Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Vehicle Manufacturing, Repair, Services and Retail Award 2010 (AM2014/93)

20 MAY 2016

4 Yearly Review of Modern Awards

AM2014/93 – Vehicle Manufacturing, Repair, Services and Retail Award 2010

1. Introduction

1. Ai Group makes this submission in relation to the material filed by the AMWU (as a whole union) and the Motor Trades Organisations.

2. We share the very strong opposition of those organisations to the variation of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**VMRSR Award**) and *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) contemplated in the Full Bench's statement of 2 November 2015.

3. In addition to dealing with the abovementioned matter, we have set out some concerns regarding the Exposure Draft provisions concerning the implementation of a new 10 hour limit on the working of ordinary hours and the remuneration of vehicle salespersons.

2. Altering the coverage of the VMRSR Award and the Manufacturing Award

4. Set out below is a brief response to elements of the submissions of the AMWU (as a whole union) and Motor Trades Organisations relating to the central issue**.**

5. We broadly concur with many of the concerns raised by these parties. We do not however propose to repeat or refer to all of the valid issues that they have raised.

Response to the AMWU Submissions Regarding stability and certainty.

6. The AMWU has identified the need to consider the public interest in the stability of the modern award safety net, and the need (in the interests of

certainty) to avoid changes without justification.

7. Crucial to the Full Bench's determination of whether to proceed with the proposed changes to the respective awards should be a consideration of s.134(1)(g):

> "the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards."

8. Ai Group accepts that it could be argued that the proposal makes the Vehicle Award somewhat simpler and easier to understand for those that remained solely covered by the Vehicle Award. Moreover, we understand the Full Bench's desire to achieve such an outcome. However, the submissions of the respective parties demonstrate that adopting the proposed approach would, in numerous respects, give rise to new forms of complexity in the award system and/or other negative consequences. It is important to appreciate that it is the need to ensure a simple and easy to understand "award system" that the Full Bench is required to consider. The detrimental outcomes identified by the parties clearly outweigh any alleged benefits of the proposed variations.

9. Transplanting different conditions for a certain stream of employees into the Manufacturing Award would undoubtedly make the Award both lengthier and more complex, as observed in the AMWU's material. The Commission will be aware that the Manufacturing Award applies to a very large number of employers and employees. It also applies to broad range of parties. That is, it covers many parties not involved in the vehicle industry. Consequently, the Commission should be particularly mindful of ensuring the instrument is not amended in a manner that in any way makes it more difficult to understand.

10. In considering the proposed variations, the importance of the maintenance of a *stable* system, as contemplated by s.134(1)(g) should not be overlooked. Nor should it be given less weight than the objective of ensuring the system is simple and easy to understand. Stability in the system is, in and of itself, an important consideration. The significance of this consideration was considered

by the Full Bench in the Preliminary Jurisdictional Issues Decision:[1]

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

11. The need for the proposed changes is not self-evident. Moreover, changing the scope of an award's coverage of employers or employees is a very significant change to the safety net. It is also evident that there would be consequential substantial changes to existing award entitlements and obligations for numerous employees and employers covered by the relevant awards.

12. On the material before the Commission, the proposed changes are not warranted. It would be contrary to that element of the modern awards objective that speaks to the need for a stable system (s.134(1)(g)).

13. Taking into account the need to ensure the modern award system is both simple and easy to understand, as well as stable, involves the consideration of arguably interrelated objectives. Altering the coverage of modern awards so that parties who have long applied the provisions of a particular award would be forced to apply a different award, would undermine the extent to which the system can be considered simple and easy to understand. It would also add, at least in the short term, to compliance costs.

14. Section 134(1)(g) also speaks to the need to, "…*avoid unnecessary overlap of modern awards*." The material advanced by the parties, particularly the Motor Trades Associations, establishes that there would be employers who will be required to apply both the Manufacturing Award and VMRSR Award if the proposed variations are adopted. Accordingly, the proposal will be directly

[1] [2014] FWCFB 1788

inconsistent with this element of the modern awards objective.

15. The need to apply multiple awards would increase the regulatory burden as contemplated by s.134(1)(f).

16. The AMWU has identified a raft of entitlements that it appears would be altered by the proposed variation. This alone should warrant the Commission abandoning the proposed variations. The Commission should not amend the awards in pursuit of simplicity at the cost of altering substantive entitlements.

17. Ai Group has not, to date, undertaken a comprehensive review of all of the changes to the most recent version of the Exposure Draft of the Manufacturing Award which is being considered in the current proceedings. Nor are we certain that the AMWU analysis of the Manufacturing Award is comprehensive. Nonetheless, given the nature of the Review not being dependent upon the role of parties, we contend that the Commission should not proceed with the variations unless it is satisfied that the proposed variations would not give rise to unintended or unjustified changes. We submit that the Commission cannot be satisfied on the material which is before it.

18. Moreover, adopting the proposed variations, based on the material before the Commission, would be inconsistent with the approach to the Review articulated by the Full Bench in its review of the *Security Services Industry Award 2010*: (emphasis added).[2]

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed

[2] [2015] FWCFB 620

award variations.

19. The proposed variation to the Awards would give rise to a significant change, both in terms of the impact on the parties and the lengthy history of the particular provisions, as addressed by the various parties. There is no evidence before the Commission addressing the operation of the Awards currently or the likely impact of the proposed changes that would justify proceeding with the amendments. The approach to determining whether the proposed variations to the Awards are warranted should not fundamentally differ simply because it is the Commission itself that proposed the variation to the awards. Especially not in circumstances where there are major industrial parties before the Commission who are uniformly raising major concerns about the variations.

Response to Paragraphs 81 to 86 of the MTA submissions

20. The MTA submissions demonstrate the diverse nature of many businesses falling within the coverage of the VMRSR Award. Ai Group does not dispute that the MTA submissions reflect the circumstances of many of the businesses covered by the VMRSR Award. This point represents a powerful argument for maintaining a separate VMRSR Award.

21. Nonetheless, the Commission should not lose sight of the reality that the majority of vehicle manufacturing businesses and their employees are covered by the Manufacturing Award. This includes the vast majority of automotive component manufacturers.

22. Any alteration to the existing split between the two awards will disrupt industrial arrangements of a significant number of organisations.

23. It is trite to observe that many employers covered by the VMRSR Award and the Manufacturing Award currently face a challenging and changing business environment. The MTA submissions paint a clear picture of some of the very substantial difficulties to which parts of the 'vehicle industry' are subject. The Commission should refrain from adding to these challenges by requiring employers to grapple with changes award coverage. There is no necessity for

such a variation and the variation is not warranted.

The Resolution of this issue

24. In light of the submissions of the parties, the Full Bench should not proceed with its proposal that the manufacturing stream of the VMRSR Award should be transplanted into to the Manufacturing Award.

25. However, if contrary to this submission, the Commission intends to potential proceed to vary the awards in the manner proposed we contend that it is vital that the vast array of parties potentially interested or affected by a variation to the Manufacturing Award be afforded an opportunity to address the Commission in relation to the matter. A final determination as to whether it is appropriate to incorporate conditions for 'vehicle manufacturing employees' into the Manufacturing Award should not be made until this occurs.

26. To date, proceedings concerning this issue have been undertaken in the context of the review of the VMRSR Award. Relevantly, all statements and directions of the Full Bench, exposure drafts, and submissions by the parties have been published on the FWC website page dedicated to the VMRSR Award. Such material has not been published on the page applicable to the Manufacturing Award. Such parties cannot reasonably be expected to have followed proceedings specific to the review of the VMRSR Award.

27. This course of action would also enable a more thorough review of the exposure draft of the Manufacturing Award. This would clearly be prudent given the array of changed entitlements already identified by the AMWU and Ai Group.

Clauses 18.3 and 18.5

28. The Exposure Draft introduces a restriction on ordinary hours of work. Relevantly, it restricts the ordinary hours to a maximum of 10 per day.

29. Clause 18.5 introduces, in effect, a transitional arrangement that permits the working of 12 hour days or shifts where such arrangements were regularly

adopted prior to 1 January 2016.

30. At paragraphs 109 to 111 the AMWU identifies that the proposed transitional provision it supported in the report to the Full Bench dated 29 September 2015 has not been included. It appears to argue that its provision should be inserted.

31. In response to the AMWU submission, Ai Group reiterates that it opposes the introduction of the restrictive limitation of ordinary hours to 10 per day. The working of up to 12 ordinary hours per day is by no means novel in the modern award system. No party has, in our view, established the necessity for adopting a more restrictive approach in the context of employers and employees covered by the VMRSR Award, based on their specific characteristics.

32. In the alternative, Ai Group has also called for a transitional arrangement in the event that such a new restriction is introduced despite our opposition.

33. All parties recognise that there is a need for some form of transitional arrangement if the proposed change is to be implemented.

34. Employees have been able to work more than 10 ordinary hours per day or shift for more than 6 years under the modern award. Further, as previously identified, under a relevant predecessor instrument there has been a capacity, in certain contexts, for the working of more than 10 ordinary hours per day.

35. The AMWU supported transitional arrangement referred to in paragraph 109 of their submissions only addresses the needs of, *"…employers in miming and infrastructure industries accustomed to using longer shifts."* This transitional arrangement was part of the "package" of matters agreed between certain participants in these proceedings.

36. Ai Group has proposed an alternate transitional arrangement that would address the needs of all parties that have, entirely legitimately, adopted arrangements involving the working of more than 8 ordinary hours of work per day. Ai Group's proposal is contained at paragraph 55 of the 29 September

2015 Report.

37. The benefit of a transitional arrangement should not only be enjoyed by a narrow range of employers as a consequence of a deal struck between certain industrial associations. Rather, it would be prudent and sensible to include a transitional provision that ensures the new limitation does not disturb any existing arrangements that may well be operating to the satisfaction of all parties.

38. There would be particular merit in this approach given there is no evidence of any actual difficulties flowing from the current terms of the award. The adoption of a transitional arrangement would also minimise the risk of disputation associated with forcing parties to alter the existing approach to arranging ordinary hours of work.

39. Ai Group also notes that the Exposure Draft gives rise to an anomalous position under the award whereby an employee can work 10 ordinary hours a day or 12 ordinary hours a day, but nothing in between. Why should an employee be able to work 12 hour days or shifts but not 11 hour days or shifts? This issue was ventilated during the August proceedings in an exchange between the Vice President and the AMWU's representative:

PN478

MS MOUSSA: So the intent is to retain the ability to have 12 hour shifts; it's not simply to replicate what we say the pre-modern award provided, which was that shifts could not exceed 10 hours in length and only under certain circumstances could they do so, so without wanting to involve the Commission in having to negotiate or ratify terms of such employment, the proposed variation was put on the basis of the maximum number of ordinary hours would be 10 in a day and by agreement it could be up to 12 sorry, could be 12.

PN479

VICE PRESIDENT HATCHER: Well it logically should be in excess of 10 up to 12, shouldn't it? That is, you might for some reason want an 11-hour shift. Is there any reason why you couldn't do that through a facilitative provision?

PN480

MS MOUSSA: By amending 33.4(b)?

PN481

VICE PRESIDENT HATCHER: Yes.

PN482

MS MOUSSA: I might have to take that - - -

PN483

VICE PRESIDENT HATCHER: Otherwise it has the same criticism that you've advanced, that is, it leaves what's between 10 and 12 in a sort of anomalous position. Anyway I'll put that out there for the parties to consider, but again you might want to give that some further thought.

40. Ai Group suggests that this anomalous position can be addressed through the following amendment to clause 18.5 of the Exposure Draft;

"By agreement between an employer and the majority of employees in the enterprise or part of the enterprise, arrangements involving the working of up to 12 ordinary hours per day or shift may be introduced subject to;…."

41. The proposal would ensure that there were significant safeguards governing the working or more than 10 ordinary hours per day. It is very difficult to understand why the safeguards applicable to the implementation of 12 hour days or shifts would not be sufficient to permit the working of days or shifts that are shorter than this, but of more than 10 hours' duration.

42. Notwithstanding the above submissions, Ai Group contends that, at the very least, there should be a clause in the nature of clause 18.5(b) to avoid disturbing any already implemented 12 shift arrangements.

Residual drafting issues associated with the insertion of clause 18.3

43. Although clause18.3 would limit the working of ordinary hours to 10 per day, clause 18.5 permits the working of 12 hour days.

44. As currently drafted, clause 18.5 does not expressly provide that where 12 days or shifts are adopted ordinary hours of work may exceed 10 hours on any day. This would be necessary if clause 18.3 was implemented.

45. Adoption of Ai Group's proposed amendment to clause 18.5(a) would address this issue.

Offsetting of Commission Payments

46. The AMWU has opposed what it perceives as an ability to offset against any of the amounts referred to in clause 23.5(a).[3]

47. The Award does not mandate the payment of commission payments. Consequently, the Award does not dictate that employees should ever, necessarily, receive more than the minimum amount payable pursuant to the other terms of the Award.

48. However, where arrangements are implemented, the Award regulates the manner in which they are applied. Indeed, any sum payable under an agreement made pursuant to clause 24.4 is deemed to be payable under the Award. Accordingly, the commission payments are effectively taken to be part of the safety net.

49. Ai Group has, understandably, opposed the expansion of the existing obligations relating to the payment of vehicle salespersons. However, we support an amendment to the Award empowering employers to offset commission payments against any other amounts payable to employees pursuant to the Award.

50. If the Commission were to introduce a new obligation, it is appropriate for it to be accompanied by measures to mitigate any adverse financial consequences for employers. The proposed amendment should be seen in this light.

51. There is no reason for the award endorsed offsetting to be limited to payments applicable under clauses 11.2 or 11.6.

52. If a much more onerous obligation in relation to the payment of hours worked is to be imposed on employers, it is appropriate that they be afforded a greater capacity to manage the way the apply commission payments.

[3] See paragraphs 112 to 118 of their 11 May 2015 submission

53. Regardless, there can be no persuasive argument that a broad ranging offsetting provision is inappropriate given employees would always be receiving payments that would, in terms of quantum, meet their minimum entitlements under the Award.

54. Similarly, we note that commission should not be viewed as an "above award" matter the operation of which should be purely left to the agreement of the parties, given the Award's regulation of the payment and the fact that Full Bench is potentially considering altering the award derived remuneration structure for vehicle salespersons in a fundamental way.

Residual drafting issues

55. The meaning of clause 24.5(a) is somewhat ambiguous or uncertain.

56. It is unclear whether the rates derived from clauses 11.2 or 11.6, but required to be paid pursuant to the new clause 24.5(a), are paid in addition to the amounts referred to in clause 24.3 or whether the penalty rates are payable in substitution for such payments. Under the Exposure Draft this issue is only addressed, to any degree, in the context of work on a Sunday.

57. It would plainly be unfair for employees to receive both a payment at the minimum hourly rate and the relevant penalty.

58. On one view, clause 24.5 may be intended to simply require that rates apply in circumstances where the penalty rates do not apply. However, this is far from clear.

59. If the intention is that the salesperson only receive payment for the hours worked or the relevant penalty, but not both, the clause should be amended to clarify the circumstances in which the applicable penalty should be applied in lieu of the minimum hourly rate.

60. Nonetheless, we reiterate our previous submission that the fact that penalties are not referable to 'hours' worked reinforces our argument that the union is proposing a significant change to the safety net.

Payment for annual leave (clause 25.5)

61. Ai Group notes that the Exposure Draft has not addressed our concerns over the current wording of the provision regulating payment for annual leave.

62. We do not seek to now address this in any significant way, given we are not aware of the reasoning for such an approach.

63. Nonetheless, we note that a similar issue was addressed by the Full Bench in the context of the Exposure Draft for the Manufacturing Award.[4]

64. We propose to raise this matter in the course of oral submissions.

[4] [2015] FWCFB 7236 at 78