



DECISION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards – Plain language project (AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 18 MARCH 2022

4 yearly review of modern awards – plain language re-drafting – standard clauses – redundancy clauses – Manufacturing and Associated Industries and Occupations Award 2020 – Timber Industry Award 2020.

1. Introduction

[1] This decision deals with outstanding ‘plain language’ issues in relation to the redundancy provisions in the *Manufacturing and Associated Industries and Occupation Award 2010* (Manufacturing Award 2010) and the *Timber Industry Award 2010* (Timber Award 2010). We note that since our last decision the technical and drafting of each of these awards in the 4 yearly review of modern awards has been finalised by the Full Bench in AM2019/17 and the awards have been varied and renamed accordingly as the *Manufacturing and Associated Industries and Occupation Award 2020* (Manufacturing Award 2020) and the *Timber Industry Award 2020* (Timber Award 2020) respectively.

Procedural history

[2] On 11 December 2018 we issued a Decision¹ (*December 2018 decision*) in which we provisionally adopted a restructured plain language standard redundancy provision to be inserted into 100 awards identified in Attachment A of the *December 2018 decision*. In the same decision we divided the remaining modern awards which have redundancy provisions into 3 separate categories:

Category 1:

Awards with an industry-specific redundancy scheme.

¹ [\[2018\] FWCFB 7447](#).

Category 2:

Awards with an industry-specific redundancy element that supplements the NES (such as providing an entitlement to redundancy pay for employees of small businesses).

Category 3:

Awards with other variations from the standard redundancy provisions.

[3] We indicated that the *Manufacturing and Associated Industries and Occupation Award 2010* (Manufacturing Award 2010) and the *Timber Industry Award 2010* (Timber Award 2010) fell into the second category.

[4] We expressed the *provisional* view that awards with an industry-specific element that supplements the NES should be amended to include the plain language standard redundancy clause but with adaptations as necessary to retain the substance of the industry-specific elements. We stated that the note at the beginning of the redundancy clause in these awards may also be amended so as to refer to the industry-specific elements.

[5] Draft determinations were issued on 13 December 2018 and interested parties had until 25 January 2019 to file submissions in response, with submissions in reply being due by 7 February 2019. These matters were the subject of hearings on 26 September 2019.

[6] On 9 October 2019 we issued a further Decision² (*October 2019 decision*) in which we dealt with the submissions made in relation to each award. We noted that both the Manufacturing Award 2010 and Timber Award 2010 contain a small employer redundancy term that refers to the predecessor awards to the modern awards. We stated that each of these terms raised an issue about state-based differences. However, we stated that we were satisfied that the relevant clauses limit the entitlement to redundancy pay by reference to the types of work covered by the predecessor awards, and not on a geographical basis.

[7] In the *October 2019 decision* we also indicated that a conference of interested parties would be held to address the simplification of the types of work to which the small employer redundancy terms apply in the Timber Award 2010 and Manufacturing Award 2010. A conference was convened as such on 6 November 2019 (*November 2019 conference*)³.

[8] The outstanding issues in respect of each award are set out and dealt with below.

Timber Industry Award

[9] In relation to the Timber Award 2010, the term in issue was clause 15.7, which refers to clause 6 of the *Timber and Allied Industries Award 1999* and clause 6 of the *Furnishing Industry National Award 2003* (Furnishing Award 2003). Following the finalisation of the technical and drafting matters of the Timber Award 2010 in the 4 yearly review of modern awards, clause

² [\[2019\] FWCFB 6858](#).

³ [Transcript](#), 6 November 2019.

15.7 of the Timber Award 2010 was retained in the Timber Award 2020 in identical terms (save for minor administrative changes) at clauses 38.5(a) and (b).⁴

[10] Relevantly, clauses 38.5(a) and (b) provide:

(a) In this clause, **small employer** means an employer to whom the NES does not apply because of the provisions of section 121(1)(b) of the Act.

(b) Despite the terms of section 121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the scope of this award which immediately prior to 1 January 2010 was in clause 6 of the *Timber and Allied Industries Award 1999*, or clause 6 of the *Furnishing Industry National Award 2003*, except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table: ...

[11] In the *November 2019 conference* it was agreed that ‘the remaining provisions of Subdivisions B and C of Division 11 of the NES’ to which clause 15.7(b) of the Timber Award 2010 (now clause 38.5(b) of the Timber Award 2020) refers could be expressed as applying to any small business covered by the award except in respect of employees falling within clause 4.2(f) of the Timber Award 2010 (also clause 4.2(f) of the 2020 Timber Award), namely the pulp and paper sector.⁵

[12] A second issue arose in respect of clause 15.8 of the Timber Award 2010, which stated ‘such provisions do not apply to weekly piecework employees.’ In the *December 2018 decision* we said that it was not entirely clear whether the exclusion in clause 15.8 is directed just to clause 15.7—Small employer, or to all of clause 15—Redundancy, and expressed the *provisional* view that clause 15.8 appears to be unnecessary given the exclusion of pieceworkers from various award provisions (including clause 15) under clause 12.5(d) of the award. However, in the *October 2019 decision* we determined that the clause is not otiose and should not be omitted from the new redundancy provision. In this respect we noted the following submission advanced by the Ai Group:

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

‘Clause 15 does not apply to weekly piecework employees’.”

[13] We stated in the *October 2019 decision* that we agreed with the Ai Group and would vary the determinations accordingly.

⁴ See [\[2020\] FWCFB 5302](#) and [PR722475](#).

⁵ [Transcript](#), 6 November 2019, at PN74 to PN78.

[14] In the Timber Award 2020, the equivalent to clause 15.8 of the Timber Award 2010 is clause 38.5(c), which provides that ‘Such provisions do not apply to weekly piecework employees’. The ‘provisions’ referred to must be understood as being those in clause 38.5 concerning small employers, in which clause 38.5(c) has been located. This is to be compared to the previous clause 15.8 of the Timber Award 2010, which was a ‘standalone’ subclause within the redundancy pay provisions of clause 15 and was separate from clause 15.7 which dealt with small employers. The current position in the Timber Award 2020, whereby the exclusion operates only in respect of the small employer redundancy provisions and not the entirety of the redundancy pay provisions, appears to be inconsistent with that in the Timber Award 2010 as well as with the position we preferred in the *October 2019 decision*.

[15] However, having reviewed the situation further, we have now come to the conclusion that the reference in clause 38.5(c) of the Timber Award 2020, previously clause 15.8 of the Timber Award 2010, is anomalous and should be removed altogether. The expression ‘weekly piecework employees’ used in the provision is not defined in either version of the award. The only category of employees covered by the award who are expressly described as ‘pieceworkers’ are those to whom clause 13.1, *Piecework – General Timber Stream* of the 2020 Timber Award (clause 12.5 of the Timber Award 2010⁶) applies. However, the definition of such pieceworkers in clause 13.1(a) of the Timber Award 2020 (clause 12.5(a) of the Timber Award 2010⁷) provides that such a pieceworker ‘...is an employee who is *not* a weekly employee...’ (italics added). Accordingly, on its face, the expression ‘weekly piecework employee’ does not refer to employees to whom clause 13.1(a) applies.

[16] Who then does it refer to? The only other possibility is those employees to whom clause 13.2, *Payment by results – Wood and Timber Furniture Stream* (clause 12.6 of the Timber Award 2010) applies. However, we do not consider that the expression can be read as referring to such employees. The initial version of the Timber Award 2010 which took effect on 1 January 2010⁸ included clause 15.8, but did *not* include the Payment by Results provisions at this time. Accordingly, the expression ‘weekly piecework employees’ in clause 15.8 could not have been intended to refer to employees to whom the Payment by Results provisions currently apply. The Payment by Results provisions were only added as a result of a subsequent Full Bench decision and order made on 9 March 2010⁹ (*March 2010 decision*). The Full Bench’s *March 2010 decision* does not disclose any intention that employees to whom the Payment by Results provisions were to apply, if full-time/‘weekly’ employees, were to be excluded from the operation of the redundancy pay provisions in clause 15. Indeed, the Full Bench expressed some doubt as to whether such employees were properly to be characterised as pieceworkers at all, while affirming that the National Employment Standards were to apply:

“[6] It is not clear from the draft provision or the submissions whether what is contemplated is a true piecework provision or a system of payment by results based on a standard working week. In view of the level of agreement expressed in the submissions

⁶ As it was immediately before the Timber Award 2020 commenced operation. At the time the Timber Award 2010 first took effect on 1 January 2010, the provision was numbered as clause 12.4.

⁷ The provision was numbered as clause 12.4(a) at the time the Timber Award 2010 first took effect.

⁸ PR988930.

⁹ [2010] FWAFB 1878 at [5]-[6]; PR994716.

and the absence of any opposition we have decided to grant the application in the form proposed but with the addition of the definitions required by the National Employment Standards.”

[17] The best inference is that the reference to ‘weekly piecework employees’ in clause 15.8 of the Timber Award 2010 was a mistake, and in fact what was intended was a reference to ‘non weekly piecework employees’ that picked up pieceworkers in the general timber stream under clause 12.5 of the 2010 Award. We infer this for three reasons:

- (1) Reading the reference as being to ‘non weekly piecework employees’ would align the exclusion in clause 15.8 of the Timber Award 2010 with the ‘non weekly’ definition of such pieceworkers in clause 12.5(a), remembering that these were the only pieceworkers in the award when it first took effect on 1 January 2010.
- (2) Clause 34.2 of the Timber Award 2010 provided, in respect of clause 34, *Personal/carer’s leave and compassionate leave*, ‘Such provisions do not apply to *non weekly* piecework employees’ (italics added). This makes it likely that clause 15.8 was intended to read the same way. (Ironically, the existence of the exclusion in clause 34.2 was itself a mistake, since clause 12.5(d) provided that clause 34 *did* apply to pieceworkers – a position which departed from the preceding pre-modernisation *Timber and Allied Industries Award 1999*, which in clause 15.6.5 did not include the personal/carers leave or compassionate leave provisions in the list of award clauses which applied to pieceworkers. This has been corrected in the Timber Award 2020 in that the exclusion was not included in clause 29, *Personal/carer’s leave and compassionate leave*.)
- (3) The exposure draft for the Timber Award 2010 published in May 2009 during the conduct of the award modernisation process did not include the pieceworker exclusions in either the redundancy clause or the personal/carer’s leave/compassionate leave clause. The subsequent inclusion of these provisions appears to have been a consequence of written submissions dated 12 June and 26 June 2009 made by the Victorian Association of Forest Industries (VAFI) and Australian Forest Contractors Association (AFCA), and oral submissions made by the VAFI and the AFCA on 23 June 2009 (which submissions were supported by the Timber Trade Industrial Association). In those submissions, the VAFI and the AFCA referred to the ‘Need to Reinstate Piecework Exclusion’ in the redundancy and personal carer’s leave/compassionate leave clauses, as well as the termination of employment clause. It proposed that this be done by adding the words ‘Such provisions do not apply to *non weekly* Piecework employees’ (italics added) in each case. The appearance of the pieceworker exclusions in the redundancy clause and the personal/carer’s leave/compassionate leave clause of the Timber Award 2010 which was ultimately made appears to reflect partial accession to the VAFI/AFCA submissions, except that in the former case the prefix ‘non’ was mistakenly excluded.

[18] We see no purpose in either perpetuating this apparent error or trying to correct it, in circumstances where clause 13.1(d) of the Timber Award 2020 makes it perfectly clear that the redundancy provisions in clause 38 do not apply to pieceworkers in the general timber stream to whom clause 13.1 applies. Accordingly, it is our *provisional* view clause 38.5(c) shall be deleted from the award.

[19] Our review of this matter has led to the identification of another difficulty in the Timber Award 2020. In the pre-modernisation *Timber and Allied Industries Award 1999* (1999 Award), clause 15 provided for the following categories of employment: full-time, casual, part-time, piecework, apprentices, juniors and trainees. The Payment by Results provisions were not contained in clause 15, but were included as a separate clause (clause 25) in Part 5, *Wages and Related Matters*. In other words, the Payment by Results provisions were not included as a category of employment but rather as a method of remuneration. As earlier stated, when the Timber Award 2010 was made, the Payment by Results provisions were initially not included. Clause 12, *Employment Categories* of the Timber Award 2010, included the piecework provisions at clause 12.4. Importantly, clause 12.1 provided that ‘All employees except those engaged as part-time, piecework or as casual employees will be employed by the week (unless otherwise specified in the award)’. That provision was consistent with the ‘non weekly’ definition of ‘pieceworker’ in clause 12.4(a) (as it was then numbered).

[20] When, as a result of the *March 2010 decision*, the Payment by Results provisions that had been contained in the 1999 Award were added to the Timber Award 2010, they were placed into Clause 12, *Employment Categories* as clause 12.6 (with the pieceworker provisions in clause 12.4 being renumbered as clause 12.5 as a result of the addition of a casual conversion provision as clause 12.3). This gave the impression that employees to whom the Payment by Results provisions applied were intended to be a separate category of employment, and raised a question as to whether they were ‘pieceworkers’ for the purpose of clause 12.1 and thus were not engaged by the week. This difficulty has been exacerbated in the Timber Award 2020. The pieceworker and Payment by Results provisions have been grouped together in clause 13, *Piecework and payment by results*. Clause 9 provides:

9. Types of employment

9.1 Employees under this award will be employed in one of the following categories:

- (a) full-time;
- (b) part-time;
- (c) piecework (see clause 13—Piecework and payment by results); or
- (d) casual.

[21] Clause 9 thus reinforces the impression that employees to whom the Payment by Results provisions apply are intended to constitute a category of employment separate to the other categories.

[22] We consider this is an error. The Payment by Results provisions were not established as a category of employment but as an alternative mode of remuneration so that, for example, a full-time employee within the meaning of clause 10 may also be remunerated in accordance with the Payment by Results provisions if the preconditions in those provisions are satisfied.

This is confirmed by the fact that the Payment by Results provisions set out the rates of pay to apply for the purpose of the NES entitlements.

[23] Our *provisional* view is that the Payment by Results provisions currently contained in clause 13.2 of the Timber Award 2020 should be removed from clause 13 and placed as a separate subclause within clause 20, *Minimum Rates*. Consequential upon this, and to remove any prospect of further confusion, the references to ‘employee on a piecework rate’ currently found in clause 13.2(d) and (e) should be removed and replaced with ‘employee paid by results under this subclause’.

[24] A draft determination incorporating the variations to the Timber Award 2020 outlined in this decision (including the variation proposed in the *provisional* view in [18] and [23] above) and earlier decisions in these proceedings will be issued in conjunction with this decision, with an operative date of **2 May 2022**.

[25] Interested parties will have until **3:00pm (AEDT) on Thursday 31 March 2022** to file any submissions in relation to the draft determination and our *provisional* views before the changes to the Timber Award 2020 are finalised. Submissions must be sent electronically to amod@fwc.gov.au. Any contested issues in respect of our *provisional* views and the finalisation of the draft determination will be determined on the papers by Vice President Hatcher.

Manufacturing and Associated Industries and Occupations Award

[26] In relation to the Manufacturing Award 2010, the term at issue was clause 23.2, which set out specific arrangements for redundancy pay for employees of ‘small furnishing’ employers, and which referred to clauses 6.1 and 6.6 of the Furnishing Award 2003. Following the finalisation of outstanding technical and drafting matters in the 4 yearly review of modern awards, clause 23.2 of the Manufacturing Award 2010 was inserted in the Manufacturing Award 2020 in identical terms (save for minor administrative changes) at clause 45.2.¹⁰ It is useful to set out clause 45.2 below:

45.2 Small furnishing employer

(a) For the purposes of clause 45.2(b), **small employer** means an employer to whom Subdivision B of Division 11 of the NES does not apply because of the provisions of section 121(1)(b) of the Act.

(b) Despite the terms of section 121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the Manufacturing and Associated Industries and Occupations which immediately prior to 1 January 2010 was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003*, except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:

¹⁰ See [\[2020\] FWCFB 1814](#) and [PR718704](#).

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

[27] In the *October 2019 decision*, we agreed to extend the exclusions contained in a proposed replacement to clause 45.2 to employees prescribed by regulations made under section 123(4)(d) of the *Fair Work Act 2009* (the Act).¹¹

[28] At the *November 2019 conference*, parties discussed simplifying the current description of the types of work to which the small furnishing employer redundancy clause applies. The parties supported the approach of maintaining the current drafting of clause 45.2(b) but including a hyperlink to the coverage provision of *Furnishing Award 2003*.¹² However, it was proposed by the member conducting the conference that a better way to simplify the clause would be to include cross references to those aspects of the coverage clause of the *Manufacturing Award 2010* that were previously covered by the *Furnishing Award 2003*.¹³ Parties were directed to identify the agreed areas of coverage of the *Manufacturing Award 2010* that derived from the *Furnishing Award 2003*, the areas in dispute and the areas of which coverage cannot be determined with precision.¹⁴

[29] On 14 February 2020, in response to the directions, a joint report¹⁵ was filed by the Ai Group, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and the Australian Manufacturing Workers' Union (AMWU). The joint report included a new small furnishing employer redundancy term proposed by the Ai Group, adapted from the draft we proposed in the December 2018 decision.¹⁶ The Ai Group's proposal was for a new clause 23.4(a) (of the *Manufacturing Award 2010*) which would provide:

“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 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;

¹¹ [\[2019\] FWCFB 6858](#), at [72].

¹² [Transcript](#), 6 November 2019, at PN45 and PN84.

¹³ [Transcript](#), 6 November 2019, at PN101 and PN101.

¹⁴ [Transcript](#), 6 November 2019, at PN101 and PN104.

¹⁵ [Joint report of Ai Group, the CFMMEU and the AMWU](#), 14 February 2020.

¹⁶ [\[2018\] FWCFB 7447](#) at [49].

(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.”

[30] A further conference¹⁷ was convened on 30 March 2020 (*March 2020 conference*). During the conference, the parties participating agreed that the purpose of the small furnishing employer exemption is to preserve an entitlement for those employees who would have been covered by the Furnishing Award 2003 prior to award modernisation.¹⁸ However, the parties were unable to reach agreement on the approach taken to identify the relevant coverage, with the union parties submitting that the Ai Group’s proposed term sought to curtail or limit the coverage contained in the existing clause.¹⁹

[31] During the *March 2020 conference* it was agreed that the union parties would submit a version of the Ai Group’s proposed term that included those elements of coverage they submitted were excluded. The Ai Group would then have the opportunity to file a further submission in reply. Following receipt of these submissions, this Full Bench would decide in principle whether to include a hyperlink to the Furnishing Award 2003 in the small furnishing employer redundancy clause or, if we did not consider this the appropriate course, proceed to consider the re-drafting proposals contained in the submissions.

[32] The CFMMEU and the AMWU (unions) filed a joint submission²⁰ on 23 April 2020. The unions re-iterated their submissions raised in the *March 2020 conference* that the Ai Group’s proposed term, if adopted, would significantly reduce the application of the small furnishing employer redundancy clause in the Manufacturing Award 2020 as, they submit, elements of the coverage of the Furnishing Award 2003 were omitted. The unions submitted that the application would be further limited by the additional words ‘except where any of the above items are made out of metal, plastic, rubber or any like material’ in the Ai Group’s proposed term.

[33] The unions’ joint submission contains the following alternative proposal for clause 23.4(a) which, the unions submitted, would ensure that the application of the small furnishing employer redundancy clause was not reduced:²¹

“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 following work:

(i) Wholly or partly preparing, packing, assembling, manufacturing, repairing or fixing, whether new or second-hand:

- any article of furniture (including in-built furniture); or

¹⁷ [Transcript](#), 30 March 2020.

¹⁸ [Transcript](#), 30 March 2020, at PN14.

¹⁹ [Transcript](#), 30 March 2020, at PN20.

²⁰ [Joint submission of CFMMEU and AMWU](#), 23 April 2020.

²¹ [Joint submission of CFMMEU and AMWU](#), 23 April 2020, at [10].

- camp and/or garden furniture; or
- caravan furniture and/or caravan beds made by a furniture manufacturer; or
- any article of furniture usually made or partly prepared by cabinet makers or chair, settee, lounge or couch (fixed or convertible) makers; or
- show cases, clock cases, printer's cases; or
- ice chests.

Except where any of the foregoing are made of wood or timber, manufactured wood or timber products.

- (ii) upholstery on metal or any substitute material,
- (iii) manufacturing, assembling or repairing of mattresses and bedding;
- (iv) making, fixing or repairing draperies, blinds, lampshades, awnings or screens (including venetian and/or wire blinds) but not including persons working as tentmakers;
- (v) preparing or sealing floors (other than wood) where such preparing or sealing is necessary to ensure the correct laying of the required floor coverings;
- (vi) making or repairing picture frames (including art picture frames) or framed mirrors (except where any of the foregoing are made of wood or timber, manufactured wood or timber products);
- (vii) wholly or partly preparing, repairing or manufacturing refrigerators;
- (viii) optical work or glass, excepting spectacle lenses or frames.
- (ix) manufacturing or repairing musical instruments or parts thereof other than electronic organs (Except where made of wood or timber, manufactured wood or timber products)
- (x) tuning or servicing musical instruments (including electronic organs);
- (xi) building, repairing, servicing or tuning pipe-organs;
- (xii) manufacturing or assembling of baby carriages, dolls' carriages, mobile chairs or parts thereof;
- (xiii) Manufacture of any goods made of wicker, bamboo, cane or similar materials;

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.”

[34] The Ai Group filed a submission in reply²² on 7 May 2020. The submission included the following alternative proposal for clause 23.4(a) which, the Ai Group submitted, more accurately reflects the existing coverage of the Small Business Redundancy Scheme in the Manufacturing Award:

“23.4 Redundancy pay for employee of furnishing small business employer

²² [Ai Group submission](#), 7 May 2020.

(a) Clause 23.4 applies to an employee of a small business employer covered by this Award in respect of employees for whom the principal 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 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.”

[35] The Ai Group submitted that:

- consistent with the priority stage award modernisation decision²³ of the Australian Industrial Relations Commission, it is essential that the small business redundancy pay exemption is maintained for employers entitled to the exemption when the National Employment Standards came into operation;²⁴
- it is apparent from changes made during award modernisation proceedings that the Manufacturing Award’s coverage of furnishings made from metal, plastic and like materials is not derived from the Furnishing Award 2003;²⁵
- 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 Furnishing Award 2003;²⁶
- the unions’ approach in determining the definition of ‘small furnishing employer’ for the purposes of clause 45.2 pays insufficient regard to the coverage of the Manufacturing Award 2010, including those elements of coverage that were derived from awards other than the Furnishing Award 2003;²⁷ and
- the unions’ proposed clause would extend the scheme to a large number of employers not currently covered.²⁸

[36] The Ai Group’s submission sets out in detail its response to the various types of work that the unions’ submit were inappropriately excluded from the Ai Group’s proposed term, detailing the Ai Group’s rationale for its exclusion.²⁹ The Ai Group submits that the unions’

²³ [2008] AIRCFB 1000.

²⁴ [Ai Group submission](#), 7 May 2020, at [24].

²⁵ [Ai Group submission](#), 7 May 2020, at [29].

²⁶ [Ai Group submission](#), 7 May 2020, at [30].

²⁷ [Ai Group submission](#), 7 May 2020, at [31].

²⁸ [Ai Group submission](#), 7 May 2020, at [32].

²⁹ [Ai Group submission](#), 7 May 2020, at [37] – [71].

proposed term suggests that the small business redundancy scheme could potentially apply to an employee who performs any of the work listed in the proposed clause, regardless of its proportion of the total work undertaken or the significance of the work.³⁰ The Ai Group submits that the application of the scheme to such employees would be absurd, and its proposed term incorporates the principal purpose test summarised in *Carpenter v Corona Manufacturing*³¹ to prevent this.³²

[37] The Ai Group submits that the priority stage award modernisation decision held that imposing a small business redundancy pay obligation on employers that did not have such an obligation at that time would exclude a term of the National Employment Standards, and as such be contrary to s 55 of the Act.³³ The Ai Group submits that the small furnishing employer redundancy clause should be worded in a manner that avoids imposing such obligations on employers that did not have them prior to award modernisation. To the extent that the existing term could be interpreted as doing so, the Ai Group submits that such a wider application would have no effect pursuant to s 56 of the Act.

[38] The starting point for our consideration is the current clause 45.2 of the Manufacturing Award 2020. No party submitted that we should abolish the extension of the FW Act redundancy pay entitlements to employees of small furnishing employers covered by the award that is effected by clause 45.2. The difficulty arises because of the way in which the application of the provision is expressed. Clause 45.2(a) makes the provision applicable to those employees of any ‘small employer’ (as defined in clause 45.2(a)) who performs ‘any of the work’ within the ‘Manufacturing and Associated Industries and Occupations’ (which expression is defined in clause 2 to bear the meaning set out in clause 4.8) which immediately prior to 1 January 2010 was in clauses 6.1 to 6.6 of the Furnishing Award 2003. Those provisions of the Furnishing Award 2003 are reproduced in Attachment A to this decision.

[39] It appears to us that, in order for an employer or employee (or a court charged with enforcing the award) to ascertain whether a redundancy pay entitlement arises under clause 45.2 in respect of an employee covered by the Manufacturing Award 2020, the following process of analysis would be required. *First*, it would be necessary to identify the work actually performed by the employee in question (presumably as at the time immediately before being made redundant) within the scope of the award. This task would need to be undertaken not merely by reference to clause 4.8, which sets out the ‘Manufacturing and Associated Industries and Occupations’ but also clause 4.9, because the specified industries in clauses 4.8(a)(i) and (ii) (in which the major part of the coverage of the Manufacturing Award is located) are defined by reference to the ‘products, structures, articles, parts, components, materials and substances’ listed in clause 4.9. The task is made conceptually more difficult because while clause 45.2 refers to the work of the employee, clause 4.8(a) operates with respect to specified ‘industries’.

[40] *Second*, having identified the work of the employee in this way, it is then necessary to ascertain whether *any* of this work would have fallen within clauses 6.1 to 6.6 of the Furnishing Award 2003. That requires in the first instance access to those provisions of the Furnishing

³⁰ [Ai Group submission](#), 7 May 2020, at [72] – [74].

³¹ (2002) 122 IR 387, at [9].

³² [Ai Group submission](#), 7 May 2020, at [76].

³³ [Ai Group submission](#), 7 May 2020, at [77]. Ai Group cite [2008] AIRCFB 1000, at [59]-[60].

Award 2003, a pre-modernisation award which ceased to have effect over a decade ago. The Furnishing Award 2003 is no longer accessible on the Commission's website, although it is for the time being accessible on the website of the Fair Work Ombudsman for users with an account. Assuming a copy of the provisions can be obtained, the analysis then required to be undertaken involves a degree of complexity since clauses 6.1-6.6 of the Furnishing Award 2003 are lengthy and structured in a way which bears no ready correspondence with clauses 4.8 and 4.9 of the Manufacturing Award 2020.

[41] The difficulty associated with this process of analysis is such that we consider that clause 45.2(b) does not meet the modern awards objective in s 134(1) of the Act, with the need to ensure a simple and easy to understand modern awards system in paragraph (g) being the paramount consideration in this respect. The primary difficulty with the provision is the need to have access to an external document, namely a pre-modernisation award that has long ceased to operate, in order to comprehend the effect of the provision. However, that is far from being the only problem: there is also the conceptual confusion between the work of the employee and the industry in which the employee works, the level of difficulty involved in trying to compare clauses 4.8- 4.9 of the Manufacturing Award and clauses 6.1-6.6 of the Furnishing Award 2003 to see if any category of work falling within the former provisions also falls within the latter, and the fact that it is sufficient for *any* work done by the employee to fall within the coverage of the Furnishing Award 2003 for clause 45.2 to apply regardless of the principal function or purpose of the employee's employment or the employer's business.

[42] As recounted above, the interested parties which attended the November 2019 conference initially proposed resolving this issue by inserting a hyperlink to clauses 6.1-6.6 of the Furnishing Award 2003 into what is now clause 45.2. However, this would not assist parties using a hard copy of the award, there is no guarantee in the longer term that there will remain a copy of the Furnishing Award 2003 on the internet to link to, and this proposal does not resolve the other difficulties to which we have adverted. An alternative might be to reproduce clauses 6.1-6.6 of the Furnishing Award 2003 as an annexure to the Manufacturing Award 2020 to which clause 45.2 might cross-refer, but again this does not resolve the problems we have identified. The unions' proposal is little different from this alternative, since it would require large slabs of 6.1-6.6 of the Furnishing Award 2003 to be reproduced in clause 45.2 without any attempt to align or reconcile them with the coverage provisions in clauses 4.8 and 4.9 of the Manufacturing Award 2020.

[43] The major feature of the Ai Group's proposal with which the unions disagree is that it excludes work performed by an employee with any items that are made out of metal, plastic, rubber or any like material from the operation of clause 45.2. As earlier stated, the basis for this exclusion which is advanced by the Ai Group is that, to the extent that any the coverage of the Manufacturing Award 2020 is derived from pre-modernisation awards other than the Furnishing Award 2003, principally the *Metal, Engineering and Associated Industries Award 1998* (Metals Award 1998) and the *Rubber, Plastic and Cablemaking Industry Award 1998* (RPC Award 1998), clause 45.2 should not apply to such areas of coverage. However, no such exclusion currently appears in clause 45.2. The simple fact is that the coverage of the Furnishing Award 2003 overlapped with that of the Metals Award 1998 and the RPC Award 1998, so that the coverage of the current Manufacturing Award has multiple sources in pre-modernisation awards. For example, both the Furnishing Award 2003 and the Metals Award 1998 covered the manufacture of metal furniture and both the Furnishing Award 2003 and the RPC Award 1998

covered the manufacture of plastic furniture. Such overlaps in coverage in pre-modernisation awards had little practical significance at the time because they were respondent-based, so that a particular employer would usually be named as a respondent to one of the awards but not the other.

[44] When, in the award modernisation process, the Full Bench of the Australian Industrial Relations Commission determined in 2009 to preserve the redundancy pay entitlement for employees of small businesses previously covered by the Furnishing Award 2003 in the modern Manufacturing Award,³⁴ it said:

“[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...”

[45] Thus the Full Bench did not confine the operation of the small furnishing employer redundancy pay provisions in the modern Manufacturing Award to those parts of the coverage of the Furnishing Award 2003 which did not overlap with the coverage of other awards, but neither did it confine the operation of these provisions to employees of employers who had been respondents to the Furnishing Award 2003. This has resulted in a situation whereby, since the Manufacturing Award took effect on 1 January 2010, the small furnishing employer redundancy pay provisions have applied to employees of any employer that would have fallen within the scope of coverage of the Furnishing Award 2003, regardless of whether such an employer was or could have been covered by the Metals Award 1998 or the RPC Award 1998. The unions are therefore correct in submitting that the Ai Group’s proposal would narrow the current scope of operation of clause 45.2.

[46] Another important feature of the Ai Group’s modified proposal of 7 May 2020 is that it introduces a “principal purpose” test for the work of the employee. We consider that this has substantial merit. The coverage of the Furnishing Award 2003 did not operate on the basis that it was sufficient for ‘any’ of an employee’s work to fall with the scope of clauses 6.1-6.6, and we consider that it was implicit that this needed to constitute the primary function or principal purpose of the employee’s work. Nor does the Full Bench’s decision of 2009, quoted above, disclose any intention that the scope of the small furnishing employer redundancy pay provisions operate in this way. Clause 45.2 should be modified to address this.

³⁴ [2009] AIRCFB 345.

[47] Having regard to these matters, our *provisional* view is that the current clause 45.2 (which will be renumbered as clause 46.4 as a result of other variations) should be redrafted to provide as follows:

46.4 Furnishing employees of small business employers

- (a) Clause 46.4 applies to a furnishing employee of a small business employer except for an employee who is excluded from redundancy pay under the [NES](#) by sections 121(1)(a), 123(1), 123(4)(a) or 123(4)(d) of the [Act](#).
- (b) In clause 46.4(a) an employee is **a furnishing employee of a small business employer if:**
- (i) 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](#); and
- (ii) the employee's principal purpose of employment is to perform work in any of the industries specified in clauses 4.8(a)(i) and 4.8(a)(iii) in respect of any of the following items:
- furniture (except where made of wood or timber, manufactured wood or timber products), frames (pictures or mirrors);
 - clock cases (except where made of wood or timber, manufactured wood or timber products);
 - optical instruments, but not including spectacle lenses or frames;
 - lamp shades;
 - furnishings made from cane, bamboo and other like materials;
 - upholstery, furnishing drapery, blinds, screens, swings, awnings, mattresses and bedding;
 - flooring products made from other than wood;
 - picture frames other than wood;
 - musical instruments other than wood.

- (c) Subject to clauses 46.4(f) and 46.4(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 clause 46.4(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 clause 46.4(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 ‘clause 46.4(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. Clause 46.4(f) applies these arrangements also to redundancy pay under clause 46.4(d).
- (g) The terms of section 122 of the [Act](#) apply as if section 122 referred to ‘clause 46.4’ rather than ‘this Subdivision’ and to ‘clause 46.4(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. Clause 46.4(g) applies these arrangements also to redundancy pay under clause 46.4(d).

[48] We note, as was accepted by the Ai Group, that preparing, repairing or manufacturing of refrigerators fell within the coverage of the Furnishing Award 2003 (see clause 6.1.25). However, we agree with the Ai Group that the practical coverage of the Furnishing Award 2003 in this area was likely to be *de minimis*. Only one business in the respondent list in Schedule A of the Furnishing Award 2003 was identifiable in the refrigeration industry,³⁵ and that business appears to no longer exist. We have therefore *provisionally* not included this area of coverage in the draft clause above.

[49] A draft determination which would give effect to the *provisional* views expressed in paragraphs [47] and [48] above will be issued in conjunction with this decision, with an operative date of **2 May 2022**. Interested parties will have until **3pm (AEDT) on Thursday 31 March 2022** to file any submissions in response to the draft determination and our *provisional* views. Submissions must be sent electronically to amod@fwc.gov.au. Any contested issues in respect of our *provisional* views and the finalisation of the draft determination will be determined on the papers by Vice President Hatcher.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR739363>

³⁵ 'Peters Commercial Refrigerators, 33 Anzac Highway, ASHFORD, 5035'

Attachment A
Clauses 6.1-6.6 of the Furnishing Industry National Award 2003

6. COVERAGE OF AWARD

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

6.1 Furniture

6.1.1 Wholly or partly preparing, packing, assembling, manufacturing, repairing or fixing, whether new or secondhand:

- any article of furniture; (including in-built furniture)
- camp and/or garden furniture; or
- caravan furniture and/or caravan beds made by a furniture manufacturer; or
- show cases, clock cases, printer's cases; or
- wood beds; or
- ice chests.

6.1.2 Repairing any new or second-hand article of furniture usually made or partly prepared by cabinet makers or chair, settee, lounge or couch (fixed or convertible) makers;

6.1.3 upholstering on wood, metal or any substitute material;

6.1.4 wood carving;

6.1.5 spraying;

6.1.6 wood turning;

6.1.7 wood machining;

6.1.8 fixing or repairing new or second-hand furniture or seating in buildings;

6.1.9 French polishing new or second-hand furniture in or in connection with buildings;

6.1.10 polishing or finishing with wax, lacquer or any other material new or second-hand furniture or fittings in connection with buildings;

6.1.11 displaying, fixing or repairing in a building or shop, display units, cabinets, shop fittings and furnishings for shops, offices, banking chambers, churches, court rooms and the like and private houses, provided such articles are manufactured in the factory of a respondent to this award and who is engaged manufacturing other articles covered by the award;

6.1.12 designing, making, covering with baize or similar material, repairing, painting or decorating furnishing accessories or novelties (excluding such articles made entirely of fibre glass, plastics or similar materials) such as nut bowls, smokers' stands, display stands, ornamental stands, fancy boxes, breadboards or salt boxes;

6.1.13 designing, making, repairing, painting or decorating walking sticks;

6.1.14 wholly or partly preparing or manufacturing furniture timbers cut to size, veneers, veneered panels, plywood or coreboard or any substitute thereof;

- 6.1.15** manufacturing or repairing mantels or wood mantel pieces;
- 6.1.16** manufacturing, assembling or repairing wire mattresses;
- 6.1.17** manufacturing or repairing mattresses or bedding;
- 6.1.18** sanding or sealing wooden floors preparatory to either the laying of floor coverings or the application of all types of lacquers and polish;
- 6.1.19** applying all types of lacquers and polishes to wooden floors;
- 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;
- 6.1.21** waxing, gilding, bronzing or applying other “metallic finish” process by hand, brush, power-tool, machine or spray;
- 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;
- 6.1.23** the work of persons employed as mattress sewers, upholstery sewers, table hands, lampshade hands or drapery hands;
- 6.1.24** making or repairing picture frames (including art picture frames) or framed mirrors;
- 6.1.25** wholly or partly preparing, repairing or manufacturing refrigerators;
- 6.1.26** preparing hardboard or similar materials for all purposes;
- 6.1.27** the woodwork of wireless cabinets, billiard tables, incubators and sewing machines;
- 6.1.28** planning, designing, cutting, laying, measuring, repairing, and/or fixing and sewing of floor coverings and furnishing drapery, loose covers, stuffed quilts, pillows, bolsters, cushions, blinds (other than venetian blinds) where such work is performed in the employment of a retail shop and furnishing drapery establishments, and in the house furnishing cutting and sewing and in the preparation of and filling with materials for such work;
- 6.1.29** employees other than workers in the employment of a retail shop and furnishing drapery establishments engaged in wholly or partially in the planning, measuring, and/or repair of blinds, cornice boxes, pelmets, facia and the like used in connection with blinds.
- 6.2** **Glass or glazing**
- 6.2.1** Designing, bevelling, cutting, embossing or glazing by hand or machine, painting, silvering, sandblasting, bending or otherwise working all kinds of plate, sheet, float, figured rolled, structural or stained glass, louvers, clear-plastic or glass lenses or prisms;
- 6.2.2** fitting and/or fixing in position all kinds of plate, sheet, float, figured rolled, structural or stained glass, fibre glass, louvers, mirrors, spandrel panels, glazing bars, clear-plastic or glass lenses or prisms;
- 6.2.3** packing all kinds of plate, sheet, float, figured rolled, structural or stained glass, louvers, mirrors, clear-plastic or glass lenses or prisms including any labouring work in connection with any such operations;
- 6.2.4** manufacturing toughened (heat treated) or laminated safety glass;

6.2.5 manufacturing or repairing lampshades;

6.2.6 optical work or glass, excepting spectacle lenses or frames.

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.

6.4 Radio, audio equipment and television cabinets

Building or repairing the cabinets (mainly of wood) of radios, audio equipment or television sets.

6.5 Wicker and baby carriages

6.5.1 Manufacturing

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

6.5.1(b) any goods made of wicker, bamboo, cane or similar materials;

6.5.1(c) assembling or putting together any parts of baby carriages, dolls' carriages or mobile chairs.

6.6 Wooden toys

Manufacturing or repairing wooden toys.