Australian Industry Group

Application to vary the *Textile, Clothing, Footwear and Associated Industries Award 2020*

Reply Submission

(AM2023/25)

26 April 2024

AM2023/25 APPLICATION TO VARY THE *TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2020*

1. INTRODUCTION

1. The CFMEU opposes Ai Group's application to vary the TCF Award. Its position is set out in a submission it filed on 3 April 2024 (**CFMEU Submission**). This submission responds to the CFMEU Submission.[1]

2. We note at the outset that we have necessarily been limited in the extent to which we can respond to the CFMEU Submission, by virtue of the distinctly positional nature of the material advanced which, in various respects, does little to articulate the *reasons* underpinning the submissions advanced by the union. This is so despite having been afforded a meaningful period of time to develop and advance its written submission.[2] It is also relevant that the Commission's directions required the union to file written *submissions* in response to the application (rather than an *outline* of submissions).

3. We note that the matter is listed for hearing on 7 May 2024. In the circumstances described above, any attempt made by the CFMEU to embellish its reply submission with an articulation of the reasoning behind its position or other relevant details that it could have advanced in its written submission, should not be permitted.

[1] We have adopted the same abbreviations as in our submission in chief dated 7 February 2024, in this submission.

[2] I.e. a period of eight weeks.

2. THE EVOLUTION OF THE IMPUGNED CLAUSES

4. In section C.2 of the CFMEU Submission, the union advances the following key contentions.

5. *First,* the shift penalties prescribed by clauses 29.3.1 and 29.3.2 of the Pre-Modern Footwear Award were payable per *shift*, not per *week*.[3] We disagree, for the reasons set out at [35] – [45] of our submission in chief.

6. *Second,* no reliance can be placed on clause 29.3.4 of the Pre-Modern Footwear Award for the purposes of ascertaining the proper interpretation of clauses 29.3.1 and 29.3.2 of the award.[4] We disagree, for the reasons set out at [43] – [45] of our submission in chief.

7. *Third,* clauses 35.1 and 35.2 of the 2010 Award required the payment of the relevant shift penalties per *shift*, not per *week*.[5] We disagree, for the reasons set out at [46] – [56] of our submission in chief.

8. *Fourth,* Ai Group's submission in chief *'does not fairly represent or characterise the key developments in respect of the Relevant Clauses in the four yearly review'*. The CFMEU goes on to proffer an alternate set of conclusions that should, in its view, be reached by the Commission instead.[6] We refute the union's submission.

9. Paragraph [47](b) of the CFMEU Submission mischaracterises the relevant submission advanced by the TCFUA in the 4 yearly review, which is set out at row 19 of Attachment B to our submission in chief.

[3] CFMEU Submission at [40].

[4] CFMEU Submission at [41].

[5] CFMEU Submission at [43].

[6] CFMEU Submission at [47].

10. Ai Group had pointed out that a footnote was missing from clause C.2.2 of the exposure draft published by the Commission and submitted that it be inserted in the following terms:

    Payment per shift in addition to the appliable minimum hourly rate.[7]

11. In response to Ai Group's submission, the TCFUA said as follows: (emphasis added)

    - The TCFUA disagrees with the AIG submission.
    - There are different methods of calculation in relation to the shift loading for employees (non-textile) and employees (textile).
    - Further, the textile shift loadings are calculated against the General skill level 2 classification in clause 10; whereas the General shift loadings are determined according to the actual skill level classification appropriate to the work performed by the employee.

12. The TCFUA expressly took issue with the terms of the footnote proposed by Ai Group. The CFMEU's submission that the TCFUA *'did not oppose the AIG's submission'*[8] is patently wrong.

13. Further, one of the bases for the TCFUA's opposition was the method of calculation articulated by the proposed footnote. Specifically, it sought to draw a distinction between the method of calculation required by the Award in relation to the shift loading payable to employees in the textile industry (which is payable, uncontroversially, in respect of each *shift*[9]) and the shift loading payable to other employees (which is payable in respect of each *week*).

14. It is on this basis that Ai Group submits, in this proceeding, that the Commission erroneously concluded that the issue of the terms of the footnote was *'resolved'* and replicated the (inaccurate) footnote appearing in the table of rates relating to casual employees in the table of rates relating to permanent employees.[10]

[7] Ai Group submission dated 7 February 2024, Row 16 of Attachment B.

[8] CFMEU Submission at [47](b).

[9] Clauses 30.3(a) – (b) of the TCF Award.

[10] Ai Group submission dated 7 February 2024 at [63](d).

15. Thus, the Commission should not reach the conclusions set out in the CFMEU Submission at [47].

16. *Fifth,* the inclusion of footnotes in C.3.1 and C.5.1 of the Award as a result of the 4 yearly review of modern awards, indicating that the relevant shift penalties are payable per *shift*, was not an error.[11]

17. Our submission in chief deals extensively with why the footnotes contained at C.3.1 and C.5.1 constituted errors. We continue to rely on those aspects of our submission.[12]

18. *Sixth,* Ai Group's submission that the Commission (and Ai Group) were not conscious of, and did not intend, the implications of variations made to clauses 29.3(a) and 29.3(b) of the Award after the 4 yearly review of modern awards is *'misconceived'*.[13]

19. We disagree. We repeat and rely on [66] – [70] of our submission in chief.

[11] CFMEU Submission at [49].

[12] Ai Group Submission dated 7 February 2024 at [57] – [72] and [94] – [97].

[13] CFMEU Submission at [51].

3. AMBIGUITY, UNCERTAINTY AND / OR ERROR

20. In its submissions in response to Ai Group's contention that the Impugned Clauses are ambiguous and / or uncertain, the union has done little more than to state that this is not so and to contend that there is only one interpretation available (i.e. the First Interpretation).[14] It has not engaged with the substance of our submissions regarding the Second Interpretation or the provisions being uncertain.

21. As for Ai Group's contention that the relevant provisions reflect errors resulting from the 4 yearly review and subsequent proceedings in AM2021/59; the union seeks to rely on the position adopted by Ai Group in those matters.[15]

22. The position adopted by Ai Group in those proceedings does not alter the proposition that the Impugned Clauses contain errors that can and should be rectified. Ai Group devoted extensive resources to contributing to the 4 yearly review of modern awards. No other organisation devoted comparable resources to the process. We identified countless inadvertent substantive errors made in the course of the redrafting of over 70 modern awards, including the TCF Award.[16] To the extent that we did not identify the erroneous approach adopted in the Impugned Clauses; this does not of itself undermine the force of the arguments we advance in this proceeding or obviate the necessity to vary the relevant terms of the Award.

[14] CFMEU Submission at [54] – [63].

[15] CFMEU Submission at [66] – [67].

[16] See Attachment B to our submission in chief for some examples of the detailed submissions we made about the redrafting of the TCF Award.

4. THE COMMISSION'S DISCRETION

23. The CFMEU submits that even if the Commission finds that the Impugned Clauses are ambiguous, uncertain and / or contain errors, the Commission should *'exercise its discretionary power by declining to make the Proposed Variations'*.[17] In part, it advances this argument on the basis that the variations proposed would not result in the Award achieving the MAO. We deal with these arguments in the following section of this submission.

24. The union also contends that the *'conduct of [Ai Group] in respect of the four yearly review proceeding and the 2021 variations provides a compelling reason to decline to make the Proposed Variations'*.[18]

25. This argument plainly cannot be accepted. The position adopted by Ai Group in previous proceedings relevant to the Impugned Clauses does not of itself obviate the need, or undermine the necessity for, the proposed variations. Nor is it so much as a factor that weighs against granting them. We refer to, and rely on, the submissions advanced above at [22].

[17] CFMEU Submission at [69].

[18] CFMEU Submission at [70].

5. THE MODERN AWARDS OBJECTIVE

26. The CFMEU argues that the Commission should not make the variations proposed by Ai Group pursuant to s.157 of the Act, in large part, because the evidentiary case we have advanced is deficient.

27. There are obvious practical challenges associated with advancing evidence in the context of a matter in which:

    (a) There is, in effect, a dispute about the proper interpretation of award provisions that require the payment of a material financial entitlement; and

    (b) A major union is arguing that the proper interpretation of the relevant award terms requires the payment of certain amounts that, in practice, employers covered by the award are not paying, because they have adopted an alternate interpretation of the instrument.

28. Unsurprisingly, employers in these circumstances are reluctant to provide evidence in public proceedings, in which the relevant union is also involved.

29. In this matter, the circumstances described above have presented an insurmountable challenge to advancing further witness evidence. The union's criticism that Ai Group has *'failed to adduce evidence from even a single employer that pays its employees shift penalties pursuant to the Award'*[19] must be considered in this context. We expect that the union does not, and could not, contest the proposition that some employers do pay shift penalties pursuant to the Award.

30. It is also relevant that many of the arguments advanced by Ai Group:

    (a) Do not rely on factual propositions; or

    (b) Rely on self-evident or logical factual propositions, which ought not be controversial.

[19] CFMEU Submission at [92].

31. For instance, the CFMEU takes issue with Ai Group's submission that if the First Interpretation is to be adopted, the Impugned Clauses result in a substantial and unjustifiable cost burden on employers. The union argues that this submission should be rejected *'as it is not supported by sufficient probative evidence'*.[20] It goes on to contend that to *'properly advance this submission, [Ai Group] would have had to adduce evidence from a number of employers that are vexed by the clauses as is claimed'*.[21]

32. It is axiomatic that a requirement to pay a shift loading in the vicinity of $130 - $300 per shift,[22] to each employee engaged on the shift, would amount to a significant cost burden. This was illustrated in our submission in chief at [141] – [142]. It is a submission that has logical force, on its face. It does not necessitate the calling of evidence. It is also self-evident that the First Interpretation imposes a significantly greater cost impost than the Second Interpretation.[23] Indeed, the differing financial consequences of the competing interpretations in issue in this proceeding is part of the reason for the union's opposition to our application.[24]

33. The relevance of Ai Group not having called evidence *'at all from employers in the clothing industry, and the allied manufacturing and fabricating industries'*[25] is also not clear. Whilst it might be argued that different shift patterns may be implemented in different sectors (or parts of sectors) covered by the Award; the central point advanced by Ai Group must be accepted as being true in any such context – that is, the First Interpretation would result in a significant cost burden.

34. The CFMEU seeks to liken the proposals advanced by Ai Group to those that were sought by employer interests in proceedings during the 4 yearly review of modern awards to reduce weekend penalty rates ***(Penalty Rates Case)***.[26] It

[20] CFMEU Submission at [91].

[21] CFMEU Submission at [91].

[22] Clause C.3.1 of the Award.

[23] See Ai Group Submission dated 7 February 2024 at [82].

[24] CFMEU Submission at [106].

[25] CFMEU Submission at [91].

[26] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

argues that the *'type of evidentiary case which [Ai Group] would have needed to run … is illustrated by the case run by the employers'* in that matter.[27]

35. Plainly, Ai Group's application in this proceeding is of a fundamentally different character, in large part because the primary position advanced by Ai Group is that the Award should be varied to address an ambiguity, uncertainty and / or error. The proposed variations would ensure that the Award reflects what we say is the better interpretation of the presently ambiguous and / or uncertain terms. In the alternate, the variations sought would result in the Award removing the relevant errors. The *Penalty Rates Case* did not involve a consideration of any such issues.

36. Moreover, the extent of evidence called in the *Penalty Rates Case* should not be applied as a threshold that must be overcome by parties in other proceedings. Ultimately, an assessment of whether the evidence called in a particular matter establishes the factual propositions relied upon by the parties to that matter must, necessarily, be undertaken in respect of each proceeding in its own right.

37. We do not accept that Ms Carr's evidence is of limited utility by virtue of the fact that the relevant operations of Blundstone are covered by an enterprise agreement. The evidence illustrates various implications that would flow from the significant cost implications of the First Interpretation, which include (but are not limited to) the impact on the enterprise bargaining process most recently entered into by Blundstone.[28] In particular, the evidence demonstrates the types of operational consequences that would flow if Blundstone was required to adopt the First Interpretation.

38. The CFMEU seeks to marginalise the relevance of Ai Group's analysis of the shiftwork provisions found in other modern awards[29] and in doing so, misses the point. The analysis demonstrates that the First Interpretation of the Impugned Clauses results in an outcome that is radically out of step with other modern

[27] CFMEU Submission at [93].

[28] Witness statement of Ms Carr at [26].

[29] CFMEU Submission at [94].

awards that contain shiftwork provisions. Unless the disutility of performing work on shifts under the Award by non-textile sector employees is radically greater than that which is experienced by employees covered by other awards, the disparity of approach is unsustainable and unfair.

39. In various instances, the union argues that Ai Group's submissions as to the merits of its proposed variation are misconceived because *'the s.157 Application is advanced in [c]ircumstances where the Commission has ruled that the clauses are not ambiguous or uncertain'*.[30]

40. The union's position is misguided. Ai Group's submissions regarding the merits of the proposed variations concern not only the application to vary the Award pursuant to s.157 of the Act; they also seek to address the reasons why the Commission should exercise its discretion to vary the Award in the manner proposed if it finds that the Award is ambiguous, uncertain and / or contains errors. Clearly, arguments such as those advanced at [116] and [129] of our submission in chief are relevant in the latter context.

A *'Fair'* Safety Net

41. Contrary to the union's submission, Ai Group has not *'conveniently ignore[d] the fact that s.134(1) refers to a "fair and relevant safety net"'*.[31] We dealt expressly with the notion of fairness at [110] – [117] of our submission in chief.

The Relative Living Standards and Needs of the Low Paid

42. The union argues that *'the needs of the low paid will not be met if the Proposed Variations are granted',* but has not filed any evidence in support of this proposition.[32] Further, for reasons stated earlier, we do not accept that the relevant provisions have a *'long and established history'* of the nature contended by the CFMEU.[33]

[30] See for example CFMEU Submission at [98] – [99] and [122].

[31] CFMEU Submission at [101].

[32] CFMEU Submission at [106].

[33] CFMEU Submission at [107].

The Need to Encourage Collective Bargaining

43. The union's submissions in respect of s.134(1)(b) should not be accepted.[34] The evidence before the Commission clearly demonstrates the significant practical difficulties associated with engaging in enterprise bargaining if the First Interpretation is correct (or if it is pressed by the union in the context of bargaining).

44. Further, the Commission should not conclude that the status quo (i.e. the existence of key terms of the Award that are ambiguous, uncertain and / or contain errors) would encourage employers to engage in collective bargaining.[35] There is no evidence of this.

Social Inclusion

45. We refer to the submissions made earlier at [27] – [29], regarding the difficulties associated with obtaining evidence in support of our application, in response to the union's submissions concerning s.134(1)(c) of the Act.[36] We also note that the submissions we made in relation to this issue reflect the feedback provided to us by employers covered by the Award.

Flexible Modern Work Practices & the Efficient and Productive Performance of Work

46. Contrary to the union's submission, Ai Group did address s.134(1)(d) at [143], [144](a), [144](b) and [144](c) of its submission in chief. The union has not seriously engaged with any of these arguments.

[34] CFMEU Submission at [110] – [112].

[35] CFMEU Submission at [111].

[36] CFMEU Submission at [115] – [117].

Additional Remuneration for Work on Shifts

47. The Commission should not find that s.134(1)(da) would *'not be met'* if the proposed variations are granted or that it weighs heavily against the making of the variations sought.[37]

48. The union's submission that s.134(1)(da) *'requires [a] consideration of the need for additional remuneration for such work and as such what is fair and reasonable'*[38], misconstrues the relevant provision of the Act. The question of whether the applicable shift loadings are fair and relevant is a separate matter, that does not arise from s.134(1)(da).[39] Put another way, s.134(1)(da) does not require an assessment of whether the quantum of a penalty rate or other form of additional remuneration is *adequate* or *appropriate.* Considerations of that kind arise from other aspects of s.134(1) of the Act.

49. The union states that Ai Group has *'failed to address s.134(1)(da)(ii)'* of the Act, which refers to employees working *'unsocial, irregular or unpredictable hours'*.[40]

50. We do not accept that the performance of work necessarily constitutes work that is irregular or unpredictable, for the purposes of s.134(1)(da)(ii) of the Act. In fact, employees performing work on shift may be engaged to do so on a regular and ongoing basis over an extended period of time.[41] We also do not accept that all shiftwork constitutes work at times that are unsocial. However, to the extent that it does, our submission in chief at [136] – [138] applies equally to it.

The Impact on Business

51. Plainly, s.134(1)(f) is not a neutral consideration in this matter, as suggested by the CFMEU.[42]

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[37] CFMEU Submission at [124].

[38] CFMEU Submission at [127].

[39] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [202].

[40] CFMEU Submission at [125].

[41] See for example, witness statement of Ms Carr at [26](f)(B).

[42] CFMEU Submission at [131].

52. The union argues that a *'major deficiency'* in the case advanced by Ai Group is the absence of evidence about the prevalence of afternoon and night shift work.[43]

53. Section 134(1)(f) directs the Commission's attention to the impact on business. This does not only enliven macroeconomic considerations but also, microeconomic considerations. Plainly, the cost impact of the First Interpretation of the existing provisions on an employer who operates an afternoon and / or night shift, is significant. It is not necessary to call evidence about the prevalence of shiftwork under the Award generally in order to satisfy the Commission of this. Further, we doubt that the union would seriously suggest that shiftwork is not a common feature amongst enterprises covered by the Award (and that are not engaged in the textile industry). Plainly, it has not advanced any such contention in its written submission.

54. Similarly, the Commission should disregard the union's nonsensical submission that there is an *'insufficient evidentiary basis for the Commission to conclude that the impact on business arising from reduced afternoon and night shift penalty rates under the Award would be of <u>any</u> significance'* (our emphasis).[44]

55. The union argues that Ai Group's submissions *'misconstrue the meaning of productivity'*, but then does not proceed to articulate what is, in its submission, the proper meaning.[45]

56. In any event, we do not accept this criticism. Productivity, for the purposes of s.134(1)(f) of the Act, has been found to be directed at *'the conventional economic concept of the quantity of output relative to the quantity of inputs'*.[46] Inputs include capital and equipment. Thus, where the quantity of inputs remain the same (in the form of capital and equipment) but the outputs are reduced (because those inputs are not being utilised outside of day work hours), this necessarily results in a reduction in productivity.

[43] CFMEU Submission at [130].

[44] CFMEU Submission at [132].

[45] CFMEU Submission at [133].

[46] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [224] – [225].

6. RETROSPECTIVE VARIATIONS

57. The CFMEU opposes Ai Group's submission that the proposed variations should be made with retrospective effect, from 1 February 2021. It submits that the *'circumstances of the cases relied upon by [Ai Group in its submission in chief at] paragraphs 105 and 106 are entirely distinguishable from the current circumstances'*.[47]

58. We disagree, for the reasons set out at [107] of our earlier submission. The union's contention that those submissions should be rejected because they are not *'properly supported by probative evidence'*[48] fails to properly engage with the propositions we have advanced which, with one exception, do not rely on factual propositions that need to be made out through evidence.

59. The exception arises at paragraph (e) of [107] of our submission in chief. Ai Group has advanced evidence from one employer as to its long-standing understanding of the operation of the shiftwork provisions in the Award.[49] This is consistent with feedback provided to Ai Group by other employers covered by the Award. For the reasons explained at [27] – [29] of this submission, it has not been feasible to call further evidence in this proceeding. We would also observe that the CFMEU has failed to call *any* evidence, including any evidence that might establish that the relevant shift loadings have, in practice, been applied in a manner that differs from that which is contended by Ai Group.

[47] CFMEU Submission at [73].

[48] CFMEU Submission at [74].

[49] That is, the witness statement of Ms Carr at [14] – [15].

7. TRANSITIONAL ARRANGEMENTS

60. The CFMEU submits that it is *'notable that [Ai Group] has not proposed any variation to offset or mitigate any reduction in take home pay'* that would result from the proposed variations.[50] The union also says that it *'seeks an opportunity to be heard on appropriate transitional provisions'* in the event that the Commission decides to vary the Award as sought by Ai Group.[51]

61. The CFMEU's submission rests on the fundamental premise that presently, the Impugned Clauses entitle employees to the relevant shift loadings in accordance with the First Interpretation. In a similar vein, it repeatedly characterises the proposed variations as *'cutting'* an existing entitlement.[52]

62. Ai Group does not accept the central principle underpinning the union's aforementioned submissions and by extension, the submissions themselves.

63. Nonetheless, we acknowledge that the Commission could exercise its discretion to implement transitional arrangements, if it considers that they are *necessary* in the sense contemplated by s.138 of the Act. Ai Group submits that it should be afforded an opportunity to be heard in respect of any specific transitional arrangements that the Commission proposes to adopt (noting that the CFMEU has not suggested any).

[50] CFMEU Submission at [106].

[51] CFMEU Submission at [141].

[52] See for example CFMEU submission at [2].