Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

Airline Operations – Ground Staff Award 2010
(AM2018/15)

1 March 2019

4 YEARLY REVIEW OF MODERN AWARDS
AM2018/15 AIRLINE OPERATIONS – GROUND STAFF AWARD 2010

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to submissions and evidence filed by the Transport Workers' Union (**TWU**), the Australian Workers' Union (**AWU**) and the Australian Manufacturing Workers' Union (**AMWU**) (collectively, **Unions**) in response to amended directions issued by the Fair Work Commission (**Commission**) on 13 December 2018.

2. The Unions' each propose amendments to clause 32.1 of the *Airline Operations – Ground Staff Award 2010* (**Airline Operations Award** or **Award**), which would have the effect of increasing the rate payable to non-continuous shiftworkers during overtime, with associated variations sought as to the circumstances in which work constitutes overtime.

3. Ai Group opposes the variations proposed by the Unions. The provisions proposed by the Unions are not necessary to ensure that the Award achieves the modern awards objective.

2. THE STATUTORY FRAMEWORK

4. The Unions' claims are being pursued in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

5. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

6. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

7. We later address each element of the modern awards objective with reference to the Unions' claims for the purposes of establishing that, having regard to s.138 of the FW Act, the claims should not be granted.

3. THE COMMISSION'S APPROACH TO THE REVIEW

8. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*1 provides the framework within which the Review is to proceed.

9. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** 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.[2]

10. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[3]

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

11. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

12. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[5]

13. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

14. Accordingly, the Preliminary Jurisdictional Issues Decision establishes the following key threshold principles:

(a) A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

(b) The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

(c) An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

(d) Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

15. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> **[8]** 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.[6]

16. The Unions' claims conflict with the principles in the Preliminary Jurisdictional Issues Decision. Further, they have not discharged the evidentiary burden described in the above decision. Accordingly, their claims should be rejected.

[6] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

4. THE UNIONS' CLAIMS

17. As earlier identified, the Unions' claims relate to the rate payable to shiftworkers during the performance of overtime, with associated variations sought as to the circumstances in which work constitutes overtime.

18. Clause 32.1 of the Award prescribes the rates payable for overtime worked by day workers, continuous shiftworkers and non-continuous shiftworkers. It reads as follows: (emphasis added)

> **32.1 Payment for working overtime**
>
> **(a)** All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time.
>
> **(b)** For the purposes of this clause, ordinary hours means the hours worked in an enterprise, fixed in accordance with clause 28.2(c).
>
> **(c)** The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week.
>
> **(d)** In computing overtime each day's work stands alone.

19. The term 'continuous shiftworker' is not defined by the Award. However, clause 28.3(a) defines 'continuous shiftwork' as follows:

> **Continuous shiftwork** means work carried on with consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days without interruption except for breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer.

20. Ai Group understands the reference to 'continuous shiftworkers' in clause 32.1(a) of the Award to be to employees performing 'continuous shiftwork' as defined by clause 28.3(a).

THE TWU's CLAIM

21. The variations proposed by the TWU to the extant clause 32.1 are marked below:

> **32.1 Payment for working overtime**
>
> **(a)** Day work - All work done outside ordinary hours ~~on any day or shift~~ (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. ~~For a continuous shiftworker the rate for working overtime is double time.~~
>
> **(b)** Shift worker – All time worked in excess of or outside ordinary hours or on a shift other than a rostered shift must be paid double time.
>
> **(~~b~~c)** For the purposes of this clause, **ordinary hours** means the hours worked in an enterprise, fixed in accordance with clause 28.2(c) for a dayworker and 28.3 and 30.2 for a shiftworker.
>
> **(~~c~~d)** The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week.
>
> **(~~d~~e)** In computing overtime each day's work stands alone.

22. The variations would have the following consequences:

(a) Increase the overtime rate payable to non-continuous shiftworkers such that they would be entitled to payment at double time for all overtime worked.

(b) Create a new entitlement to payment at double time where a shiftworker has had less than 48 hours' notice of the shift.

(c) Potentially re-characterise ordinary hours of work performed by shiftworkers as a result of a change to their roster where they have not been given at least two days' notice of the relevant change (in accordance with clause 30.2(c)) as overtime. This in turn has various other potential implications under the Award, the NES and superannuation entitlements.

23. Ai Group notes that no justification for the consequences outlined at paragraphs (b) and (c) above is proffered by the TWU. The union has not filed any submissions or evidence that provide any basis for those variations. There is no identifiable warrant for extending the circumstances in which overtime rates are payable to shiftworkers or altering the characterisation of certain time worked from ordinary hours to overtime. Accordingly, these elements of the TWU's claim should be dismissed.

24. The TWU's case is based on the following primary contentions:

    (a) The different overtime rates currently payable to continuous and non-continuous shiftworkers under the Award are the product of "unintended" changes to the relevant overtime rates as a result of the Part 10A Award Modernisation Process.

    (b) The different overtime rates currently payable to continuous and non-continuous shiftworkers under the Award are unfair and "lack any logic or merit".

    (c) The disutility experienced by continuous shiftworkers and non-continuous shiftworkers when working overtime is the same.

    (d) The Award is ambiguous as to the rate payable to non-continuous shiftworkers who perform ordinary hours and overtime on Sundays.

    (e) The variations proposed will "correct the tension" between the overtime rates payable to non-continuous shiftworkers on a Sunday as compared to the penalty rate payable for ordinary hours of work performed on the same day.

    (f) The variations proposed will have minimal impact on business because most employers in the airline operations industry are covered by enterprise agreements containing provisions that reflect the variations sought by the TWU.

THE AMWU'S CLAIM

25. The AMWU supports a variation to the Award in the same terms as that sought by the TWU.

26. In the alternate, the AMWU has proposed the insertion of a new clause 30.8 as follows:

> **30.8** The rate at which a shiftworker must be paid for all time worked on Sundays and public holidays is double time and on Christmas Day and Good Friday is double time and a half.

27. The AMWU's case is based on the following primary contentions:

(a) There is a tension between clauses 32.1 and clause 30.7 as to the rate payable to non-continuous shiftworkers during overtime on a Sunday, as a result of which the Award is not "simple and easy to understand".

(b) The application of clause 32.1 to overtime performed on a Sunday by non-continuous shiftworkers "results in absurd outcomes".

(c) The relevant pre-modern awards did not contain a distinction between continuous and non-continuous shiftworkers, which is a relevant historical consideration. All shiftworkers received double time for all overtime worked.

(d) The diminution of the overtime entitlement for non-continuous shiftworkers "appears to have transpired accidentally" during the Part 10A Award Modernisation Process.

(e) There was no apparent justification or merit case advanced for the diminution of the overtime entitlement for non-continuous shiftworkers when the Award was made.

(f) The Part 10A Award Modernisation was not intended to diminish employee entitlements.

(g) The Award is not achieving the modern awards objective and has not done so since the time that it was made.

(h) The Award is not providing a fair and relevant safety net.

(i) The variation is necessary to ensure that the Award is providing additional remuneration for employees working overtime.

(j) The variations proposed will have minimal impact on business because most employers in the airline operations industry are covered by enterprise agreements containing provisions that reflect the variations sought by the AMWU.

THE AWU's CLAIM

28. The variations proposed by the AWU to the extant clause 32.1 are marked below:

32.1 Payment for working overtime

(a) All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a ~~continuous~~ shiftworker, the rate ~~for~~ of working overtime is double time.

(b) For the purposes of this clause, **ordinary hours** for a day worker means the hours worked in an enterprise, fixed in accordance with clause 28.2(c). For a shiftworker, **ordinary hours** means hours worked in accordance with clause 28.3(b) and clause 30.2(a).

(c) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours ~~in a~~ per week.

(d) In computing overtime each day's work stands alone.

29. The variations would have the following consequences:

(a) Increase the rate payable to non-continuous shiftworkers such that they would be entitled to payment at double time for all overtime worked.

(b) Potentially require the payment of overtime to shiftworkers where they work outside the hours prescribed on their roster, pursuant to clause 30.2(a) and treat such hours as overtime; even if the roster is varied pursuant to clause 30.2(b).

(c) Potentially re-characterise ordinary hours of work performed by shiftworkers as a result of change to their roster where they have not been given at least two days' notice of the relevant change to their roster (in accordance with clause 30.2(c)) as overtime. This in turn has various other potential implications under the Award, the NES and superannuation entitlements.

30. Ai Group notes that no justification for the consequences outlined at paragraphs (b) and (c) above is proffered by the AWU. The union has not filed any submissions or evidence that provide any basis for those variations. There is no identifiable warrant for extending the circumstances in which overtime rates are payable to shiftworkers or altering the characterisation of certain time worked from ordinary hours to overtime. Accordingly, these elements of the AWU's claim should be dismissed.

31. The AWU submits that in the alternate, the Award should be amended to achieve the following outcomes:

(a) Non-continuous shiftworkers should not receive a lower rate of pay for the performance of overtime than they do for performing ordinary hours of work;

(b) The overtime entitlements are clear and easy to understand; and

(c) The overtime entitlements are "consistent for all types of worker[s]".

32. The AWU's case is based on the following primary contentions:

(a) The variations proposed are "self-evident, and as such can be determined with little formality".

(b) The Award is inconsistent with the need to provide additional remuneration for employees performing overtime (s.134(1)(da)).

(c) There is no justification for non-continuous shiftworkers receiving a lower rate of pay for overtime performed on Sundays as compared to day workers or continuous shiftworkers. The work should be considered of the same value.

(d) The variations proposed will make the Award simpler and easier to understand.

(e) The variations proposed will correct "an inadvertent error made during the Award Modernisation process"; that being the inclusion of the word "continuous" in clause 32.1(a) of the Award.

(f) All principal pre-reform awards afforded all shiftworkers with payment at the rate of 200% for overtime.

(g) The variations proposed will have a limited impact on business.

5. BACKGROUND TO THE APPLICATION

33. The submissions filed by the Unions identify that one of the issues that their claims seek to address had its genesis in the 'exposure draft process'. That is, the Commission's redrafting of the Award brought into sharper focus that in some circumstances the Award currently affords a lower rate of pay for overtime performed on Sundays than the rate prescribed for the performance of ordinary hours of work on Sundays.

34. Any argument by the Unions that the variations they seek are merely "technical and drafting" issues should be dismissed. The variations, if made, would amount to significant and substantive changes to employee entitlements (and by extension, labour costs incurred by employers). So much has already been acknowledged by the Commission.[7]

35. It would be misleading to suggest that the variations seek to "clarify" the current entitlement afforded to employees in the relevant circumstances.

[7] Transcript of proceedings on 2 February 2017 at PN551 – PN554 and *4 yearly review of modern awards – Award stage – Group 4 awards – Substantive Issues* [2018] FWCFB 6107.

6. THE RELEVANT PRE-MODERN AWARDS

36. The AIRC identified a number of pre-modern awards as applying in the "airline operations" industry, which included (but was not limited to) ground staff, pilots, air crew and engineers.[8]

37. The instruments relevantly include the following pre-modern awards, which appear most relevant to the making of the Award:[9]

- *Aircraft Engineers (General Aviation) Award 1999*;
- *Airline Operations (Clerical and Administrative) Award 1999;*
- *Airline Operations (Transport Workers') Award 1998;* and
- *Overseas Airlines (Interim) Award 1999*.

38. The AMWU submits that "none of the above awards contained a distinction between continuous and non-continuous shiftworkers"[10]. This is not accurate. Both the *Airline Operations (Transport Workers') Award 1998* and the *Overseas Airlines (Interim) Award 1999* contemplated the notion of "continuous work" in the context of shiftwork in relevantly similar terms to the definition of "continuous shiftwork" now found at clause 28.3(a) of the Award. Both instruments ascribed specific entitlements to shiftworkers engaged on continuous work[11].

39. The remaining two awards (that is, the *Airline Operations (Clerical and Administrative) Award 1999* and the *Aircraft Engineers (General Aviation) Award 1999*) did not contemplate any distinction between continuous and non-continuous shiftworkers, as is now found in the Award. That those instruments afforded all shiftworkers payment at a rate of double time for overtime is neither here nor there for the purposes of these proceedings. The Unions' primary

[8] *Award Modernisation* [2009] AIRCFB 100.

[9] See the Commission's Draft Award Audit.

[10] AMWU Submission dated 29 January 2019 at paragraph 38.

[11] See for example clause 20.2 of the *Overseas Airlines (Interim) Award 1999* and clause 30.2.1 of the *Airline Operations (Transport Workers') Award 1998*.

argument in these proceedings, as we understand it, is that non-continuous and continuous shiftworkers should be afforded payment at the same rate during overtime for reasons associated with a perceived unfairness arising from the current provisions as well as the assertion that the disutility experienced by all shiftworkers whilst working overtime is the same. Reliance on pre-modern instruments that did not include the relevant distinction does not advance the Unions case in this regard.

40. The Unions also rely on the relevant pre-modern awards to lament the "diminution" of the entitlement to overtime rates for non-continuous shiftworkers after the Award commenced operation.

41. As we set out in greater detail below, the Part 10A Award Modernisation Process conducted by the Australian Industrial Relations Commission (**AIRC**), which culminated in the making of the Award, necessarily resulted in various changes to employee entitlements and employer obligations. As is well known to the Commission and the industrial parties involved, the process was one which, by its very nature, resulted in various "swings and roundabouts". The existence of a higher overtime rate for non-continuous shiftworkers in two pre-reform awards which applied to an unknown proportion of employers covered by the Award some ten years ago is of limited relevance to the proceedings now before the Commission. The issue before the Commission in these proceedings is simply whether the proposed provisions are necessary to ensure that the Award achieves the modern awards objective. The terms of the relevant pre-modern awards are of limited assistance to the Commission in this context.

7. THE PART 10A AWARD MODERNISATION PROCESS

42. Much is sought to be made of the Part 10A Award Modernisation Process by the Unions in this matter. We therefore deal firstly with the nature of the process that was undertaken by the AIRC.

43. The then Minister for Employment and Workplace Relations requested that the AIRC undertake a process of award modernisation in accordance with the Minister's written request. The Minister's request stated that the process was not intended to disadvantage employees or increase costs for employers.[12]

44. What followed was a process of immense proportions. It resulted in the consolidation and amalgamation of a large number of pre-modern instruments for the purposes of making the modern awards.

45. The process required the AIRC to adopt a "swings and roundabouts" approach[13] whereby employee entitlements, in some respects, were enhanced through the process whilst in relation to other terms and conditions, the making of the modern awards saw some reductions to employee entitlements. Such a balancing exercise was necessary to ensure that the process was undertaken in accordance with the aforementioned element of the Minister's request. The AIRC described the process in the following way: (emphasis added)

> **[4]** The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.

[12] Award Modernisation Request by The Hon. Julia Gillard at paragraphs 2(c) and (d).

[13] Re *Rail Industry Award 2010* [2017] FWCFB 719 at [31] and *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [32].

> **[5]** Various parties have pointed to the impact of modern award provisions. The parties largely addressed this matter on the basis of a comparison between existing and proposed award obligations rather than the impact of the modern award on actual terms and conditions. Even so, it is clear that some award conditions will increase, leading to cost increases, and others will decrease, leading to potential disadvantage for employees, depending upon the current award coverage. The creation of modern awards which will constitute the award elements of the safety net necessarily involves striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply. It is in that context that the formulation of appropriate transitional provisions arises.[14]

46. The nature of the process and the AIRC's approach is borne out in the terms of the Award. Specific examples of the "swings and roundabouts" that resulted from the process are identified in Qantas' written submissions.

47. The Unions' claim, to the extent that it is advanced on the premise that it reflects a pre-modern award standard in some instruments, reflects merely a desire to cherry-pick a more beneficial element of such instruments and reintroduce it to the modern awards system absent any proper foundation for doing so. The terms and conditions included in the Award were intended to strike a balance between the interests of employers and employees. The Unions seek to now tip the balance on the simplistic basis that the variations proposed reflect the terms found in certain pre-modern awards. As we have earlier submitted, in the context of the current legislative framework governing the Review and in light of the passage of almost ten years since the Award was made, the Unions submissions in this regard are largely irrelevant to the exercise that the Commission is here required to undertake.

48. We also note that since the Award was made, various additional terms and conditions have been introduced that further enhance the safety net that it provides. Specific examples of this are identified later in our submission. Section 134(1) of the Act, like the Award Modernisation Request, includes various competing considerations[15] that require the Commission to endeavour to strike a balance between the interests of employers and employees. This

[14] Re *Award Modernisation* [2009] AIRCFB 800 at [4] – [5].

[15] See for example s.134(1) and s.134(1)(f) of the Act.

objective is also reflected in s.3 of the Act.[16] The grant of the Unions' claim in this context is unjustified and not *necessary* to ensure that the Award achieves the modern awards objective.

49. The Unions allege that the terms of the Award are the result of an error that occurred during the Part 10A Award Modernisation Process.

50. A consideration of the documents filed in the AIRC during the Part 10A Award Modernisation Process reveals that a distinction between continuous and non-continuous shiftworkers for the purposes of overtime was first found in a draft award filed by the Australian Council of Trade Unions (**ACTU**) on 18 March 2009. Correspondence from the ACTU that accompanied the draft award indicated that the draft had been prepared by the ACTU's affiliates with the assistance of the ACTU. A draft award filed by the TWU on the same day contains relevantly similar terms. A subsequent draft award filed by Ai Group and Qantas adopted the unions' proposed overtime clause to the extent relevant to these proceedings.

51. The Unions' assertion that the overtime provision contained in the ACTU and TWU draft awards was an "error" is without foundation. The material before the Commission is not probative and does not enable it to properly reach that conclusion.

52. Further, the contention that the impugned clause was included in the Award by mistake overlooks the fact that modern awards were not made by the parties. They were made by a Full Bench of the AIRC. Any alleged error made by the parties in the preparation of their draft awards is of little relevance in this context. It was the AIRC that ultimately determined that the Award ought be made in the relevant terms in accordance with the statutory provisions governing its discretion.

[16] See for example s.3(a).

53. In any event, even if ACTU and TWU made an error in the preparation of their draft awards during the Part 10A process, that does not of itself enliven the Commission's power to now vary the Award. The Commission has jurisdiction to vary the Award only if it considers that the proposed terms are *necessary* in the relevant sense. This requires a consideration of the variations proposed in the context of the safety net in its current form. For all the reasons set out in this submission, the Unions have failed to satisfy the requisite legislative precondition stipulated by s.138 of the Act and therefore, the claims should be dismissed.

8. THE MODERN AWARDS OBJECTIVE

54. In exercising its modern award powers, the Commission is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h) of the Act.

55. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are *necessary* to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense.

56. The statute requires that the Commission ensure that the Award includes terms only to the extent necessary to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires a consideration of the Award, taken as a whole, including the various terms and conditions it provides. Accordingly, by way of example, an overarching assessment that as a matter of principle, non-continuous shiftworkers and continuous shiftworkers should be entitled to the same overtime rates would of itself be an insufficient basis for grounding the variations sought by the Unions.

57. Further, the employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine flexible work practices. No adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

58. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponents of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to

material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

59. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.[17]

60. It is therefore for the proponents to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.

61. For all the reasons we have set out in this submission, the Unions have *not* overcome that threshold. They have failed to mount a case that establishes that the provisions proposed are necessary to ensure that the Award meets the modern awards objective.

A Fair Safety Net

62. Section 134(1) of the Act requires that the Commission ensure that the Award provides a *fair* safety net. As has now been observed by the Commission in various decisions, the question of *fairness* is to be assessed from the perspective of employers and employees.[18]

63. The grant of the Unions' claim would be unfair to employers covered by the Award. The Unions' claim seeks to 'undo' the approach taken during the Part 10A Award Modernisation process and cherry-pick an employee entitlement

[17] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[18] See for example *4 yearly review of modern awards* [2015] FWCFB 3177 at [109] and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

from certain pre-modern awards absent a proper basis. Further, it would be unfair to increase employer costs in the absence of a proper justification for it, as is here the case.

A Relevant Safety Net

64. In the recent Penalty Rates Decision, the Full Bench expressed the view that: (emphasis added)

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. …[19]

65. A modern award will suit contemporary circumstances if it reflects modern work practices, working arrangements and operational requirements. Further, it will be drafted having regard to other existing parts of the safety net.

66. We note that it is not uncommon for modern awards to draw a distinction between continuous and non-continuous shiftworkers and to ascribe different entitlements to them. Further, some of those awards draw a similar distinction between continuous and non-continuous shiftworkers for the purposes of overtime as that found in the Airline Operations Award.[20] Such a distinction has been a feature of the awards system since at least the 1930s.[21] To this extent, the relevant provisions of the Award are not out-of-step with the awards system more generally.

67. Further, the central premise of the Unions' claim (that the variations sought should be made to rectify an alleged "error" during the Part 10A Award Modernisation Process) entirely disregards the need to ensure a relevant safety net. The argument suggests that the Commission should simply increase

[19] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

[20] See for example *Aluminium Industry Award 2010; Aquaculture Industry Award 2010; Cement and Lime Award 2010; Coal Export Terminals Award 2010; Concrete Products Award 2010; Electrical Power Industry Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Food. Beverage and Tobacco Manufacturing Award 2010; Hydrocarbons Industry (Upstream) Award 2010; Legal Services Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Mining Industry Award 2010; Oil Refining and Manufacturing Award 2010; Salt Industry Award; Seafood Processing Award 2010; Textile, Clothing, Footwear and Associated Industries Award* 2010 and *Wool Storage, Sampling and Testing Award 2010*.

[21] *Consolidated Metal Trades Award* (1937) 38 CAR 875.

overtime rates on the basis that some pre-reform awards contained such a entitlement more than 10 years ago, without regard for whether such an entitlement is *necessary* in the context of the current safety net provided by the Award and the NES.

68. Finally, we shortly turn to the potential implications that the proposed clause may have with reference to s.134(1)(d), which requires that the Commission take into account the need to promote flexible modern work practices and the efficient and productive performance of work. Having regard to the issues that we there raise, the proposed clause cannot properly form part of a relevant safety net.

A Minimum Safety Net

69. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the Award, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)). The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the essential rights and protections that must be afforded to all employees and employers.

70. A minimum safety net is not intended to reflect the union movement's wish list for additional terms and conditions that it considers desirable, such as the provisions here sought by the Unions. Matters such as these are more appropriately dealt with through enterprise bargaining.

Section 134(1)(a) – Relative living standards and needs of the low paid

71. The Annual Wage Review 2014 – 2015 Decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent

standard of living" and to engage in community life, assessed in the context of contemporary norms.[22]

72. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[23]

73. The Unions do not appear to rely on s.134(1)(a) in support of their claims. The AMWU concedes that the proposed variations are "unlikely … [to] have any significant impact on living standards"[24] and that this is therefore a neutral consideration in this matter.

74. There is insufficient material before the Commission to enable it to undertake the requisite assessment and conclude that s.134(1)(a) lends support to the grant of the variations proposed.

75. We agree with the AMWU's submission that this is a neutral consideration in this matter.

Section 134(1)(b) – The need to encourage collective bargaining

76. Section 134(1)(b) requires that the Commission have regard to the need to encourage collective bargaining. For the reasons that follow, we submit that this factor lends support to the proposition that the claim should be dismissed.

77. *Firstly*, the Unions' submissions and evidence highlight that various enterprise agreements require payment for overtime at the rates here sought by the Unions and that one or more of the Unions were bargaining representatives for the purposes of those agreements. This of itself suggest that the matter here in

[22] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[23] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[24] AMWU Submission dated 29 January 2019 at paragraph 73.

issue is of importance to the Unions, which, absent its inclusion in the Award, would encourage it and its constituents to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

78. *Secondly*, a continuing rise to the minimum floor of entitlements will, in our submission, ultimately have the effect of discouraging employers from engaging in collective bargaining. Multiple award variations that increase employment costs and impose additional operational constraints are likely to have a cumulative effect, as a result of which there will be less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

79. We make this submission in the context of the current Review, as a result of which a number of variations have been made to the Award, each of which have the effect of introducing additional costs and inflexibilities. For instance, the Award has been varied to introduce a casual conversion clause, additional restrictions and requirements where an employee seeks flexible working arrangements, family and domestic violence leave provisions, new restrictions on how and when an employee must be paid upon termination of employment, a more restrictive 'time off in lieu of overtime' provision, a new substantive accident make up pay entitlement and an absolute right to take annual leave in certain circumstances.

80. The minimum safety net has been lifted significantly as a result of the aforementioned variations to the Award. In our submission, the Commission ought bear in mind their potential cumulative impact, which may ultimately have the effect of undermining the need to encourage collective bargaining. This further tells against the grant of the claims.

Section 134(1)(c) – The need to promote social inclusion through increased workforce participation

81. The proper interpretation of s.134(1)(c) of the Act was dealt with by the Commission in the Penalty Rates Decision as follows:

> **[179]** Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[25]

82. There is no evidence or material that suggests that the grant of the claims will increase workforce participation and thereby, promote social inclusion. Accordingly, s.134(1)(c) does not advance the Unions' case. The Unions do not appear to seek to argue to the contrary.

Section 134(d) – The need to promote flexible modern work practices and the efficient and productive performance of work

83. A requirement to pay employees at a higher rate for the performance of overtime in various circumstances may cause an employer to make cost-saving alterations to its work practices which in turn have an adverse effect on the efficient and productive performance of work.

84. For instance, to the extent that increased employment costs flowing from higher overtime rates for certain shiftworkers has the effect of causing an employer to alter their rostering practices in a way that undermines the efficient and productive performance of work, s.134(1)(d) does not support the grant of the claims.

[25] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [179].

Section 134(da) – The need to provide additional remuneration

85. Section 134(1)(da) of the FW Act requires the Commission to take into account the need to provide additional remuneration for employees working in various circumstances; including overtime, weekends, public holidays, shifts, or unsocial, irregular or unpredictable hours.

86. The Unions make the following arguments in relation to s.134(1)(da) of the Act:

    (a) The proposed variations are "necessary to ensure that additional remuneration is provided for employees working overtime."[26]

    (b) "This element of the modern awards objective cannot be met if the Award provides for a shiftworker to receive a lower rate of pay for commencing overtime on a weekend or a public holiday."[27]

    (c) Shiftworkers working non-continuous shiftwork experience the same disability as shiftworkers working continuous shiftwork.

87. The first and second submissions summarised above are misconceived.

88. The proposed variations are not *necessary* to ensure that additional remuneration is provided for employees working overtime. Under the Award, all employees who perform overtime are already entitled to additional remuneration; that is, they receive an amount more than the base hourly rate prescribed by the Award.[28]

89. Further, the submissions appear to proceed on the premise that s.134(1)(da) *mandates* that an Award prescribe a higher rate of pay for the performance of work in the circumstances described at ss.134(1)(da)(i) – (iv). Such a construction of the relevant provisions is, however, directly inconsistent with the

[26] AMWU Submission dated 29 January 2019 at paragraph 80.

[27] AWU Submission dated 29 January 2019 at paragraph 46.

[28] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [190] and [192].

Penalty Rates Decision, in which the Full Bench observed as follows: (emphasis added)

[189] First, s.134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).

[190] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:

> (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
>
> (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
>
> (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.

[192] The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

[193] As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

> 'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.' (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) '*requires* additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the *need* for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

[197] A further contextual consideration is that 'overtime rates' and 'penalty rates' (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

> '… s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards…'

…

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

…

[202] Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance

(s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working 'unsocial … hours'. Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides 'a fair and relevant minimum safety net.' A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.[29]

90. In respect of the final proposition articulated by the Commission at paragraph [202] of the decision (underlined above), the material here before the Commission does not establish that non-continuous shiftworkers are not afforded a fair and relevant minimum safety net or that the Award does not provide them with fair and relevant compensation for the disutility associated with working overtime.

91. Indeed, as for the Unions' third argument summarised above, there is no probative evidence before the Commission about the disutility experienced by non-continuous shiftworkers working overtime under the Award. There is certainly no evidence that forensically considers and compares the disutility experienced by continuous shiftworkers as compared to non-continuous shiftworkers when working overtime.

92. Continuous shiftwork, by its very definition, is work carried on with consecutive shifts of employees throughout the 24 hours of each of six or more consecutive days. The corollary to this is that non-continuous shiftwork includes shift patterns that do not involve the performance of work by employees throughout a 24 hour period, over at least a six day period.

93. The Award draws a distinction between the two categories of shiftworkers in respect of certain provisions by providing higher benefits to continuous shiftworkers than non-continuous shiftworkers (e.g. paid meal breaks and crib breaks). Also, many continuous shiftworkers are entitled to a fifth week of

[29] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [189] – [202].

annual leave under the NES as a result of the definition of "shiftworker" in the annual leave clause of the Award.

94. On its face, it is readily apparent that the performance of consecutive shiftwork can result in greater disruption to an employee's personal life and that as a result, there is greater disutility associated with the performance of such work. Where an employer's operations continue 24 hours a day, 7 days a week, the prospect of the employee being required to work (and in fact working) hours with greater variability in their starting and finishing times is necessarily higher. The provision of more generous entitlements to continuous shiftworkers can be readily understood in those circumstances. Further, to that extent, Ai Group does not accept the TWU's proposition that "the ordinary hours of work for shiftworkers are the same regardless of whether they perform continuous or non-continuous shiftwork".[30]

95. Based on the material before it, in our submission, the Commission cannot properly conclude that:

    (a) Shiftworkers working non-continuous shiftwork experience the same disutility as shiftworkers working continuous shiftwork; or

    (b) The overtime rates currently payable to non-continuous shiftworkers do not afford a fair and relevant safety net to such employees.

96. Further and in any event, s.134(1)(da) is not determinative of the matter.[31] Even if the Commission finds that s.134(1)(da) lends support to the grant of the Unions claims, this must be balanced against the various other considerations identified at s.134(1). As the Full Bench observed in the Preliminary Jurisdictional Issues Decision, no particular primacy attaches to any of those considerations, including s.134(1)(da).

[30] TWU's Submission dated 29 January 2019 at paragraph 13.

[31] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [196].

Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value

97. The phrase "equal remuneration for work of equal or comparable value" is defined in s.302(2) of the FW Act to mean "equal remuneration for men and women workers for work of equal or comparable value".

98. Ai Group submits that this is a neutral consideration in the present proceedings.

Section 134(1)(f) – The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

99. The Unions contend that the impact of increasing the overtime rate as proposed will have a minimal impact on business because:

    (a) The majority of employers covered by the Award have in place enterprise agreements applying to them, which provide that all shiftworkers will receive payment at double time for all overtime worked.

    (b) The scope of the claim is limited; that is, it would require an increased rate of payment only in relation to non-continuous shiftworkers and only during the first two hours of each instance of overtime.

100. The Unions' submissions should be rejected for the following reasons.

101. *Firstly,* the evidence before the Commission does not establish that the majority of employers covered by the Award are covered by enterprise agreements. The only evidence in relation to the issue is that which has been led by the TWU, which relates primarily to employees "engaged in the transport stream of the Award"[32]. It does not include evidence of the enterprise agreement coverage of employees covered by other streams such as the clerical stream or the maintenance and engineering stream.

[32] Statement of Shane O'Brien dated 29 January 2019 at paragraph 8.

102. *Secondly* and in any event, arguments about the enterprise agreement coverage or otherwise of employees covered by the Award ignore the following propositions:

(a) Those enterprise agreements may incorporate the Award by reference, in which case the terms of the Award clearly have a bearing on an employer's labour costs.

(b) The minimum floor set by the Award has a bearing on an employer's labour costs notwithstanding the coverage of an enterprise agreement as a result of the application of the 'better off overall' test (**BOOT**). A substantial increase to overtime rates, as sought by the Unions, can have direct and indirect cost implications for an employer covered by the Award where, as a result, an enterprise agreement does not pass the BOOT in circumstances where it would otherwise have done so.

103. *Thirdly,* the Unions have not advanced any probative evidence that might establish that the financial impact of the claim on employers will be "minimal".

104. *Fourthly,* the variations sought may adversely impact on productivity for the reasons articulated in our submissions above in relation to s.134(1)(d).

Section 134(1)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

105. The Unions argue that the Award is not simple and easy to understand because the interaction between clauses 32.1(a) and 30.7(a) of the Award is unclear. The crux of the argument is that it is unclear whether clause 32.1(a) or clause 30.7(a) apply to the performance of overtime by non-continuous shiftworkers on a Sunday.

106. Ai Group disputes the proposition that the relevant provisions are unclear. Although non-continuous shiftworkers are not explicitly referred to in clause 32.1(a), there is no basis for interpreting the provision as excluding them from its application. It is clear that the entitlement afforded by the first portion of the

provision applies to non-continuous shiftworkers. The explicit reference to continuous shiftworkers in the final sentence seeks to distinguish the entitlement that it affords for continuous shiftworkers to the entitlement afforded by the earlier part of the clause to non-continuous shiftworkers.

107. Further, Ai Group submits that even if the Commission were to find that the relevant provisions are ambiguous, a substantive increase to employee entitlements for non-continuous shiftworkers is an inappropriate and unwarranted response to any perceived ambiguity for all the reasons set out in this submission.

108. The need to maintain a stable modern awards system also tells against the grant of the claim, particularly in the absence of a sound evidentiary and meritorious case.

9. CONCLUSION

109. For all the reasons stated in this submission, the Unions' claims should be dismissed.