Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain language re-drafting
Standard Clauses
(AM2016/15)

25 January 2019

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/15 PLAIN LANGUAGE RE-DRAFTING – STANDARD CLAUSES – SMALL BUSINESS REDUNDANCY ENTITLEMENT

1. INTRODUCTION

1. This submission is made by Australian Industry Group (**Ai Group**) in response to the Decision issued by the Fair Work Commission (**Commission**) on 11 December 2018 (**the December Decision**).

2. At paragraphs [35] – [44] of the December Decision, the Commission raised a number of issues relating to the application of clause 15.7 and the operation of clause 15.8 of the *Timber Industry Award 2010* (**Timber Award**). The issues raised concern the following:

   - The Commission's provisional view that clause 15.7(b) of the *Timber Award* does not limit the application of small business redundancy pay on a geographic basis.

   - If clause 15.7(b) of the *Timber Award* limits the application of 'small business redundancy pay on a geographic basis, how the impugned clause is to be dealt with, considering the prohibition on 'State-based difference terms' in s.154 of the *Fair Work Act 2009* (Cth) (**FW Act**).

   - The extent of the exclusion of 'weekly piecework employees' from the application of 'such provisions' under clause 15.8 of the *Timber Award*. The Commission has proposed, at paragraph [43] of the December Decision to omit this clause from the new redundancy provision on the grounds that it is unneeded, given the broader exclusion of 'weekly piecework employees' from various provisions of the *Timber Award* under clause 12.5(d).

   - The Commission's provisional view that clause 15 of the *Timber Award* should be replaced by the plain language redundancy clause together with a new redundancy pay provision set out at paragraph [43] of the

December Decision, governing the entitlement to redundancy pay for employees of small business employers.

3. At paragraphs [45] – [50] of the December Decision, the Commission raised the following issues concerning 'small furnishing employer' redundancy pay under the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**):

- The Commission's provisional view that clause 23 of the *Manufacturing Award* should be replaced by the plain language standard redundancy clause together with a new redundancy pay provision, set out at paragraph [49] of the December Decision governing the entitlement to redundancy pay for employees of 'small furnishing employers'.

- How the current description of the types of work to which the present redundancy pay provision applies may be simplified.

- The Commission's provisional view that clause 23.2(b) of the *Manufacturing Award* does not limit the application of small business redundancy pay on a geographic basis.

- If clause 23.2(b) of the *Manufacturing Award* limits the application of 'small furnishing employer' redundancy pay on a geographic basis, how the impugned clause is to be dealt with, considering the prohibition on 'State-based difference terms' in s.154 of the FW Act.

4. This submission deals with each of the above issues which arise out of paragraphs [35] – [44] and [45] – [50] of the December Decision.

2. TIMBER AWARD

5. Clause 15.7 of the *Timber Award* provides for 'small employer redundancy pay' (reproduced below):

> **15.7 Small employer**
>
> **(a)** For the purposes of this clause small employer means an employer to whom the NES does not apply because of the provisions of s.121(1)(b) of the Act.
>
> **(b)** Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the scope of this award which immediately prior to 1 January 2010 was in clause 6 of the Timber and Allied Industries Award 1999, or clause 6 of the Furnishing Industry National Award 2003 except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:

Employee's period of continuous service with the employer on termination	**Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years and over	8 weeks

Geographical limitation of small business redundancy pay

6. The development of the small business redundancy entitlement has its origin in test case proceedings which took place in the Australian Conciliation and Arbitration Commission (**ACAC**) in 1984. Two decisions arose out of those proceedings. The first of those decisions, issued by the ACAC in August 1984 provided for severance payments to be made to redundant employees.[1] In the second decision, handed down in December 1984, employers with less than 15

[1] *Termination, Change and Redundancy decision* [Print F6230; (1984) 8 IR 34].

employees were exempted from the requirement to make severance payments.[2]

7. As the exemption from the requirement to make severance payments was expressed to be "*subject to an order of the Commission in a particular redundancy case…*", the ACAC envisaged that the the small business exemption may be removed from various awards on a case-by-case basis. Seven tribunal decisions reintroduced the small business redundancy entitlement to specific awards. Two of these decisions are relevant to the present inquiry. In *Re Furnishing Trades Award, 1981*[3] and *Re Timber Industry Award 1990*,[4] the ACAC removed the small business redundancy exemption for the furniture and furnishing industries and the timber industry respectively.

8. In the *2004 Redundancy Test Case*, the AIRC determined that the standard severance pay clause which arose out of the 1984 proceedings should apply to small business respondents to federal awards who employ fewer than 15 employees up to a maximum of eight weeks' pay after four years of service.[5]

9. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (**Work Choices Act**) inserted Schedule 3A into the *Workplace Relations Act 1996* (Cth) (**WR Act)** which made redundancy pay by an employer of not less than 15 employees an allowable award matter. This had the effect that a small business redundancy entitlement for employees of employers with less than 15 was not an allowable award matter. The explanatory memorandum to the Work Choices Act referred to the *2004 Redundancy Test Case* before concluding that *"The Australian Government opposes any attempt to impose redundancy pay obligations on employers who employ fewer than 15 employees".*

10. The Work Choices Act preserved award terms imposing redundancy pay obligations on employers of fewer than 15 employees made before 26 March

[2] *Termination, Change and Redundancy Supplementary decision* [Print F7262; (1984) 9 IR 115, 137].

[3] Print L5424 (September 1994).

[4] Print M1434 (May 1995).

[5] *Redundancy Case, Decision* PR032004, [275] – [276].

2004.[6] This had the effect of maintaining the specific entitlements to small business redundancy pay for certain employers in the timber and furnishing industries.

11. In the context of the award modernisation proceedings, the then Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, used small business redundancy provisions as an example of existing award entitlements to which regard may be had to ensure the maintenance of a fair minimum safety net[7]:

> Subject to paragraph 34 below [concerning long service leave entitlements], a modern award may supplement the NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to the terms of this request and the existing award provisions (including under NAPSAs) for those employees, such as small business redundancy entitlements or the rate of pay at which various types of leave is taken. The Commission may only supplement the NES where the effect of these provisions is not detrimental to an employee in any respect, when compared to the NES.

12. In a Decision issued on 19 December 2008, the Australian Industrial Relations Commission (**AIRC**) made the following comments concerning the incorporation of the small business redundancy entitlement into modern awards (emphasis added):[8]

> The exposure drafts uniformly provided for redundancy payments for employees who would not be entitled to such payments under the NES because their employer had fewer than 15 employees. This reflected a preliminary view. We have received a wide range of detailed submissions and consequently we have decided to consider the small business exemption afresh.
>
> ...
>
> Seen in the context of the history we have set out, the terms of the NES indicate an intention to adopt the Commission's 1984 decision in relation to small business—that employees of employers of fewer than 15 employees should not be entitled to redundancy pay. We are obliged by the terms of the NES to observe the small business exemption. We therefore conclude that the draft provision would exclude a term of the NES contrary to the terms of s.30. We also find that it is not necessary to include the provision in modern awards generally to ensure the maintenance of the safety net. As a general rule, therefore, the small business

[6] The date of the *2004 Redundancy Test Case*.

[7] Award Modernisation Request, paragraph 32.

[8] [2008] AIRCFB 1000, [56], [60].

> exemption will be maintained. We shall make an exception for federal awards and industries in which there was no small business exemption prior to the *Redundancy Case 2004*.

13. It is apparent from the extracts reproduced above that the intent behind the incorporation of the small business redundancy entitlement into modern awards in the course of the award modernisation proceedings was to preserve an existing entitlement to small business redundancy pay in sectors where such an entitlement already existed rather than extending such an entitlement to broad segments of industry that would not have otherwise been covered.

14. Following the issuing of the abovementioned decision by the AIRC, the small business redundancy entitlement was included in the draft of the *Timber Award* submitted by the Forestry and Furnishing Products Division of the Construction, Forestry, Mining and Energy Union (**CFMEU**) to the AIRC on 6 March 2009. In its submission in support of the draft award, the CFMEU referred to the Award Modernisation Request as justification for its position concerning the maintenance of the existing small business redundancy entitlement:[9]

> While the general effect of the WorkChoices legislation was to remove severance entitlements for employees of small business where that entitlement arose only as a result of the *2004 Redundancy Test Case*, the transitional provisions to the *Workplace Relations (Work Choices) Amendment Act 2005* preserved severance entitlements for employees of small business where those entitlements were on foot prior to 2004. Consequently, the small business severance entitlements in the *Furnishing Industry National Award 2003* and *Timber and Allied Industries Award 1999* have continued to apply and be enforced. The Union submits that paragraph 32 of the Award Modernisation Request, which states that a modern award may supplement the NES where necessary to maintain a fair minimum safety net having regard to excising award provisions …such as small business redundancy entitlement, is intended to address the maintenance of these preserved small business severance pay entitlements. The general principles in relation to whether or not small business severance pay entitlements should be included in modern awards do not apply in the case of the Timber Industry which, along with the other industries affected by Item 5A, Part 2 of Schedule 4 of the transitional provisions of the *Workplace Relations (Work Choices) Amendment Act 2005*, is a special case. (italics in original, underlining added).

15. The CFMEU's reference to the purpose of the intent of paragraph 32 of the Award Modernisation Request to "address the maintenance of these preserved small business severance pay entitlements" indicates that the small business

[9] Award Modernisation – Timber Industry - CFMEU - Forestry & Furnishing Products Division, (9 March 2009), [54].

redundancy clause in the *Timber Award* was included to preserve an existing entitlement rather than to extend the entitlement to States and Territories where it would not have applied prior to 26 March 2004.

16. It is apparent that the small business redundancy entitlement contained in the *Timber Award* is a preserved entitlement. It was not introduced with the purpose of extending its reach. If this were the case, an obligation to make redundancy payments would be provided to all covered employees who are employed by a small business or clause 15.7 the *Timber Award* would have been drafted without reference to the two premodern awards.

17. Ai Group submits that the contextual considerations outlined above suggest that the small business redundancy entitlement preserved in clause 15.7 of the *Timber Award* was not intended to extend further than the coverage of the two pre-modern awards. The coverage provisions in clause 6 of each of the two pre-modern awards includes a preamble referring to the States and Territories in which the respective awards were intended to apply. The work referred to in the coverage clauses cannot be divorced from the wider clause which, when read in its entirety, can only be understood to encompass a geographical limitation. As such, contrary to the Commission's provisional view, as outlined in paragraph [41] of the December Decision, the *Timber Award* does limit the application of the small business redundancy pay provision on a geographic basis.

18. Considerations as to whether the limitation of the application of the small business redundancy entitlement based on geography offends s.154 of the *FW Act* and an appropriate response are dealt with concurrently in this submission with consideration of the 'small furnishing employer' redundancy pay provision under clause 23.2 of the *Manufacturing Award*.

Weekly Piecework Employees

19. At paragraph [42] of the December Decision, the Full Bench referred to the operation of clause 15.8 of the *Timber Award*. Clause 15.8 reads as follows:

> "Such provisions do not apply to weekly piecework employees."

20. Ai Group agrees with the Full Bench that it is not apparent whether clause 15.8 operates to exclude weekly piecework employees from clause 15.7 (small business redundancy pay) or from clause 15 in general.

21. Clause 12.5(d) of the *Timber Award* provides an exclusive list of clauses that apply to weekly pieceworkers. Clause 15 is not listed amongst these clauses.

22. Ai Group does not agree that clause 15.8 is otiose and should be omitted from the new redundancy provision. A large number of employers who read and apply modern awards are not legally trained or expert in industrial relations. It may not occur to some employers to examine the entirety of an award in the course of determining whether a particular employee is entitled to redundancy pay. Ai Group suggests that rewording clause 15.8 is preferable to deletion to avoid misunderstandings by employers of weekly pieceworkers who have not read clause 12.5(d). The intended effect of clause 15.8 may be clarified through the following wording:

> "Clause 15 does not apply to weekly piecework employees."

3. MANUFACTURING AWARD

23. Clause 23.2 of the *Manufacturing Award* provides for 'small furnishing employer redundancy pay' (reproduced below):

> **23.2 Small furnishing employer**
>
> (a) For the purposes of clause 23.2(b), small employer means an employer to whom Subdivision B of Division 11 of the NES does not apply because of the provisions of s.121(1)(b) of the Act.
>
> (b) Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the Manufacturing and Associated Industries and Occupations which immediately prior to 1 January 2010 was in clauses 6.1 to 6.6 of the Furnishing Industry National Award 2003, except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:

Employee's period of continuous service with the employer on termination	**Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks pay
At least 2 years but less than 3 years	6 weeks pay
At least 3 years but less than 4 years	7 weeks pay
At least 4 years and over	8 weeks pay

Geographical limitation of small business redundancy pay

24. The contextual considerations referred to above in relation to the *Timber Award* apply equally to the 'small furnishing employer redundancy pay provision' in clause 23.2 of the *Manufacturing Award*. These weigh in favour of an interpretation that the geographical application of the *Furnishing Industry National Award 2003* is preserved in the small furnishing employer redundancy pay provision.

25. At paragraph [47] of the December Decision, the Full Bench noted that clause 23.2(b) of the *Manufacturing Award* refers only to clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003* and not also to the preamble to the coverage clause which contains the relevant references to the geographic limitations which qualify the work contained in clause 6. This should not dissuade the Full Bench from finding that the *Manufacturing Award* limits the application of 'small furnishing employer redundancy pay' on a geographic basis. No indication appears in any Statement or Decision issued in the course of the award modernisation proceedings that the 'small furnishing employer redundancy pay' provision in the *Manufacturing Award* was intended to have broader application than the equivalent provision in the *Timber Award*.

26. In a Decision issued on 3 April 2009, a Full Bench of the AIRC made clear its intention to preserve the existing small employer redundancy provisions in the *Manufacturing Award*: (references omitted, emphasis added)

> The terms and conditions in the award are substantially the same as those in the award at the conclusion of the priority stage, reflecting prevailing industry standards. However, small employer redundancy provisions have been inserted for those who perform work within the manufacturing and associated industries and occupations which immediately prior to 1 January 2010 would have been covered by the *Engine Drivers' and Firemen's (ACT) Award 2000* (Engine Drivers' (ACT) Award) or was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003* (Furnishing Award). <u>They reflect the small employer redundancy provisions of these two awards.</u> The Engine Drivers' (ACT) Award is a common rule award. The provision concerning the Engine Drivers' (ACT) Award is transitional given its application solely in the Australian Capital Territory. To provide a consistent approach to the application of the small employer redundancy provisions in modern awards, that concerning the Furnishing Award is not limited to the current respondents to the award.

27. The AIRC's statement that the preservation of the small furnishing employer redundancy pay entitlement was intended to reflect the existing provision in the *Furnishing Industry National Award 2003* suggests that the entitlement which carried over into the *Manufacturing Award* retains the geographic limitation in the pre-modern award. Moreover, the statement that the application of the small furnishing employer redundancy pay provision was not restricted to the current respondents to the award is notable for the significant omission of any reference to extending the entitlement beyond the geographic limitations of the pre-modern award.

28. The reference to clauses 6.1 – 6.6 of the *Furnishing Industry National Award 2003* should not give rise to a presumption that the geographical limitation in the preamble was not intended to be incorporated in the small furnishing employer redundancy pay provision in the *Manufacturing Award*. Such a contention would ignore the importance of context and purpose in the interpretation of awards and the frequently acknowledged principle that narrow or pedantic approaches to the interpretation of an award are misplaced. To view the definition of 'work' in clause 23.2(b) of the *Manufacturing Award* as entirely confined to the scope of clauses 6.1 – 6.6 of the *Furnishing Industry National Award 2003,* without reference to the preamble which frames the meaning of these clauses, would constitute an overly restrictive approach. Such an interpretation runs counter to the observations of French J who made the following statement in City of *Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (*Wanneroo*)[10]:

> The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '... the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken... It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities.

29. Given the significant financial implications associated with extending the small furnishing employer redundancy pay provision to the jurisdictions which were not previously covered by the *Furnishing Industry National Award 2003*, it would be reasonable to expect some clear statement to have been made by the AIRC that incorporation of this entitlement into the *Manufacturing Award* did not carry the same geographical limitations, if this is what was intended.

[10] [2006] FCA 813, 438 to 439.

30. Regard may also be had to the principle voiced in *George A Bond & Co Ltd (In liq) v McKenzie* by Street J:[11]

> "...[S]peaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such, and they have to be obeyed to the same extent as any other statutory enactment.

31. Assistance in determining the scope of the small business redundancy entitlement can be gained from case law concerning the approaches to the use of preambles for interpretation purposes. It is clear from the following statement by Gibbs CJ in *Wacando v Commonwealth* that a preamble may be considered in determining the meaning of an operative provision:[12]

> It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.

32. If the principle relating to the use of preambles in the interpretation of statutes is to be taken into account, failure to consider the various kinds of 'work' referred to in clauses 6.1 – 6.6 of the *Furnishing Industry National Award 2003* in the context in which they appear, i.e. qualified by a preamble indicating a clear geographical limit to the location of such work, risks taking the kind of narrow and pedantic approach which has been frequently rejected by the Commission and its predecessors.[13] The clear intent for clauses 6.1 – 6.6 of the *Furnishing Industry National Award 2003* to be read in light of the preamble to clause 6 is indicated by direct references which appear in the preamble to the 'work' referred to in the coverage clause (emphasis added):

---

[11] [1929] AR (NSW) 498 at 503 – 504. Cited, with approval in *Construction Forestry Mining and Energy Union (Construction & General Division) v The Master Builders* Group Training Scheme Inc* [2007] FCA 435 by Besanko J.

[12] *Wacando v Commonwealth* (1981) 148 CLR 1, 15-16.

[13] *Kucks v CSR Limited* (1996) 66 IR 182. This principle has been endorsed by two members of the High Court in *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 271, 282-283, and was restated by French J in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, 440.

> This award shall apply in the States of Victoria, South Australia, Tasmania, New South Wales and the Australian Capital Territory to the following work and persons performing such work.

33. Some interpretive assistance is also provided by the temporal reference in clause 23.2(b) of the *Manufacturing* Award to the meaning of the pre-modern award prior to 1 January 2010. Reading the small furnishing employer redundancy pay provision as referring exclusively to clauses 6.1 – 6.6 of the pre-modern award's coverage provisions, without reference to the preamble, requires these clauses to be interpreted in a manner that is divorced from their intended meaning prior to 1 January 2010, effectively adulterating their intended impact. This would have the effect of defining the scope of the small furnishing redundancy pay provision by reference to 'work' which was never referred to in any pre-modern award.

Prohibition on State-based differences

34. For the reasons outlined above, the geographic limitations referred to in the coverage provisions of the two pre-modern awards have the effect of limiting the application of the small business redundancy entitlements contained in clause 15.7(b) of the *Timber Award* and clause 23.2(b) of the *Manufacturing Award*. At paragraphs [41] and [48] of the December Decision, parties were invited to express a view as to potential options available to the Commission in the event that the small business redundancy pay provisions applicable in the *Timber Award* and the *Manufacturing Award* are found to be limited on a geographic basis.

35. The Commission has indicated, at paragraph [41] of the December Decision, that such a geographical limitation would cause each of these provisions to offend the prohibition against terms containing State-based differences in s.154 of the FW Act. Section 154(1) of the FW Act is reproduced below:

> **154 Terms that contain State-based differences**
>
> *General rule—State-based difference terms must not be included*
>
> (1) A modern award must not include terms and conditions of employment (**State-based difference terms**) that:

(a) are determined by reference to State or Territory boundaries; or

(b) are expressed to operate in one or more, but not every, State and Territory.

36. The manner in which the small business redundancy provisions in the *Timber Award* and the *Manufacturing Award* restrict the geographical application of the entitlement does not cause the clauses to offend section 154. This contention relies on the interpretation of s.154 adopted by a Full Bench of the Commission in two decisions made in the context of the 'Transitional Provisions Common Issues'.

37. The first of these decisions was issued on 11 February 2015 (the **February 2015 Decision**) and contained the reasons behind a decision made by the Full Bench on 31 October 2014 to reject an application by the ACTU to delete the sunset clauses in 112 modern awards relating to accident pay and district allowances.[14] The Full Bench found that it could not make any overall assessment as to whether the model accident pay clauses would offend s.154 in their application to any of the modern awards.[15] It did however accept that when determining the accident pay entitlement under a modern award arising from the model clause *"it is necessary to have regard to the relevant terms of the predecessor awards and instruments and that some of the pre-reform instruments contain terms which limit the application of the relevant accident pay scheme by reference to State boundaries"*.[16] In the course of proceedings, it was contended that as the entitlement to 'accident pay', was liable to fluctuate based on the quantum of payments available under State workers' compensation regimes, this would mean the provisions would *"have force within or referable to State boundaries and in that sense will contravene s.154 of the Act"*.[17]

[14] *Four yearly review of modern awards* [2015] FWCFB 644.

[15] Ibid, [35].

[16] Ibid, [34].

[17] Ibid, [36].

38. Even though the ACTU's application to remove the sunset provisions applicable to 'accident pay' entitlements was rejected on other grounds, the Full Bench indicated that a provision in a modern award which had differing effect between States would not necessary contravene s.154:[18]

> We doubt that the mere fact that the cost of accident make-up pay to an employer in any individual case may differ from employee to employee and from State to State would mean that the accident pay provision could be said inherently to offend s.154. The differences and inconsistencies in such circumstances would be the result of differences which exist between the State workers' compensation schemes rather than differences relating to any general entitlement of employees covered by a modern award to accident make-up payments.

39. Greater certainty concerning the Full Bench's interpretation of s.154 in the February 2015 Decision is gained from the conclusion reached in relation to the accident pay provision in the *Black Coal Mining Industry Award 2010*. The CFMEU sought deletion of the sunset provision from the applicable accident pay provision.[19] Though the provision was in different terms to the model accident pay provision, the quantum of an entitlement was still impacted by amounts available under State workers' compensation legislation.[20] Finding that the provision did not offend s.154 of the FW Act, the Full Bench determined to remove the sunset provision.[21] The reasoning for Full Bench's finding is contained in paragraph [71] of the decision:

> The provision does not in our view include State-based terms or conditions of employment contrary to s.154 of the Act. As stated above, we do not consider that the fact that the provision may operate in the context of different State workers' compensation schemes, and that the level of make-up payments may therefore vary for workers in different States, would of itself lead to the conclusion that the provision contravenes s.154.

40. The Full Bench's expressed opinion as to the impact of s.154 on the model accident pay provisions may be contrasted with its conclusion that the transitional district allowance provisions could be defined as State-based difference terms. The reasoning behind the distinction appears to lie in the fact that the terms of the district allowance provisions were expressed to operate

[18] Ibid, [37].

[19] Ibid, [65].

[20] Ibid, [70].

[21] Ibid, [72].

only in respect of Western Australia and the Northern Territory. The Full Bench stated at [53]:

> The main reason for this decision is simply that the current transitional district allowances provisions cannot be retained in awards consistent with s.154 of the Act. By the terms of those provisions, they operate only in respect of Western Australia and the Northern Territory. Subsection 154(1)(b) provides that a modern award must not include terms that "are expressed to operate in one or more, but not every, State or Territory." In these circumstances, it would be inappropriate to remove the sunset provisions and thereby purport to continue in operation the current district allowance provisions.

41. The February 2015 Decision was considered by the Full Bench in a subsequent decision issued on 18 August 2015 in relation to an application made by the CFMEU to insert an entitlement to accident pay into 37 modern awards (**August 2015 Decision**). The Full Bench dismissed arguments that a provision allowing for an entitlement which differs based on the operation of State workers' compensation legislation necessarily constitutes a term that is "determined by reference to State or Territory boundaries". Referring to the February 2015 Decision concerning the application of s.154 in relation to the model accident pay provision and the accident provision in the *Black Coal Mining Industry Award 2010*, the Full Bench saw no reason to adopt a different view to that taken earlier. Significantly, the Full Bench drew a distinction in the consideration of s.154 between "terms and conditions of employment" to be included in an award and the calculation of an actual entitlement to an employee under those terms and conditions.[22] The Full Bench stated at paragraph [161]:

> The term or condition of employment under the award is for the maintenance of a particular level of income for an injured worker for a specified time and is not dependent upon where the particular employee is located. The term will have a differing practical operation in different States or Territories in that the amount to be provided by an employer by way of accident make-up pay may vary depending upon the level of compensation payable under the relevant workers' compensation scheme. However the entitlement of the injured worker to the level income maintenance provided by the award remains the same. The fact that the calculation of the payment required to be made by the employer in relation to an individual employee must be made having regard to the weekly amount of compensation payable to the injured worker under a State or Territory workers' compensation scheme does not, in our view, warrant a

[22] [2015] FWCFB 3523, [161].

conclusion that the relevant term of employment is determined by reference to State or Territory boundaries within the meaning of s.154(1)(a) of the Act.

42. Applying the principles which arise out of the February 2015 Decision and the August 2015 Decision, in relation to the interpretation of s.154 of the FW Act, Ai Group contends that the small business redundancy provisions in the *Timber Award* and the *Manufacturing Award* are not terms that contain 'State-based differences'. The inconsistencies that result from the application of clause 15.7 of the *Timber Award* and clause 23.2(b) of the *Manufacturing Award* are attributable to differences which arise that are extrinsic to each modern award. The difference in application of the small business redundancy entitlement is attributable to the geographic limitations of the pre-modern awards, as opposed to any expressed term in the modern award.

43. In contrast to the district allowance provisions considered in the February 2015 Decision, the geographical limitations on the scope of the small business redundancy pay provisions in the *Timber Award* and the *Manufacturing Award* do not operate as a result of an expression in either modern award that the provisions are to apply in a specific State or Territory. The inclusion of such an expression in a pre-modern award is analogous to the reference to State and Territory workers' compensation legislation in the accident pay provisions.

44. To use the distinction referred to by the Full Bench in the August 2018 Decision, the relevant 'term or condition of employment' in the *Timber Award* and the *Manufacturing Award* is an entitlement to small business redundancy pay. The term is applied differently across States owing to the limited coverage of the referenced pre-modern awards. The practical limitation of the entitlement based on the geographical application of the pre-modern awards does not inevitably lead to the conclusion that the benefits bestowed by the modern award term itself are determined by reference to State or Territory boundaries.

Removal of the small business redundancy entitlement

45. If the Commission rejects Ai Group's contention that despite the retention of limitations in the application of the small business redundancy entitlement based on geography, neither clause 15.7 of the *Timber Award* nor clause 23.2(b) of the *Manufacturing Award* offend s.154, the appropriate response would be to remove the small business redundancy pay provisions from both awards.

46. A provision which falls foul of s.154 would constitute a term which must not be included in a modern award via the operation of s.136(2)(a) of the FW Act. A term of a modern award has no effect to the extent that it contravenes s.136.[23]

47. The following table outlines the respective geographical coverage of the *Timber and Allied Industries Award 1999* and the *Furnishing Industry National Award 2003* as expressed in clause 6 of each award:

State	***Timber and Allied Industries Award 1999***	***Furnishing Industry National Award 2003***
New South Wales	✓	✓
Australian Capital Territory	✓	✓
Victoria	✓	✓
Queensland		
South Australia	✓	✓
Tasmania	✓	✓
Northern Territory		
Western Australia	✓	

48. If the current award terms offend s.154 of the Act, they have no effect. Therefore, the removal of the terms would not disadvantage any employees.

[23] *Fair Work Act 2009* (Cth) s.137.

49. Should a claim proceed that the small business redundancy provisions be extended to States which were not covered by either of the two pre-modern awards, such a proposal would constitute a significant change and should be supported by a substantial merit based argument. The Full Bench in the *Preliminary Issues Decision* stated: (emphasis added)

> The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."

50. Additional commentary has been provided by a Full Bench of the Commission regarding the threshold a merit based case is required to meet in support of a variation to a modern award in the context of contested proceedings:[24] (emphasis added)

> While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

[24] *Four yearly review of modern awards* [2015] FWCFB 620, [8].

51. As mentioned above, amending the small business redundancy pay provisions to extend the entitlement beyond the original geographic limitations would constitute a significant change to the relevant awards requiring justification in a substantive, merit based argument. This contention is supported by the statements made by the Full Bench in the August 2015 Decision regarding the extension of the entitlement to accident pay to all States and Territories:[25] (emphasis added)

> In some of the awards which we have grouped in the third broad category above, the award entitlement to accident pay was limited to one or more State/Territory. For example, the main pre-reform instruments in relation to the *Clerks - Private Sector Award 2010* and the *General Retail Award 2010* which included accident pay were awards which only applied in Victoria. Whilst several pre-reform federal awards in the food, beverage and tobacco manufacturing industry provided for accident pay, the majority of those instruments and/or the accident pay entitlements in them applied only in Victoria. The continuation of such State-based entitlements in a modern award would be contrary to s.154 of the Act. The extension of such entitlements to all employees covered by the awards and in all States and Territories would be a significant change in the terms of the modern award.
>
> In other awards in the third category, the entitlement to accident pay under pre-reform instruments only applied in some industries or sectors now covered by the modern award. For example, in relation to the *Manufacturing and Associated Industries and Occupations Award 2010*, there were accident pay entitlements in the pre-reform federal awards covering the adhesives industry and gelatine manufacturing and in the rubber, plastic and cable making industry as well as a federal accident pay award covering the metal, engineering and associated industries in Victoria. The extension of such entitlements to all employees covered by the modern awards would be a significant change.

52. Given the significant adverse financial impact upon employers of extending the small business redundancy pay provisions to all States and Territories, a substantive case supported by probative evidence would need to be conducted. The Commission would need to carry out a thorough examination of the impact such an amendment would have on the relevant industries potentially impacted by the proposal.

53. It long been established that small businesses with less than 15 employees should be exempt from the requirement to make redundancy payments, other than in very limited circumstances. This is a principle which can be traced back

[25] [2015] FWCFB 3523, [202] – [203].

to the small business exemption from the 'compulsory notification' procedures in the *Employment Protection Act 1982* (NSW) and the ruling by the ACAC to exclude employers with less than 15 employees from the standard redundancy pay clause in the *Termination, Change and Redundancy Supplementary Decision*.[26]

54. The small business redundancy pay exemption has been incorporated into the National Employment Standards in s.121 of the FW Act. The standard exemption was recognised in a Decision issued on 19 December 2008, in which the Full Bench of the AIRC made the following statement:

> Seen in the context of the history we have set out, the terms of the NES indicate an intention to adopt the Commission's 1984 decision in relation to small business—that employees of employers of fewer than 15 employees should not be entitled to redundancy pay. We are obliged by the terms of the NES to observe the small business exemption. We therefore conclude that the draft provision would exclude a term of the NES contrary to the terms of s.30. We also find that it is not necessary to include the provision in modern awards generally to ensure the maintenance of the safety net. As a general rule, therefore, the small business exemption will be maintained.

55. As referred to above, the genesis of the small business redundancy entitlement in the *Timber and Allied Industries Award 1999* and the *National Furnishing Industry Award 2003* lie in two decisions of the ACAC in *Re Furnishing Trades Award, 1981*[27] and *Re Timber Industry Award 1990*.[28] It is evident that these decisions were made in a context which was specific to the time in which they were issued. For example, in *Re Furnishing Trades Award, 1981*, the Full Bench of the ACAC referred to arguments by the CFMEU that economic forces extant at the time were encouraging employment reductions. These included:[29]

- the policy of progressive tariff reductions;
- technological change; and

[26] Print F7262; (1984) 9 IR 115, 137.

[27] Print L5424 (September 1994).

[28] Print M1434 (May 1995).

[29] Print L5424 (September 1994).

- the recession.

56. Moreover, it should be noted that *Re Furnishing Trades Award 1981* and *Re Timber Industry Award 1990* were both decided prior to the enactment of the FW Act. The decisions were under the very different legislative framework set by the *Industrial Relations Act 1988* (Cth). As such, considerations of the justification for introducing industry specific entitlements in these decisions are of limited assistance in determining whether extension of the application of the entitlement to all States and Territories meets the modern awards objective.

57. In the event that submissions and/or evidence are presented in the current proceedings in support of the extension of the geographic scope of the small business redundancy provisions in the award, Ai Group requests that the Commission provide an opportunity for parties to make submissions in response.

Simplification of application

58. Parties were invited to make submissions as to how the current description of the types of work to which the present redundancy pay provision applies may be simplified in the *Manufacturing Award*. In the event that the Commission retains the small business redundancy provision in the *Manufacturing Award*, Ai Group submits that a link to the pre-modern award would be appropriate.

Additional Drafting Matters

59. Proposed clause 15.4(a)(ii) of the *Timber Award* and proposed clause 23.4(a) of the *Manufacturing Award* exclude from the obligation to make redundancy payments, employers who are excluded from redundancy pay under the NES by s.121(1)(a), s.123(1) or s.123(4)(a) of the FW Act. The exclusion should extend to employees prescribed by regulations made under s.123(4)(d) of the FW Act given the potential for such regulations to be made in the future.