

IN THE FAIR WORK COMMISSION

Four Yearly Review of Modern Awards  
(AM2014/64 & Ors)  
Plain Language Redrafting – Standard Clauses

**REPLY SUBMISSION OF THE  
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION –  
MANUFACTURING DIVISION  
AWARD SPECIFIC MATTERS**

**(11 February 2019)**

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## BACKGROUND

1. On 11 December 2018 the Plain Language Drafting Full Bench issued a further decision [2018] FWCFB 7447<sup>1</sup> (*'December Decision'*) regarding the form of the model terms for Standard Clauses in modern awards, as well as responding to issues arising in specific awards.
2. The model standard clauses are:
  - A. Award flexibility
  - B. Consultation about major workplace change
  - C. Consultation about changes to rosters or hours of work
  - D. Dispute resolution
  - E. Termination of employment
  - F. Redundancy
  - G. Transfer to lower paid job on redundancy
  - H. Employee leaving during the redundancy notice period.
3. At paragraphs [10] to [135] of the *December Decision* the Full Bench stated its provisional views on a range of issues, including various award specific matters.
4. Revised draft determinations (reflecting the findings and provisional views of the Full Bench in its *December Decision*) were subsequently published on 13 December 2018 in respect to multiple awards.
5. At paragraph [144] of the *December Decision*, the Full Bench stated:

*'Any interested party who opposes any of our provisional views is invited to comment on the draft determinations and file a submission setting out their position and any*

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<sup>1</sup> (AM2016/15) 4 yearly review of modern awards – Plain Language – Standard Clauses, [2018] FWCFB 7447 (11 December 2018)

*arguments in support of that position by no later than noon on Friday 25 January 2019. Submissions in Reply are to be filed by 4.00pm on Friday 7 February 2019. In the absence of a request for an oral hearing any outstanding issues will be determined on the papers.'*

6. The CFMMEU – Manufacturing Division ('CFMMEU – MD') has reviewed the draft determinations for the following modern awards in which it has an interest.
  - *Dry Cleaning and Laundry Industry Award 2010* ('DC&LI Award')
  - *Joinery and Building Trades Award 2010* ('Joinery Award')
  - *Manufacturing and Associated Industries Award 2010* ('Manufacturing Award')
  - *Textile, Clothing, Footwear and Associated Industries Award 2010* ('TCF Award')
  - *Timber Industry Award 2010* ('Timber Award')
  
7. Submissions with respect to a number of the awards above (Joinery Award, Manufacturing Award and Timber Award) were filed by the Australian Industry Group<sup>2</sup> ('AIG'), Housing Industry Australia<sup>3</sup> ('HIA') and Master Builders Australia<sup>4</sup> ('MBA'). The Reply submission of the CFMMEU – MD provides a response to a number of issues raised in the submissions of the AIG, HIA and MBA.

#### **JOINERY AND BUILDING TRADES AWARD 2010 – REVISED DRAFT DETERMINATION**

8. In response to the submissions of the MBA and the HIA, the CFMMEU - MD supports and adopts the reply submissions filed by the CFMMEU – Construction and General Division ('CFMMEU – C&G') on 8 February 2019.<sup>5</sup>

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<sup>2</sup> (AM2016/15) Australian Industry Group, Submission (25 January 2019)

<sup>3</sup> (AM2016/15) Housing Industry Australia, Submission (25 January 2019)

<sup>4</sup> (AM2016/15) Master Builders Australia, Submission (25 January 2019)

<sup>5</sup> (AM2016/15) CFMMEU – Construction and General Division, Reply Submission (8 February 2019) see paragraphs [11] – [18]

## MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010

9. The AIG submission makes a number of contentions with respect to clause 23.2 of the Manufacturing Award regarding the entitlement to redundancy for employees of a small furnishing employer.
10. Specifically, the AIG submissions respond to the Full Bench's provisional views set out at [46] – [47] of the December Decision, including that clause 23.2 of the Manufacturing Award limits the application of 'small furnishing employer' redundancy pay according to the types of work covered by the *Furnishing Industry National Award 2003*, but not also according to the geographic application of the predecessor pre-modern award.
11. The AIG contend, amongst other things, that the geographic application of the *Furnishing Industry National Award 2003* in the small furnishing redundancy pay provision is preserved.<sup>6</sup>
12. The CFMMEU – MD opposes the contention of the AIG. The submission of the CFMMEU – C&G comprehensively outlines the history of the consideration of small business redundancy provisions during the Part 10A Award Modernisation process and various decisions of the 2014 Award Review process relevant to the construction of section 154 of the Fair Work Act 2009.
13. In response to the submissions of the AIG, the CFMMEU - MD supports and wholly adopts the reply submissions filed by the CFMMEU – Construction and General Division ('CFMMEU – C&G') on 8 February 2019.<sup>7</sup>
14. This includes the suggestion at paragraph [33] of the CFMMEU – C&G reply submission that once the substantive issue regarding the Full Bench's provisional view on geographic coverage is determined, a conference be convened of interested parties to consider the

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<sup>6</sup> (AM2016/15) AIG submission, op cit; at [24]

<sup>7</sup> (AM2016/15) CFMMEU – Construction and General Division, Reply Submission (8 February 2019) see paragraphs [19] – [34]

simplification of the description of the types of work to which the provision applies.<sup>8</sup>

## TIMBER INDUSTRY AWARD 2010

15. The Full Bench in the *December Decision* indicated a review of the of the redundancy provisions in the Timber Award raised two issues:

- (i) the application of clause 15.7; and
- (ii) the operation of clause 15.8<sup>9</sup>

16. Current clauses 15.7 and 15.8 of the Timber Award are reproduced below:

### **'15.7 Small employer**

(a) For the purposes of this clause small employer means an employer to whom the NES does not apply because of the provisions of s.121(1)(b) of the Act.

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

<b>Employee's period of continuous service with the employer on termination</b>	<b>Redundancy pay period</b>
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

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<sup>8</sup> [2018] FWCFB 7447, at [46], [50]

<sup>9</sup> [2018] FWCFB 7447, at [35]

At least 4 years and over

8 weeks

- 15.8 Such provisions do not apply to weekly piecework employees.’ [emphasis given]

*First Issue – Application of clause 15.7*

17. With respect to the first issued identified, the Full Bench in its *December Decision* came to the provisional view that clause 15 – Redundancy, of the Timber Award:

“should be replaced by the plain language standard redundancy clause together with a new redundancy pay provision, clause 15.4 – Redundancy pay for employee of small business employer, as set out at [43] below. The proposed new redundancy pay provision has been drafted on the basis that clause 15.7(b) of the Timber Award limits the application of ‘small employer’ redundancy pay according to the types of work covered by the two predecessor awards. Accordingly, the proposed new provision applies to ‘small business employers’ throughout Australia.’<sup>10</sup>

18. The CFMMEU – MD supports the provisional view of the Full Bench that the small employer redundancy pay provision in clause 15.7 of the Timber Award is not limited on a geographical basis but rather its application is limited ‘according to the types of work covered by the two predecessor awards’.

19. In contrast, the AIG in its submission oppose the Full Bench’s provisional view and contend that clause 15.7 of the Timber Award does limit the small business redundancy pay provision on a geographic basis.<sup>11</sup>

20. In the CFMMEU – MD’s submission the contention of the AIH is misconceived.

21. In our submission, the intended scope of the small business redundancy provision in the Timber Award is clear on its face and is not geographically confined. The entitlement to

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<sup>10</sup> [2018] FWCFB 7447 at [40]

<sup>11</sup> (AM2016/15) AIG submission; op cit;

small business redundancy in clause 15.7(b) of the Timber Award is determined by reference 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...*'. That is, the nexus for the entitlement to be triggered is the 'work' undertaken by the employee, by reference to the current Timber Award, and the two pre-reform awards.

22. The AIG submission further ignores the consideration by the Award Modernisation Full Bench of geographic limitations in pre-modern awards and NAPSA, and subsequently by various Full Benches in the 2014 Award Review (for example, the Accident pay case in 2015<sup>12</sup>).
23. These decisions are considered in some detail in the reply submission of the CFMEU – CG in context of the small furnishing employer redundancy provisions in the Manufacturing Award. They are equally relevant here to a consideration of the small business redundancy provision in the Timber Award. As in relation to the Manufacturing Award, by way of general application, we support and adopt the rely submissions of the CFMMEU C&G.
24. We submit that if the Award Modernisation Full Bench had intended to include a small business redundancy provision in the Timber Award to apply on a limited geographic basis only, it would have been explicit in doing so, either in the various decisions relevant to the making of the modern Timber Award and/or in the terms of clause 15.7 itself. It did not do so.
25. We further submit, that consistent with the approach it took to various other entitlements contained in pre-reform awards, NAPSA's and Division 2B state awards (whose application was geographically defined to a small number of states or territories), the Award Modernisation Full Bench would have likely made the small business redundancy provisions in the Timber Award transitional if they were intended to only apply to a limited number of

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<sup>12</sup> [2015] FWCFB 3523

states and territories (with such transitional provisions ceasing to apply as of 31 December 2014)

26. Attachment B to the *December Decision*, sets out the respective coverage clauses of the Timber Industry Award 2010 (clause 4), the pre-reform *Furnishing Industry National Award 2003* (clause 6) and the pre-reform *Timber and Allied Industries Award 1999* (clause 6).
27. It is relevant that clause 4 of the *Furnishing Industry National Award 2003* applied to a majority of the states and territories (Victoria, South Australia, Tasmania, New South Wales and the Australian Capital Territory). Similarly, clause 6 of the *Timber and Allied Industries Award 1999* applied to a majority of states and territories (New South Wales, Victoria, South Australia, Tasmania, Western Australia and the Australian Capital Territory). This broad coverage is not surprising given that both of these pre-reform awards were pre-eminent national awards applying in the furnishing and timber and allied industries in Australia.
28. On the basis of the above submissions, we therefore contend that the small business redundancy provisions in the Timber Award should apply to small business employers across Australia.
29. In relation to clause 15.7 of the Timber Award, the Full Bench proposes to redraft it as a new 'small business employer' redundancy provision (i.e. new clause 15.4).<sup>13</sup> The proposed new clause 15.4(a) is reproduced below:
  - (a) Clause 15.4 applies to an employee of a small business employer except for an employee who:
    - (i) only performs work within clause 4.2(f) – Pulp and paper sector of this award; or
    - (ii) is excluded from redundancy pay under the NES by section 121(1)(a), section 123(1) or section 123(4)(a) of the Act.
30. With respect to the exclusion of employees who only perform work in the pulp and paper

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<sup>13</sup> [2018] FWCFB 7447 at [43]



sector (as per coverage of clause 4.2(f) of the Timber Award), we bring to the Full Bench's attention that a small business redundancy provision did exist under the pre-reform *Pulp and Paper Industry (Maintenance and Services) Award 2003* [AP822169] ('P&P Maintenance and Services Award'). The P&P Maintenance and Services Award was one of 2 significant pre-reform awards in the pulp and paper sector prior to award modernisation.<sup>14</sup>

31. The P&P Maintenance operated in a majority of states and territories (New South Wales, Victoria, South Australia, Western Australia and Tasmania) (see clause 6 – Coverage and Parties Bound). It covered 7 major respondent manufacturers<sup>15</sup> in the pulp and paper industry with respect to certain defined classifications for maintenance and service employees. It also covered 5 unions (AMWU; AWU; CFMEU – FFPD (Pulp and Paper Workers Branch); CEPU; NUW).<sup>16</sup>
32. In this context, we consider that there are reasonable grounds to also carve out the maintenance and service coverage as per the P&P Maintenance and Services Award, such that the small business provisions in the Timber Award would also apply to those employees. We note however, that at this time such an inclusion would have minimal practical impact on the affected employers given the large size of their pulp and paper operations.

#### *Second Issue – operation of clause 15.8*

33. The second issue<sup>17</sup> raised by the Full Bench in its *December Decision* concerns clause 15.8 which currently states:

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<sup>14</sup> The other was the Pulp and Paper Industry - Production Award 1999 [AP792323] which operated in 4 states (NSW, Vic, SA and Tas) and applied to the majority of the same employer respondents as the P&P Maintenance and Services Award. i.e. Amcor Ltd; Carter Holt Harvey Tissue Australia; Johnsons Controls Pty Ltd; Kimberly-Clark Australia Pty Ltd; Paper Australia Pty Ltd; Huhtamaki Australia Ltd.

<sup>15</sup> Pulp and Paper Industry (Maintenance & Services) Award 2003; clause 6.1 – employers named included Amcor Packaging Australia Pty Ltd (6.1.1); Carter Holt Harvey Tissue Australia Limited (6.1.2); Carter Holt Harvey Wood Products Australia Pty Ltd (6.1.3); Kimberly-Clark Australia Pty Ltd (6.1.4); Paper Australia Pty Ltd (6.1.5) and Huhtamaki Australia Limited (6.1.6).

<sup>16</sup> Ibid; clause 6.2

<sup>17</sup> [2018] FWCFB 7447 at [42]

15.8 Such provisions do not apply weekly piecework employees.’

34. At paragraph [42] of the December Decision, the Full Bench stated:

‘In relation to the second issue, the operation of clause 15.8 of the Timber Award, it is 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. In any case, clause 15.8 appears to be otiose given the exclusion of pieceworkers from various award provisions (including clause 15) under clause 12.5(d) of the award and we propose to omit from the new redundancy provision.’

35. The CFMEU – MD does not oppose the proposed deletion of current clause 15.8.

#### **DRY CLEANING AND LAUNDRY INDUSTRY AWARD 2010**

36. The CFMMEU - Manufacturing Division supports the revised draft determination for the DC&LI Award.

#### **TEXTILE CLOTHING FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2010**

37. The CFMMEU - Manufacturing Division supports the revised draft determination for the TCF Award.

Filed by the:

Construction, Forestry, Maritime, Mining and Energy Union  
Manufacturing Division

(11 February 2019)