NSW - AN120091
Building Construction Industry Award - State 2003 QLD - AN140043
Building and Construction Industry (SA) Award - AN150670
Building and Construction Workers' (State) Award SA - AN150022
Carpenters & Joiners (General) Award 1993 SA - AN150029
Building Trades (Construction) Award 1987 WA - AN160034
Building and Construction Industry Award TAS - AN170010

[41] Several other pre-existing awards provide for weekly payment, with no variation by agreement provisions at all:

Australian Workers' Union Construction-on-site and Civil Engineering (A.C.T.) Award 1999 - AP765604
AWU Geomembrane and Geotextile Installation Award 2003 - AP823562
Building Crane Drivers (State) Award NSW - AN120090
Building Trades Award TAS - AN170011

[42] There are a few pre-existing instruments which provide for weekly payment but provide for variation by agreement in a subclause separated from the provision for payment where the normal pay day falls on a public holiday. In my view, it is likely, given the predominance of pre-existing instruments which explicitly limited variation by agreement to the provision for payment where the normal pay day falls on a public holiday, that the separation of those clauses in these awards is a matter of drafting, rather than intent. It is unlikely that it was intended that the whole of the payment of wages provision could be varied, in any manner, by agreement. Those instruments are as follows:

Australian Workers' Union Construction and Maintenance Award 2002 - AP815828
AWU/CFMEU Construction and Maintenance Award (South Australia) 1989 - AN150011
Construction and Maintenance (South Australia) Award - AN150669

[43] There are also a number of pre-existing instruments which allow fortnightly payment, either as a matter of course or by agreement:

Building and Construction Industry (Northern Territory) Award 2002 - AP812941 - weekly unless otherwise mutually agreed
Roof Slaters and Tilers (Victoria) Award 2002 - AP818507 - weekly or fortnightly
South Australian Civil Contracting Industry Award 1999 - AP798273 - weekly unless otherwise agreed
Civil Construction, Operations and Maintenance General Award - State 2003 SA - AN140061 - fortnightly
Building Trades Award 1968 WA - AN160037 - weekly unless otherwise agreed

[44] Other pre-existing instruments appear not to prescribe any frequency of payment:

Australian Workers' Union Construction and Maintenance (Western Australia) Award 2003 - AP825520
National Metal and Engineering On-site Construction Industry Award 2002 - AP816828
Western Australian Civil Contracting Award 1998 - AP803190
Building and Construction Workers (State) (Mixed Industry) Award SA - AN150021
Earth Moving and Construction Award WA - AN160104
Plant, &c., Operators on Construction (State) Award NSW - AN120419
General Construction and Maintenance, Civil and Mechanical Engineering, &c. (State) Award NSW - AN120228

[45] A consideration of the content of pre-modern award instruments confirms that the terms of clause 31 reflect the predominant existing payment of wages provisions. However, it is clear that some pre-modern award instruments do not contain a requirement for weekly payment and others permit departure from weekly payment by agreement. For employers previously subject to these provisions, a requirement for weekly payment would conflict with the modern awards objective in relation to employment costs and regulatory burden in circumstances where relevant employees would suffer if prevented by the 2010 Modern Award from continuing current arrangements.

[46] It should be noted that modern awards have been made with regard to pre-modern awards and award-based transitional instruments previously governing the relevant industry. It follows that reliance on provisions in other modern awards, determined in the particular circumstances of the relevant industry, are of limited assistance. In this regard, the provision for and high incidence of daily hire employment within the building and construction industry provided a context in which the payment of wages provisions in pre-existing instruments and the 2010 Modern Award were determined. In this context, it may be noted that the Stage 2 award modernisation Full Bench invited interested parties to address it on the continuing role of the unusual daily hire mode of employment in the building and construction industry.³³

Those parties who addressed the issue strongly supported the retention of the daily hire mode of employment within the industry,³⁴ given it remained a form of employment traditionally used in the industry and in light of the project-based nature of work.

The *Mobile Crane Hiring Award 2010*³⁵

[47] The MBA relied on the statement of the Full Bench in its decision of 3 April 2009,³⁶ concerning the *Mobile Crane Hiring Award 2010* to submit that the clause 31 requirement for weekly pay and a payment for time kept waiting for late payment were “overly prescriptive provision(s)” which should be varied or removed. To assist in an assessment of this proposition, a comparison of the pre-modern *Mobile Crane Hiring Award 2002*³⁷ with the *Mobile Crane Hiring Award 2010* payment of wages provisions is set out below.

<i>Mobile Crane Hiring Award 2002</i>	<i>Mobile Crane Hiring Award 2010</i>
<p>18. Payment of wages</p> <p>18.1 Wages shall be paid in cash either weekly or fortnightly. Provided that an employer with the consent of the employee may elect to pay wages by cheque or direct transfer into the employee’s bank (or other recognised financial institution) account. Should the employer and employee so elect, the employer shall pay for establishment cost only of the account. Maintenance costs of the account shall be the employee’s responsibility.</p> <p>18.2 Wages to be paid during working hours</p> <p>Wages shall be paid during ordinary working hours and an employee kept waiting for wages on pay day after the usual time for ceasing work, shall be paid at overtime rates for the period kept waiting.</p>	<p>20. Payment of wages</p> <p>20.1 Methods of payment</p> <p>Wages will be paid in cash, cheque or direct transfer into the employee’s bank (or other recognised financial institution) account either weekly or fortnightly.</p> <p>20.2 Wages to be paid during working hours</p> <p>(a) Where an employee is paid wages by cash or cheque such wages are to be paid during ordinary working hours.</p> <p>(b) If an employee is paid wages by cash and is kept waiting for their wages on pay day, after the usual time for ceasing work, the employee is to be paid at overtime rates for the period they are kept waiting.</p> <p>20.3 Payment by cheque</p> <p>In the case of an employee paid by cheque, if the employee requires it, the employer is to have a facility available during ordinary hours for the encashment of the cheque.</p>

18.3 Day off coinciding with pay day

In the event that an employee, by virtue of the arrangement of ordinary working hours, is to take a day off on a day which coincides with pay day, such employee shall be paid no later than the working day immediately following pay day.

Provided that where the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

18.4 Termination of employment

Upon termination of employment, wages due shall be paid on the day of such termination or forwarded by electronic transfer or post on the next working day.

18.5 Details of payments to be given

An employer must issue to an employee a written pay slip relating to each payment to the employee. Such pay slip must contain the following details:

- the name of the employee;
- the classification of the employee;
- the date on which the payment is made;
- the period of days to which the payment relates;
- the ordinary hourly rate, the number of hours in that period for which the employee was employed at that rate, and the amount of the payment made at that rate;
- any overtime rates, number of hours employed at overtime rates, and the amount of payment at overtime rates;
- the gross amount of the payment;
- the net amount of the payment;
- any amount included in the net amount of the payment that is by way of an allowance;

20.4 Day off coinciding with pay day

(a) In the event that an employee, by virtue of the arrangement of ordinary working hours, is to take a day off on a day which coincides with pay day, such employee will be paid no later than the working day immediately following pay day.

(b) Provided that where the employer is able to make suitable arrangements, wages may be paid on the working day preceding pay day.

20.5 Termination of employment

Upon termination of employment, wages due will be paid on the day of such termination or forwarded by electronic transfer or post on the next working day.

<ul style="list-style-type: none"> • the amount and purpose of any deductions made; • the name number, or the name and number, of the fund or account into which the amount of the deduction was paid; • the amount of each superannuation contribution made during the period and the name of the superannuation fund to which the contribution was made. 	
<p>18.6 Casual employees</p>	<p>20.6 Casual employees</p>
<p>Where a casual employee is engaged for a work period which includes the designated pay day, wages will be paid in accordance with such arrangements. This shall not affect the employee’s status as a casual. If a casual is engaged on a daily basis, then the payment shall be made on a daily basis unless otherwise mutually agreed.</p>	<p>Where a casual employee is engaged for a work period which includes the designated pay day, wages will be paid in accordance with such arrangements. This will not affect the employee’s status as a casual. If a casual is engaged on a daily basis, then the payment will be made on a daily basis unless otherwise mutually agreed.</p>

[48] It may be seen that the Full Bench, in referring to “overly prescriptive provisions”, was not addressing the frequency of payment which remains weekly or fortnightly. Nor was that description directed to payment for waiting for late payment, which was retained in the *Mobile Crane Hiring Award 2010*. The reference to “overly prescriptive provisions” appears to have been directed to the requirement that payment could be made other than by cash only by agreement and the lengthy prescription of details of payments to be given, which did not make its way into the *Mobile Crane Hiring Award 2010*.³⁸ It may be noted that a similar provision in the NBCIA³⁹ was not included in clause 31 of the 2010 Modern Award. The observations of the Full Bench in its decision of 3 April 2009 provide no support for the application.

Decision

[49] The HIA’s “threshold” point about s.323 of the Act has no basis. The payment of wages provisions in other modern awards, made with regard to the particular circumstances of those industries, including the terms of pre-existing instruments applying in them, provide no support for the application. Nor does the passage in the 3 April 2009 Full Bench decision in relation to the payment of wages provision of the *Mobile Crane Hiring Award 2010*, when regard is had to the terms of that provision and the corresponding clause in the *Mobile Crane Hiring Award 2010*. The comments of the 26 June 2009 Full Bench in relation to applications to vary modern awards, soon after their making, militate against the making of a determination varying the 2010 Modern Award outside the system of 4 yearly reviews of modern awards. The weight of regulation in pre-modern awards and award-based transitional instruments supports the retention of clause 31 in its present form. However, the existence of some pre-existing instruments, which provided for a longer frequency of payment than

provided for by clause 31 of the 2010 Modern Award, means that the operation of clause 31 in respect of those employers who make payment less frequently in practice would suffer increased payroll administration cost and a greater regulatory burden, contrary to the modern awards objective and s.134(1)(f) of the Act in particular.

[50] I am not satisfied that making a determination varying the 2010 Modern Award generally, as sought by the applicant or its supporters, is necessary to achieve the modern awards objective. I am, however, satisfied that a variation permitting employers, who were availing themselves of a longer frequency of payment permitted by a relevant award or award-based transitional instrument applying to them immediately before the making of the 2010 Modern Award, to continue to do so is necessary to achieve the modern awards objective. Accordingly, I will make a determination varying the 2010 Modern Award in those more limited terms. Any broader review of clause 31 of the 2010 Modern Award should await the 4 yearly reviews of the modern awards.

[51] The determination will vary the *Building and Construction General On-site Award 2010* by replacing the current clause 31.3 with the following:

“31.3 Payments must be paid and available to the employee not later than the end of ordinary hours of work on Thursday of each working week. Where an employer made payment less frequently in compliance with a relevant award or award-based transitional instrument, prior to the making of this award on 1 January 2010, the employer may continue to make payment at that frequency, subject to the agreement of employees and/or a majority of employees if required by the relevant award or award-based transitional instrument.”

SENIOR DEPUTY PRESIDENT

Appearances:

B Simpson, on his own behalf.

R Calver for the Master Builders Australia Limited.

S Maxwell for the Construction, Forestry, Mining and Energy Union.

C Blades for the Australian Federation of Employers and Industries.

A Matheson for the Housing Industry Association Ltd.

Hearing details:

2010.

Melbourne:

March 26 (by video to Canberra and Sydney).

¹ MA000020.

² AN120089.

³ AN150011.

⁴ AP815828.

⁵ *Ringrow Pty Ltd v BP Australia Pty Ltd*, (2005) 224 CLR 656.

⁶ MA000011.

⁷ MA000010.

⁸ Transcript at para 74.

⁹ 27 CAR, at p. 61.

¹⁰ [2009] AIRCFB 345, at para 126.

¹¹ AN120419.

¹² AN120228.

¹³ AP806077.

¹⁴ AP817145.

¹⁵ AP790741.

¹⁶ AN120089.

¹⁷ AN140043.

¹⁸ AN150670.

¹⁹ AN150022.

²⁰ AN160034.

²¹ AN170010.

²² [2009] AIRCFB 645.

²³ Paragraph 612 of the Explanatory Memorandum to the *Fair Work Bill 2008*.

²⁴ [2009] AIRCFB 645, at para 3.

²⁵ Section 142 of the *Fair Work Act 2009* (s.576M of the *Workplace Relations Act 1996*).

²⁶ Section 139 of the *Fair Work Act 2009* (s.576J of the *Workplace Relations Act 1996*).

²⁷ Paragraph 1279 of the Explanatory Memorandum to the *Fair Work Bill 2008*.

²⁸ Paragraph 1280 of the Explanatory Memorandum to the *Fair Work Bill 2008*.

²⁹ [2009] AIRCFB 645, at para 3.

³⁰ Tenth Submission, 10 February 2009, at para 4.35.

³¹ Transcript at para 75.

³² Transcript at para 26.

³³ [2009] AIRCFB 50, at para 39.

³⁴ MBA submission of 10 February 2009, at para 4.7, the Australian Chamber of Commerce and Industry submission of 13 February 2009, at paras 166-175, CFMEU submission of 13 February 2009 at para 4.11, Tasmanian Chamber of Commerce and Industry submission of 13 February 2009 in the final paragraph, Australian Business Industrial, which retained daily hire in a marked up version of the exposure draft dated 13 February 2009, AFEI which was concerned that the terminology in clause 11 may unduly restrict the current application of daily hire employment, at para 4 of its submission of 13 February 2009 and the Australian Industry Group submission of 24 February 2009 at p. 2.

³⁵ MA000032.

³⁶ [2009] AIRCFB 345, at para 126.

³⁷ AP816842.

³⁸ In circumstances where s.536 of the Act (and Regulations 3.45 and 3.46) prescribe the form and content of pay slips.

³⁹ AP790741.

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