

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

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

Small business redundancy
entitlement in the *Manufacturing
and Associated Industries and
Occupations Award*

07 May 2020

Ai
GROUP

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

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in accordance by the Directions made by Vice President Hatcher at the Conference which took place in the Fair Work Commission (**Commission**) on 30 March 2020 in relation to the redundancy entitlement available to employees of ‘furnishing small business employers’ (**Small Business Redundancy Scheme**) under the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**).
2. This issue has arisen out of the plain language re-drafting process for standard clauses. In a Decision dated 11 December 2018, the Manufacturing Award was listed amongst those awards which required separate consideration because they contained an industry-specific redundancy element that supplements the NES.¹ The Full Bench expressed a provisional view that clause 23 should be replaced by the plain language standard redundancy clause together with a new redundancy pay provision to reflect the Small Business Redundancy Scheme.² Referring to difficulties with the simplification of the description of the types of work to which the present small business redundancy pay provision applies, the Commission invited submissions as to how the current description of the types of work may be simplified.³

¹ [2018] FWCFB 7447, [27].

² [2018] FWCFB 7447, [46], [49].

³ [2018] FWCFB 7447, [46].

3. In [Ai Group's 25 January 2019 Submission](#), it was proposed that in the event that the Commission retained the small business redundancy provision in the Manufacturing Award, a link to the pre-modern *Furnishing Industry National Award 2003 (FINA)* would be sufficient to resolve any difficulties in describing the types of work to which the entitlement applied.⁴ This approach was supported by the AMWU and the CFMMEU in a Conference which took place before the Commission on 6 November 2020.⁵ However, it was ultimately rejected by the Commission in favour of an approach whereby clause 23.4 of the Manufacturing Award would cross-reference certain aspects of the coverage clause in the Award which the parties agreed were based on the FINA.⁶ The Commission directed parties to report back to identify areas of agreement and contention regarding the extent of the coverage of the Manufacturing Award which is impacted by the Small Business Redundancy Entitlement.⁷

4. A [Joint Report](#) of Ai Group, the CFMMEU and the AMWU filed on 14 February 2020 acknowledged the following difficulties with determining the extent of the coverage of the Small Business Redundancy Scheme:
 - Some of the areas of coverage of the FINA overlapped with the coverage of the *Metal, Engineering and Associated Industries Award 1998 (Metals Award 1998)*, the *Rubber, Plastic and Cablemaking Industry Award 1998 (RPC Award 1998)* and other pre-modern awards replaced by the Manufacturing Award.

⁴ AM2016/15, Ai Group, *Submission*, (25 January 2020), 58.

⁵ AM2016/15, *Transcript* 6 November 2019, PN45, PN84.

⁶ AM2016/15, *Transcript* 6 November 2019, PN101.

⁷ AM2016/15, *Transcript* 6 November 2019, PN104.

- A small business redundancy entitlement did not exist for employers and employees covered by most of the pre-modern awards replaced by the Manufacturing Award. It did not exist in the Metals Award 1998 and the RPC Award 1998.
5. Due to the above difficulties, the parties were not able to reach agreement on the appropriate definition of a ‘small furnishing employer’ for the purposes of clause 23.4 of the Manufacturing Award.
 6. The Joint Report communicated Ai Group’s view that the appropriate approach to assessing the coverage of the Small Business Redundancy Scheme in the Manufacturing Award is to examine existing elements of the coverage in the Manufacturing Award and determine which of these are directly derived from the coverage of the FINA, but not including elements that were included in the Manufacturing Award primarily as a result of the coverage of other pre-modern awards. On this basis, Ai Group proposed a variation to the Manufacturing Award.
 7. Another Conference was held before the Commission on 30 March 2020 where the unions were requested to propose a draft variation, given that they did not agree with Ai Group’s proposed variation.⁸
 8. This submission responds to the proposed variation of the CFMMEU and AMWU (**Union Parties**) dated 23 April 2020 (**Unions’ Proposal**).
 9. Ai Group proposes an alternative variation which we consider more accurately reflects the existing coverage of the Small Business Redundancy Scheme in the Manufacturing Award. The alternative proposal is annexed to this submission and marked (**Annexure A**).

⁸ AM2016/15, *Transcript*, 30 March 2020, PN24.

2. BACKGROUND TO CLAUSE 23.2 IN THE MANUFACTURING AWARD

10. In order to understand Ai Group's position in respect of the current scope of the Small Business Redundancy Entitlement it is important to consider the development of the coverage provision of the Manufacturing Award and the industry-specific redundancy clause now in clause 23.2.
11. Many of the areas of coverage which the Union Parties consider should attract the Small Business Redundancy Entitlement were imported into the coverage clause of the Manufacturing Award to reflect the scope of pre-modern awards that did not contain redundancy entitlements for employees of small businesses. Many of these areas of coverage were included within the coverage clause in early exposure drafts and joint party drafts of the Manufacturing Award, prior to the inclusion of the Small Business Redundancy Scheme to preserve entitlements previously available under the FINA.
12. In the Part 10A Award Modernisation Process, the coverage of the Manufacturing Award was developed over the course of the Priority Stage and Stage 2.

The Priority Stage of the Award Modernisation Process

13. After extensive negotiations, Ai Group and the Metal Trades Federation of Unions (at that time consisting of the AMWU, AWU, CEPU, CFMEU, NUW and LHMU) filed a [Joint Draft Award](#) on 1 August 2008.
14. The coverage clause of the Joint Draft Award included the following areas of coverage of relevance to metal furniture and plastic furniture (see pages 20 to 25): (emphasis added)

1.3.1 The metal working and engineering and fabricating industries.....

42. Metal furniture manufacturing and repairing;

1.3.2 The **rubber, plastic and cabling industry**....

7. articles or goods containing a thermoplastic and/or a thermosetting plastic;
8. articles or goods in the manufacture of which a thermoplastic and/or a thermosetting plastic is used; or

10. plastics and any substitutes for plastics, synthetic rubbers and rubbers, thermoplastics and thermo-setting plastics, cellulose plastics.....

15. Ai Group and the MTFU filed a [Further Joint Draft Award](#) on 22 August 2008 with a simpler coverage clause, which contained the following areas of coverage of relevance to metal furniture and plastic furniture (see pages 18 to 21): (emphasis added)

1.3.1 Subject to the exemptions in Schedule 1, the **Manufacturing and Associated Industries** means the following industries, parts of industries and occupations:

- 1.3.1(a)** The manufacture, making, assembly, processing, treatment, fabrication and preparation of:
- (i) The products, structures, articles, parts and components set out in 1.3.2; and
 - (ii) The materials and substances set out in 1.3.2; and
 - (iii) Any products, structures, articles, parts or components made from, or containing, the materials or substances set out in 1.3.2.

1.3.2 For the purposes of 1.3.1(a), the products, structures, articles, parts, components, materials and substances include:

1. All products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and non-ferrous metal.

13. Stoves, ovens, steam cookers, refrigerators, kitchenware, household utensils, irons, radiators, heaters, metal furniture, metallic toys, sporting goods, perambulators, window frames, agricultural

implements, safes, strong rooms, wet batteries, dry batteries, metallic containers, canisters, drums, lifts, elevators, air-conditioning plant / equipment, bridges, girders, gates, fences, frames and engine packing.

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19. All products made from or containing plastic or rubber, or substitutes for plastic or rubber.
16. At the conclusion of Stage 1 of the Award Modernisation proceedings, a version of the Manufacturing Award was published on 19 December 2008: [Modern award—Manufacturing and Associated Industries and Occupations Award 2010 \(PDF version\)](#). The version was published in conjunction with the Priority Stage Award Modernisation Decision.⁹
17. The coverage provisions of the Award included articles made from metals and plastic as well as various substitutes thereof. The Award covered furnishings made from these materials as is clear from the following extract from the coverage provision (emphasis added):

4.2 Manufacturing and Associated Industries and Occupations means:

- (a) the following industries and parts of industries:
- (i) the manufacture, making, assembly, processing, treatment, fabrication and preparation of:
- the products, structures, articles, parts or components set out in clause 4.3; or
 - the materials or substances set out in clause 4.3; or
 - any products, structures, articles, parts or components made from, or containing, the materials or substances set out in clause 4.3.

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4.3 For the purposes of clause 4.2(a)(i), the products, structures, articles, parts, components, materials and substances include:

- (a) all products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and non-ferrous metal.

⁹ [2008] AIRCFB 1000.

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- (m) stoves, ovens, steam cookers, refrigerators, kitchenware, household utensils, irons, radiators, heaters, metal furniture, metallic toys, sporting goods, perambulators, window frames, agricultural implements, safes, strong rooms, wet batteries, dry batteries, metallic containers, canisters, drums, lifts, elevators, air-conditioning plant/equipment, bridges, girders, gates, fences, frames and engine packing.

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- (s) all products made from or containing plastic or rubber, or substitutes for plastic or rubber

18. The Manufacturing Award replaced approximately 160 pre-modern awards and NAPSAs. The two pre-modern awards that covered by far the largest number of employees were the Metals Award 1998 and the RPC Award 1998. The wages, classifications and conditions in the Manufacturing Award were largely based on the Metals Award 1998.
19. The list of industries in Schedule A of the Metals Award 1998 included 'metal furniture manufacturing and repairing'.¹⁰
20. The RPC Award 1998 covered the manufacture of:¹¹
- articles or goods containing a thermoplastic and/or a thermosetting plastic;
 - articles or goods in the manufacture of which a thermoplastic and/or a thermosetting plastic is used.

¹⁰ *Metal, Engineering and Associated Industries Award 1998*, Sch A, item 42.

¹¹ *Rubber, Plastic and Cable Making Industry - General - Award 1998*, clause 6.1.7 and 6.1.8.

21. In the Priority Stage Award Modernisation Decision,¹² the AIRC Full Bench said:
(emphasis added)

Metal & associated industries, glue & gelatine, rubber, plastic & cabling, vehicle manufacturing

[177] The terms of the modern *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing award) are largely those agreed between AiGroup and the Metal Trades Federation of Unions (MTFU). The Manufacturing award, however, is one which is likely to be subject to considerable variation as award modernisation progresses and consideration is given to it including other relevant industries and occupations.

[178] The coverage of the Manufacturing award, for example, is likely to be refined as award modernisation progresses. As a result, even though it is agreed between AiGroup, the MTFU and others that employees of electrical contractors bound by an electrical contracting award or NAPSA and, in NSW, the installation of power plants in power stations and/or substations should be excluded from the coverage of the Manufacturing award, these exclusions have not been included in the Manufacturing award at this stage pending the consideration of the modern award coverage of industries being dealt with in later stages of award modernisation.

[179] While there is considerable agreement about the terms of the Manufacturing award, there are some differences. Some terms of difference between the relevant unions and the employers, such as those concerning casual conversion to full-time or part-time employment, small business redundancy, accident pay, cashing-out of annual leave and evidence in respect of personal/carer's leave, have been dealt with earlier in this decision and the reasons for preferring one position over another explained.

22. As referred to in paragraph [179] of the Priority Stage Decision, the MTFU argued for a small business redundancy pay provision in the Manufacturing Award during the Priority Stage of the Award Modernisation Process. The provision sought by the MTFU is set out on pages 38 and 39 of the [Further Joint Draft Award](#) of 22 August 2008.
23. In rejecting the claim by the MTFU, the Australian Industrial Relations Commission (**AIRC**) made the following relevant comments in its Priority Stage Decision:¹³

¹² [2008] AIRCFB 1000.

¹³ [2008] AIRCFB 1000.

[59] We have decided to deal with this matter by reference to the arbitral and legislative history of redundancy pay for employees of small business. The Commission's *Termination, Change and Redundancy* decisions of 1984 are the source of the general standard of redundancy pay in the federal jurisdiction. In the second of those decisions the Commission provided an exemption for small business employers from the obligation to pay redundancy pay. Although the decision was of a test case nature, the small business exemption was not included in all federal awards. It was specifically not included in some awards because of the nature of the industry covered by the award. The award governing the clothing industry was one such award. In the *Redundancy Case 2004* a Full Bench of the Commission considered applications to review the test case standard established in 1984. The Bench increased the existing severance pay scale and partially removed the small business exemption. Pursuant to the decision small business employees were entitled to redundancy pay but the scale of payments was lower than that applying to other employees. The Parliament subsequently enacted legislation to nullify the removal of the small business exemption in the *Redundancy Case 2004*. Thereafter the position which had been introduced in 1984 continued to apply. The terms of the NES maintain the exemption for small business.

[60] 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. We shall make an exception for federal awards and industries in which there was no small business exemption prior to the *Redundancy Case 2004*. Among the priority modern awards the only award in this category is the Textile industry award. The terms of the Textile industry award will include the small business redundancy pay provisions previously in the *Clothing Trades Award 1999*. The provision will only apply to the clothing industry.

24. Consistent with the Priority Stage Decision of the AIRC, it is essential that the small business redundancy pay exemption is maintained for employers that were entitled to the exemption at the time when the NES came into operation. To impose redundancy pay obligations on these employers would exclude a term of the NES contrary to s.55 of the Fair Work Act 2009 (**FW Act**).

Stage 2 of the Award Modernisation Process

25. Further consideration of the ‘furnishing industry’ occurred in Stage 2 of the Award Modernisation process. In its 3 April 2009 Decision, the Full Bench of the Australian Industrial Relations Commission (**AIRC**) said (emphasis added):¹⁴

Manufacturing group

[164] The coverage clause of the Manufacturing Modern Award, one of the priority modern awards, has been varied to include all or a significant part of the brush and broom making, chemical, clay and ceramics, furnishing, glass, gypsum and plasterboard manufacturing, insulation materials manufacturing, paint manufacturing, rope, cordage and thread and saddlery, leather and canvas industries. Electrical contractors and glazing contractors have been excluded from the coverage of the award as they are covered by other awards. The production of polypropylene/polyethylene has also been excluded from the coverage of the award pending consideration of the oil and gas industry in Stage 3. The coverage clause of the Manufacturing Modern Award may require further variation once the coverage of other modern awards, in particular that to cover the timber industry, is known.

[165] 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). They reflect the small employer redundancy provisions of these two awards. 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. A number of allowances which are significant in the industries added to the award have also been included.

26. The Manufacturing Award was varied at the conclusion of Stage 2 of the Award Modernisation Process to extend the coverage to various other industries. The varied award was published in conjunction with the Stage 2 Award

¹⁴ [2009] AIRCFB 345.

Modernisation Decision on 3 April 2009:¹⁵ [Modern award—Manufacturing and Associated Industries and Occupations Award 2010 \(PDF version\)](#)

27. Subclause 4.3 of the coverage clause of the Manufacturing Award at the conclusion of Stage 2 of the Award Modernisation Process was as follows, with changes marked from the version of the coverage clause in the Award made at the conclusion of the Priority Stage:

- 4.3** For the purposes of clause 4.2(a)(i), the products, structures, articles, parts, components, materials and substances include:
- (a) all products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and non-ferrous metal.
 - (b) melting and smelting of metals.
 - (c) articles made from wire and the drawing and insulation of wire.
 - (d) industrial gases.
 - (e) ships, boats, barges and marine vessels of all descriptions, and components.
 - (f) aircraft and components.
 - (g) locomotives, rolling stock, railway line and components.
 - (h) motor engines, motor cars, motor cycles and other motor driven vehicles and components.
 - (i) industrial machinery.
 - (j) tools, saws, dies, gauges and moulds.
 - (k) electrical, electronic, telecommunications, lighting, radio, television and X-ray products, equipment, apparatus, installations, appliances, devices and signs.
 - (l) recording, measuring and controlling devices for electricity, fluids, gases, heat, temperature, pressure, time, weight, mass, etc.
 - (m) stoves, ovens, steam cookers, refrigerators, kitchenware, household utensils, irons, radiators, heaters, ~~metal~~ furniture, ~~metallie~~ toys, sporting goods, perambulators, window frames, agricultural implements, safes, strong rooms, wet batteries, dry batteries, metallic containers, canisters,

¹⁵ [2009] AIRCFB 345.

drums, lifts, elevators, air-conditioning plant/equipment, bridges, girders, gates, fences, frames and engine packing, brushes and brooms.

- (n) insulation materials and articles.
- (o) clay and ceramic articles, including but not limited to bricks, refractory bricks, terra cotta products, tiles, pipes, pottery, tableware and flower pots.
- (p) jewellery, watches and clocks (including cases), badges, name-plates, precious metal products and precious stones.
- (q) ~~spectacles, contact lenses and optical instruments~~ medical and optical instruments, appliances and equipment, including but not limited to spectacles, contact lenses and artificial limbs.
- (r) brake linings, disc pads, clutch facings and other friction materials for automotive or other industrial applications.
- (s) all products made from or containing plastic or rubber, or substitutes for plastic or rubber.
- (t) synthetic resins, powders, tablets, etc, used in the plastics industry.
- (u) duperite, bakelite, casein or similar compositions, synthetic rubberlikes, guttaperchalikes, rubberlike plastics, nitrocellulose, celluloid, leathercloth and elastomers.
- (v) thermoplastics and thermo-setting plastics, cellulose plastics, perspex, cellulose acetate butyrate, polymethyl methacrylate, nylon 66, polyethylene terephthalate, acronitrile-butadiene-styrene, epoxy resins, laminates of all descriptions, polymers of all descriptions and all long chain organic materials generally known as plastics.
- (w) transmission cables which encompasses power and communication cables (including single strand) whether insulated or not.
- (x) abrasive wheels and stones, bounded abrasives, articles or goods containing a thermoplastic and/or a thermosetting plastic and allied products.
- (y) all types of tapes including pressure sensitive tapes, cellulose adhesive tape, masking, cloth, metal, paper, plastic tapes in rolls or sheet form, films, papers or cloth surface coated with abrasives, and abrasive coated materials and abrasive coated and/or uncoated articles of all descriptions, impregnated and/or coated or uncoated films, papers or cloths, plastic ribbons, adhesives, laminates, sealers, coatings and elastic cements, and associated machinery and/or dispensing equipment using any of the above products.
- (z) gelatine, glue, agar, and their by-products, dried residues, filter earth dextrine and adhesives of all descriptions, and other like materials.
- (aa) artificial fertilizers, chemicals, alkalis and all processes involving chemical synthesis.

- (bb) paint, decorative or protective surface coatings or coverings and associated products.
- (cc) rope, cordage, twine, yarn, thread and braid made from jute or flax and/or any fibre or synthetic fibre in substitution therefore and all products made from such rope, cordage, twine, yarn, thread and braid.
- (dd) skins, pelts, leather, canvas, fibre, vulcanised fibre, webbing, bark and other tanning extracts and all substitutes and all products made therefrom, including but not limited to saddles, harnesses, whips, machine belting, sporting goods, travel goods, handbags, wallets, belts, gloves, hats, sails, tents, tarpaulins, umbrellas, parachutes, car seats, gaskets, beach shelters, deck chairs, cargo nets, shipsgear and life jackets.
- (ee) all types of flat glass and fibreglass, and all substitutes, and all products made therefrom including but not limited to flint ware, bottles, containers, jars, bricks, light bulbs, opal ware, pyrex ware, translucent reinforced sheeting, tubing, rods and lamp shades.
- (ff) gypsum, plasterboard and similar materials and all products made therefrom.
- (gg) furnishings made from cane, bamboo and other like materials.
- (hh) upholstery, furnishing drapery, blinds, screens, awnings, mattresses and bedding.
- (ii) flooring products made from other than wood.
- (jj) picture frames made from other than wood.
- (kk) musical instruments made from other than wood.

28. With regard to the furnishing industry, it can be seen from the above that clause 4.3(m) of the Manufacturing Award was varied to refer to furniture generally as opposed to 'metal furniture'. Also, the following subclauses were added:

- (gg)** furnishings made from cane, bamboo and other like materials.
- (hh)** upholstery, furnishing drapery, blinds, screens, awnings, mattresses and bedding.
- (ii)** flooring products made from other than wood.
- (jj)** picture frames made from other than wood.
- (kk)** musical instruments made from other than wood.

29. It is apparent from the above that:

- The Manufacturing Award's coverage of furnishings made from metal, plastic and like materials is not derived from the FINA;
- The articles referred to in clauses 4.10(gg) to (kk) above were principally derived from the FINA. These clauses are numbered 4.10(hh) to (ll) in the current award and 4.9(hh) to (ll) in the version of the award that will operate from 29 May 2020.

The Union Parties' Approach

30. As noted in the parties' earlier Joint Report, Ai Group submits that the appropriate approach is to examine the current coverage provisions in the Manufacturing Award and determine which parts of these existing provisions were derived from the FINA. By contrast the Unions' approach is to consider how relevant categories of work in the FINA could be reflected in the Manufacturing Award.

31. The Unions' Approach pays insufficient regard to the coverage of the Manufacturing Award, including those elements of coverage that were derived from awards other than the FINA.

32. The Unions' proposed clause would extend the Small Business Redundancy Scheme to a large number of employers who were never covered by the FINA are not currently covered by the Scheme. This would exclude the NES for the reasons explained by the AIRC Full Bench in the Priority Stage Award Modernisation.¹⁶

¹⁶ [2008] AIRCFB 1000, [59]-[60].

Ai Group's proposal

33. In the Joint Report, Ai Group proposed that the coverage of the Small Business Redundancy Scheme could be more clearly outlined by varying clause 24.3(a) of the Manufacturing Award in the following manner:

23.4 Redundancy pay for employee of furnishing small business employer

~~(a) Clause 23.4 applies to an employee of a small business 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 for an employee who is excluded from redundancy pay under the [NES](#) by section 121(1)(a), section 123(1) or section 123(4)(a) of the [Act](#).~~

(a) Clause 23.4 applies to an employee of a small business employer who is predominantly engaged in the manufacture or repair of:

- (i) furnishings made from cane, bamboo and other like materials;
- (ii) upholstery, furnishing drapery, blinds, screens, awnings, mattresses and bedding;
- (iii) flooring products made from other than wood;
- (iv) picture frames made from other than wood;
- (v) musical instruments made from other than wood;

except where any of the above items are made out of metal, plastic, rubber or any like material or the employee is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1), section 123(4)(a) or section 123(4)(d) of the Act.

34. At paragraph [8] of its 23 April 2020 Submission, the Union Parties asserted that Ai Group's proposed variation would significantly reduce the application of the Small Business Redundancy Scheme, as it "does not include parts of the coverage of the pre-modern *Furnishing Industry National Award 2003* and seeks to add a further limitation by the additional words 'except where any of the above items are made out of metal, plastic, rubber or any like material'".
35. Ai Group's rationale for inserting the words 'except where any of the above items are made out of metal, plastic, rubber or any like material' has been explained. Ai Group's reasons for considering it inappropriate to directly restate

each subclause of the FINA in clause 23.4 of the Manufacturing Award have also been outlined.

36. The Unions' submission highlights a number of provisions from clauses 6.1 – 6.6 of the FINA which the Union Parties allege have been inappropriately excluded from Ai Group's proposed provision. Ai Group has considered each of these and provided a response below. With respect to the articles listed in clauses 6.1.1 and 6.1.2, these have been addressed earlier in these submissions, with the exception of 'clock cases'.

Clause 6.1.1 – Clock cases

37. Clocks (including cases) are included in clause 4.10(p) of the Manufacturing Award. These words are not derived from the FINA.
38. This article was listed in clause 4.3(p) of the version of the Manufacturing Award made by the Commission at the conclusion of Stage 1 of the Award Modernisation Process and prior to the incorporation of elements of the FINA into the Manufacturing Award in Stage 2.
39. Inclusion of 'clock cases' in the Manufacturing Award is derived from Schedule A of the Metals Award which referred to "Making, manufacture, installation, maintenance and repair of watches and clocks, including cases". As such, the Small Business Redundancy Scheme should not be extended to encompass work involving 'clock cases'.

Clause 6.1.3 - Upholstering on ~~wood~~, metal or any substitute material

40. To the extent that these matters are covered by the Manufacturing Award, Ai Group considers that our proposed clause appropriately addresses this work through the coverage of those predominantly engaged in the manufacture or repair of upholstery.

41. In Stage 2 of the Award Modernisation Process, clause 4.3(hh) (since renumbered as clause 4.10(ii)) was included when the Award was varied to accommodate a number of industries including aspects of the furnishing industry covered by the FINA.

Clause 6.1.16 – Manufacturing, assembling or repairing wire mattresses

42. Mattresses and bedding have been included in Ai Group’s proposed clause. This is intended to reflect current 4.10(ii) of the Award, the wording of which was inserted in Stage 2 of the Award modernisation process.
43. However, the Metals Award 1998 included within Schedule A the manufacture of any article or articles from metal wire. This is reflected in clause 4.10(c) of the Manufacturing Award. As such, work on wire mattresses should be excluded from the Small Business Redundancy Scheme.

Clause 6.1.17 - manufacturing or repairing mattresses or bedding

44. With the exception of wire mattresses, and mattresses made from rubber, foam and plastic, Ai Group accepts that the manufacture of mattresses is covered by the Small Business Redundancy Entitlement.
45. The RPC Award 1998 covered the manufacturing of mattresses made out of rubber and foam.

Clause 6.1.20 - Preparing or sealing floors (other than wood) where such preparing or sealing is necessary to ensure the correct laying of the required floor coverings

46. Ai Group considers that the preparing or sealing of floors is typically part of a manufacture, repair or installation process and Ai Group’s proposed clause covers these aspects.

Clause 6.1.22 - Making, fixing or repairing draperies, blinds, awnings or screens (including venetian and/or wire blinds) but not including persons working as tentmakers

47. Ai Group has ensured that much of this clause is reflected in the coverage of the Small Business Redundancy Scheme in our proposed variation which reproduces the words in clause 4.10(ii) of the Manufacturing Award.
48. However, for reasons outlined earlier in these submissions, Ai Group opposes the assertion that the Scheme currently encompasses blinds made of metal or plastic.
49. Although, 'lampshades' were not listed in clause 6.1.22 of the FINA, an amended version of this sub-clause has been proposed for inclusion by the Union Parties as clause 23.4(iv) which includes reference to making, fixing or repairing 'lampshades'. Ai Group opposes including these categories of work amongst those which would attract the Small Business Redundancy Scheme.
50. The only reference to 'lampshades' in the coverage provision of the Manufacturing Award is at clause 4.10(ff) which deals with products made of flat glass, fibreglass, all substitutes and all products made therefrom. The first iteration of the Manufacturing Award which was issued at the end of Stage 1 of the Award Modernisation Proceedings did not contain this provision.¹⁷
51. In a [submission of 31 October 2008](#) during Stage 2 of the Award Modernisation Process, Ai Group proposed the following sub-clause for inclusion in the coverage provision to ensure certain elements of the glass manufacturing industry were covered (see paragraphs 112 to 116 on pages 42 and 43 of the submission, and Annexure F on pages 238 to 242 of the PDF file):¹⁸ (emphasis added)

¹⁷ AM2008/5, *Manufacturing and Associated Industries and Occupations Award 2010* (19 December 2008).

¹⁸ AM2008/19, Ai Group (Submission – Draft Manufacturing Award), 31 October 2009, cl. 4.4(ae).

- (ae) all types of flat glass and fibreglass, and all substitutes, and all products made therefrom including but not limited to flint ware, bottles, containers, jars, bricks, light bulbs, opal ware, pyrex ware, translucent reinforced sheeting, tubing, rods and lamp shades.

(Incorporates the scope of the Glass Industry – Glass Production – Award)

52. The above note accompanying the proposed provision states that it was intended to incorporate the scope of the *Glass Industry – Glass Production – Award*. Nothing suggests that this provision was in any way derived from the FINA.
53. As such, Ai Group opposes any reference to the making, fixing or repairing of lampshades being included in the scope of works which would attract the operation of the Small Business Redundancy Scheme.

Clause 6.1.24 - Making or repairing picture frames (including art picture frames) or framed mirrors

54. Frames were already listed amongst the articles relevant to coverage in clause 4.3(m) of the Manufacturing Award as originally made in Stage 1 of the Award Modernisation proceedings.¹⁹ This included articles manufactured from metal, plastic, rubber or any like material.
55. Following the incorporation of elements of the furnishing industry in Stage 2 of the Award Modernisation process, picture frames made from other than wood were also included in the coverage provision under clause 4.3(jj) (since renumbered as clause 4.10(kk)). As this is the only type of frame which was added to the Award when the coverage of the FINA was partially incorporated into the Manufacturing Award, Ai Group considers that the Small Business Redundancy Scheme should not be extended to articles outside the scope of this provision. Moreover, for reasons already outlined in these submissions, frames made of metal or plastic or any like material are also excluded.

¹⁹ *Manufacturing and Associated Industries and Occupations Award 2010* (19 December 2008).

Clause 6.1.25 - Wholly or partly preparing, repairing or manufacturing refrigerators

56. Ai Group acknowledges that preparing, repairing and manufacture of refrigerators was listed as work covered by the FINA but Ai Group has never heard of a business engaged in this type of work that applied the FINA. Ai Group was a respondent to the FINA. It would be inappropriate to extend the Small Business Redundancy Entitlement to such work.
57. Schedule A of the Metals Award 1998 listed amongst the industries covered by that Award 'refrigerator manufacturing, maintaining and repairing'.²⁰
58. Refrigerators were listed amongst the articles in cl. 4.3(m) of the version of the Manufacturing Award issued at the conclusion of Stage 1 of the Award Modernisation proceedings. No additional reference to refrigerators was included in the Award as part of Stage 2 when the FINA was considered.
59. To the extent that there was overlap between the FINA and the Metals Award as regards working with refrigerators, Ai Group contends that the relevant provisions in the Manufacturing Award which pertain to this work were derived from the Metals Award 1998. As such, the Small Business Redundancy Entitlement should not extend to such work. If preparing, repairing or manufacturing refrigerators were to be included in the Scheme, the entitlement would be extended to employers who were covered by the Metals Award 1998, contrary to the intention of the AIRC in preserving the entitlement only in respect of work referred to in the coverage provision of the FINA.²¹

²⁰ *Metal, Engineering and Associated Industries Award 1998*, Sch A [39].

²¹ [2009] AIRCFB 345, [165].

Clause 6.2.6 - Optical work or glass, excepting spectacle lenses or frames

60. The Union Parties have proposed that the work referred to in clause 6.2.6 of the FINA be included within the Small Business Redundancy Scheme in the Manufacturing Award. This proposal should be rejected.
61. Prior to the consideration of the 'furnishing industry' in Stage 2 of the Award Modernisation proceedings, the Manufacturing Award included within its coverage provision reference to 'spectacles, contact lenses and optical instruments' at clause 4.3(q). These words largely reflected the Joint Ai Group / MTFU Draft Award submitted to the AIRC on 1 August 2008 which included within the coverage provision 'Manufacture of spectacles, contact lenses and optical instruments'. Next to this sub-clause was inserted a note indicating that these elements were included within the coverage provision on account of the intention that the award superseded the *NSW Mechanical Opticians (State) Award*.
62. Clause 32 of the *Mechanical (Opticians) State Award* stated that it applied "to persons employed in the manufacture or repair of spectacles, contact lenses and optical instruments and employees of mechanical opticians in the State..".²² Schedule 2 in the Joint Draft Award listed this NAPSA as one of those which the Manufacturing Award was to supersede.²³
63. Clause 4.10(q) of the current award states:
- (q)** medical and optical instruments, appliances and equipment, including but not limited to spectacles, contact lenses and artificial limbs.
64. Clause 4.10(q) took its current wording through Stage 2 of the Award Modernisation Proceedings. It reflects a [draft coverage clause provided to the Commission by Ai Group on 31 October 2008](#) (see paragraphs 112 to 116 on pages 42 and 43 of the submission, and Annexure F on pages 238 to 242 of

²² AN120332 – *Mechanical Opticians (State) Award*, cl. 32

²³ AM2008/5, Ai Group (Draft Manufacturing Award), 1 August 2008, Schedule 2.

the PDF file). The proposed coverage clause was marked up to show variations proposed to the coverage provision which had been settled in the Priority Stage. The redrafted coverage clause was developed following extensive discussions and negotiations between Ai Group and the MTFU (see paragraphs 113-115 of [Ai Group's submission of 31 October 2008](#) and paragraph 403 on page 108 of [Ai Group's submission of 13 February 2009](#)). The relevant subclause is (see page 241 of the PDF file for Ai Group's submission of 31 October 2008):

(q) Medical and optical instruments, appliances and equipment, including but not limited to spectacles, contact lenses and artificial limbs.

(Incorporates aspects of the scope of the existing Metals Industry Award and the Saddlery, Leather, Canvas and Plastic Material Workers Award).

65. It is apparent that the Manufacturing Award's coverage of the articles listed in clause 4.10(q) had nothing to do with the coverage of the FINA. This coverage was instead derived from other awards.

Clause 6.3 - Musical instruments

6.3.1 Manufacturing or repairing instruments or parts thereof other than electronic organs;

6.3.2 tuning or servicing musical instruments (including electronic organs);

6.3.3 building, repairing, servicing or tuning pipe-organs.

66. Reference to 'Musical instruments made from other than wood' was first included in clause 4.3(kk) of the Manufacturing Award in Stage 2 of the Award Modernisation proceedings.²⁴ As such, it is appropriate for employees undertaking relevant work pertaining to these articles to be included within the Small Business Redundancy Scheme.

67. This is achieved through Ai Group's proposed clause.

²⁴ PR988376.

Clause 6.5.1(a) - Baby carriages, dolls' carriages, mobile chairs or parts thereof

68. There are no explicit references to baby carriages, dolls' carriages, mobile chairs or parts thereof in the Manufacturing Award.
69. The manufacture and repair of perambulators was covered by the Metals Award 1998.²⁵ Such work was also included in the version of the Manufacturing Award made at the conclusion of the Priority Stage of the Award Modernisation Process at clause 4.3(m) (since renumbered as clause 4.10(m)).²⁶ No further references were made to baby carriages or perambulators as a result of the further consideration of the FINA in Stage 2. For this reason, it is inappropriate to extend the coverage of the Small Business Redundancy Scheme to work involving baby carriages.
70. Work involving dolls' carriages is covered by the Manufacturing Award through its coverage of 'toys'. Also, such articles are typically made of metal or plastic and were covered by the Metals Award 1998 and the RPC Award 1998.²⁷
71. Work involving 'mobile chairs' is not directly referred to in the coverage provision of the Manufacturing Award. However, to the extent that such products may be considered 'furniture', Ai Group considers that, for reasons outlined earlier in these submissions, no variation is necessary to the proposed amendment in Annexure A on this account.

²⁵ *Metal, Engineering and Associated Industries Award 1998*, Sch A [40].

²⁶ *Manufacturing and Associated Industries and Occupations Award 2010* (19 December 2008), cl. 4.3(m).

²⁷ *Metal, Engineering and Associated Industries Award 1998*, Sch A [44]; *Rubber, Plastic and Cable Making Industry - General - Award 1998*, cl. 6.1.2, 6.1.7, 6.1.8 and 6.1.9.

The principal purpose of the work

72. Ai Group’s proposed amendment in Annexure A addresses a concern that the definition of a ‘small furnishing employer’ in the Award could potentially be interpreted to encompass employees who perform an insignificant amount of work which was in clauses 6.1 to 6.6 of the FINA.

73. The current Manufacturing Award limits the application of the Small Business Redundancy Scheme to:²⁸

...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...

74. The Union Parties’ proposed variation suggests that the Small Business Redundancy Scheme could potentially apply to an employee of a small business employer who performs “any” of the work listed in proposed clause 23.4, regardless of what proportion that work makes up of the duties that an employee undertakes or the significance of that work.

75. It would be absurd to apply the Scheme to employees who perform the relevant work for a minority of their time or where carrying out this work is not the principal purpose for the employment of the employee. An appropriate test to apply would be the longstanding ‘principle purpose test’. In determining whether an employee is engaged under a classification within a specific modern award, the Commission typically assesses the nature of the work and ascertains the principal purpose for which the employee was employed. The principal purpose test was summarised in *Carpenter v Corona Manufacturing*:²⁹

In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed. In this case, such an examination demonstrates that the principal

²⁸ *Manufacturing and Associated Industries and Occupations Award 2010*, cl. 23.2(b).

²⁹ *Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387, [9].

purpose for which the appellant was employed was that of a manager. As such, he was not “employed in the process, trade, business or occupation of ... soliciting orders, obtaining sales leads or appointments or otherwise promoting sales for articles, wares, merchandise or materials” and was not, therefore, covered by the award.

76. Ai Group’s proposed wording for clause 23.4(a) incorporates the ‘principal purpose’ concept.

NES inconsistency

77. As discussed earlier in this submission, in the Priority Stage Award Modernisation Decision the AIRC Full Bench held that to impose a small business redundancy pay obligation on employers that did not have such an obligation at that time would exclude a term of the NES. Accordingly, this would be contrary to s.55 of the FW Act.³⁰
78. Any award provision that contravenes the NES is of no effect (s.56 of the FW Act).
79. Therefore, it is appropriate that clause 23.4(a) be worded in a manner that avoids imposing redundancy pay obligations on any employers that did not have those obligations on 31 December 2009. To the extent that the existing provision could be interpreted as having a wider application, such wider application would have no effect as a result of s.56 of the Act.
80. Ai Group’s proposed wording for clause 23.4(a) is set out in Annexure A.

³⁰ [2008] AIRCFB 1000, [59]-[60].

Annexure A

Ai Group's proposed amendments to the clause proposed by the Full Bench at paragraph [49] of its 11 December 2018 Decision regarding the Plain Language Redrafting of Redundancy Clauses [2018] FWCFB 7447

23.4 Redundancy pay for employee of furnishing small business employer

~~(a) Clause 23.4 applies to an employee of a small business 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 for an employee who is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.~~

(a) Clause 23.4 applies to an employee of a small business employer covered by this Award in respect of employees for whom the principle purpose of their engagement is the manufacture, repair or installation of:

- (i) furnishings made from cane, bamboo and other like materials;
- (ii) upholstery, furnishing drapery, blinds, screens, awnings, mattresses and bedding;
- (iii) flooring products made from other than wood;
- (iv) picture frames made from other than wood;
- (v) musical instruments made from other than wood;

except where any of the above items are made out of metal, plastic, rubber, foam or any like material or the employee is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1), section 123(4)(a) or section 123(4)(d) of the Act.

(b) In paragraph (a) an employee is **an employee of a small business employer** if, immediately before the time the employee's employment is terminated, or at the time when the employee is given notice of termination as described in section 117(1) of the Act (whichever happens first), the employer is a small business employer as defined by section 23 of the Act.

(c) Subject to paragraphs (f) and (g), an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- (i) at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (ii) because of the insolvency or bankruptcy of the employer.
- (d) The amount of the redundancy pay in paragraph (c) equals the total amount payable to the employee for the redundancy pay period specified in column 2 of **Table 2—Redundancy pay period** according to the period of continuous service of the employee specified in column 1, worked out at the employee’s base rate of pay for his or her ordinary hours of work.

Table 2—Redundancy pay period

Column 1 Employee’s period of continuous service with the employer on termination	Column 2 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

- (e) In paragraph (d) **continuous service** has the same meaning as in section 119 of the Act.
- (f) The terms of section 120 of the Act apply as if section 120 referred to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 23.4.

- (g) The terms of section 122 of the Act apply as if section 122 referred to ‘clause 23.4’ rather than ‘this Subdivision’ and to ‘paragraph (c)’ rather than ‘section 119’.

NOTE: Under section 122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 23.4.