

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submissions in Reply
Construction Awards
(AM2014/260, 274 and 278 and
AM2016/23)

13 MARCH 2017

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

CONSTRUCTION AWARDS

1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes this submission in relation to the 4 Yearly Review of the Construction Awards being:
 - The *Building and Construction General On-site Award 2010* [MA000020] (Building Award);
 - The *Joinery and Building Trades Award 2010* [MA000029] (Joinery Award); and
 - The *Mobile Crane Hiring Award 2010* [MA 000032] (Mobile Crane Award).
2. This reply submission is filed pursuant to directions issued by the Fair Work Commission (the Commission) on 26 October 2017. The submission responds to submissions filed by the AMWU on 9 December 2016 and the CFMEU on 12 December 2016.

2. THE STATUTORY FRAMEWORK

3. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
4. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

5. The AMWU and CFMEU have failed to provide the necessary evidence to support that their respective claims are necessary to ensure that the awards achieve the modern awards objective.
6. The AMWU and CFMEU claims are not necessary to achieve the modern awards objective and are inconsistent with the modern awards objective.

3. AMWU CLAIM

7. Ai Group opposes the AMWU's proposed variation as found in Attachment A of its draft determination filed on 9 December 2016
8. The AMWU is proposing to reinsert the provisions as contained in Clause 4.2.1 of Appendix B of the *National Metal and Engineering On-site Construction Industry Award 2002* (MECA 2002 Award) with an additional note to allegedly explain the clause.
9. The AMWU relies on:
 - The history of the clause in the MECA 2002 Award and its predecessor Award; and
 - The Full Bench Award Modernisation Stage 2 Decision [2009] AIRCFB 345.
10. The history of the clauses do not advance the AMWU's position. The clauses in the relevant award use the phrase *"the calculation of the wage rates in accordance with Part A hereof shall exclude overtime payments, shift work premiums....."*.
11. Part A of the MECA 2002 Award provides for the weekly wage rates to be paid to a foreman/supervisor and a general foreman/supervisor. When Part A and Part B are read together, the reference to the words *"the calculation of wage rates"* is in fact a calculation of the relevant employees' weekly wage rates.

12. The Award Modernisation Full Bench Stage 2 Decision at paragraph 69 stated: (emphasis added):

“The final award incorporates some alterations in the definitions clause, including minor changes to adult apprentice and air-conditioning work definitions. We have also added a definition of continuous service, reflecting the award definition in the National Building and Construction Industry Award 2000 (Building and Construction Award), to apply in respect of redundancy arrangements and the living away from home-distant work provision. We have removed foreperson/supervisor and general foreperson/supervisor from the definitions clause, placing that definition with special conditions for foremen and supervisors in the metal and engineering construction sector within Part 7 – Industry Specific Provisions. These special provisions reflect Appendix B of the National Metal and Engineering On-site Construction Industry Award 2002 (Metal and Engineering On-site Award)”

13. The AMWU relies on the underlined section to support its proposition that the Full Bench intended the replication of the provisions of Appendix B of the MECA 2002 Award (Appendix) in the modern award and that the relevant words were erroneously redrafted.
14. The AMWU assertions are unsupported assumptions. In its Decision, the Full Bench expressed an intent to “reflect” Appendix B of the MECA 2002 Award in the modern award. The AMWU is endeavouring to place far too much weight on the word “reflect”. If the Full Bench had intended to exactly replicate the provisions of the MECA 2002 Award, rather than broadly reflect those provisions, it would have done so.
15. In its Decision, and in the ultimate drafting of the Award, the Full Bench gave specific attention to the terms of the Appendix. It would be an error to assume that there has been a misstating of the Full Bench’s intentions in the drafting of the clause.
16. The AMWU submits at paragraph 12 and 13 of its submission, that the current clause 43.2(b) contradicts clause 43.5. There is no contradiction in the terms. Clause 43.2(b) is clear; the employees who are being paid the additional rates are not entitled to receive overtime and other such payments.

17. Clause 43.5(a) is best described as a clause that aims to ensure that employees are not disadvantaged. For example, if an employee is paid a salary, then such salary must not be less favourable, when compared to the specific entitlements in the Award.
18. In Ai Group's experience, a large proportion of forepersons and supervisors are paid a salary and do not receive overtime payments. Therefore, the AMWU's claim would have a very significant negative cost and operational impact upon employers. It would also disturb many employment arrangements to the detriment of the relevant employees. Such consequences offend the modern awards objective, including those elements set out in s.134(1)(d) and (f) of the Act.
19. Unlike the Manufacturing Award, at clause 24.1(g), the Building Award does not contain a detailed annualised salary clause relating to forepersons and supervisors. Therefore, the current terms of clauses 43.2(b) and 43.5 are particularly important.
20. The AMWU has failed to establish that there has been an error or that its claim is necessary to ensure that the Award achieves the modern awards objective. Accordingly, the Commission should reject the AMWU's claim and decline to amend clause 43.2(b) as proposed by the AMWU.
21. If, despite Ai Group's opposition, the Commission accepts the AMWU's proposition to adopt the words as set out in Appendix B of the MECA 2002 Award, the AMWU's proposed notation should not be adopted. In the notation, the AMWU has merely set out its interpretation of the clause with no supporting evidence. The notation would be misleading and would potentially lead to increased costs for employers.

4. CFMEU CLAIM

Living Away from Home Claim

22. The CFMEU's extensive living away from home claim relating to the Building Award, the Joinery Award and the Mobile Crane Award is opposed.
23. The CFMEU has failed to provide the necessary evidence to support that its claims are necessary to ensure that the Awards achieve the modern awards objective, including by providing a fair and relevant minimum safety net of terms and conditions. In particular:
 - The evidence of Mr O'Grady, as relevant for the period after the advent of the Building Modern Award, can only be described as a summary of his experiences without any particular detail. The evidence does not demonstrate the need for the change proposed by the CFMEU.
 - At paragraphs 5 to 10, Mr O'Grady's evidence refers to conditions that were contemplated as part of enterprise agreement negotiations with various companies. His evidence is insufficient to demonstrate the need to make the changes proposed by the CFMEU.
 - Mr O'Grady fails to provide any evidence of the need for the changes proposed in relation to the Joinery Award or the Mobile Crane Award.
 - Mr Kelly's evidence is primarily based on his knowledge as a union official. His evidence outlines the disputes he has been involved in and the negotiations he has undertaken. Again, like Mr O'Grady, he simply provides anecdotal summaries.
 - Mr Kelly fails to provide any evidence of the need for the changes proposed to the Joinery Award or the Mobile Crane Award. In fact, in relation to the evidence he provides as to the disputes he has represented his members in, Mr Kelly demonstrates that the current Award terms are adequate.

- The evidence about any disadvantage suffered by workers as set out in Attachments 1 and 2 do not provide any information to identify what has changed since 2010 to require the extensive and costly changes proposed by the CFMEU.
- Mr Pallott, Mr Ferreira, Mr Reilly, Mr Burling, Mr Cummins, and Mr Kirner, all union officials, do not advance evidence to support the CFMEU's proposition.
- Mr Woodward's and Mr Callaghan's evidence, appears to be limited to projects that are covered by enterprise agreements.

24. The CFMEU's evidence to support the extension of its claim to the Joinery Award and the Mobile Crane Award is limited and does not establish that the proposed variations are necessary to ensure that the Awards achieve the modern awards objective.

25. There is no independent evidence to support the need for the increased costs associated with CFMEU's claim.

26. Accordingly, the CFMEU's living away from home claim should be rejected.

Other Claims in Relation to the Building Award

27. Ai Group opposes the CFMEU's other claims.

28. The CFMEU has provided insufficient evidence to support the claims.

29. In particular:

Amendment to Clause 4 – Coverage:

- The CFMEU's claim for primacy in relation to coverage under the Building Award is misplaced and strongly opposed. The CFMEU raised this issue in terms of the Manufacturing Award exclusion in its award modernisation submissions dated 13 February 2009.¹
- This issue was vigorously contested between Ai Group and the CFMEU during the Award Modernisation process. The following Ai Group award modernisation submissions are relevant:
 - Ai Group's Stage 2 Award Modernisation Pre-Exposure Draft Submission – 31 October 2008 – pages 6 to 16;
 - Ai Group's Stage 2 Award Modernisation Post-Exposure Draft Submission – 13 February 2009 – Pages 35 and 36;
 - The following extract from the transcript of the Post-Exposure Draft Consultations on 24 February 2009 before the Award Modernisation Full Bench, with Mr Stephen Smith representing Ai Group: (emphasis added)

“JUSTICE GIUDICE: Yes, thanks, Mr Smith.

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If I can turn now to the exposure draft of the Building and Construction Industry General Award, in our written submissions we express support for three separate awards for the three main sectors. I won't go to that issue today though we do continue to support that approach. In respect of the coverage provisions in the exposure draft, as the Commission is aware, we've argued at length in support of a number of propositions, firstly, that the scope of the modern awards for construction need to be based on the scope of existing awards. Secondly, that construction is an on site industry, and thirdly, that it's vital that Construction Awards contain an exclusion for employers covered under the modern Manufacturing Award.

¹ Response to the Statement of the Full Bench on Award Modernisation of 23rd January 2009 ([2009] AIRCFB 50) and the Stage 2 Exposure Drafts Published in Matters AM2008/13-24

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The exposure draft addresses all of these issues and we make the point that it's absolutely vital that this remain the case despite the submissions being made by some other parties. We strongly oppose the submission of the CFMEU that the Manufacturing Award exclusion be deleted and we've argued at length why it's necessary for that to remain...."

- The CFMEU's current claim is a re-agitation of a previous claim which was properly determined by the Award Modernisation Full Bench. The CFMEU has not provided any evidence to demonstrate that there are any changed circumstances that require the Commission to revisit this matter.

Amendment to Clause 19 – Minimum wage:

- The CFMEU's claim to include all relevant allowances in the hourly rate calculations is opposed. The claim is not supported by any valid reasons or evidence that such a proposal would meet the modern award objective, or is necessary to achieve the modern awards objective.

Amendment to Clause 20 - Expense Related Allowance:

- The CFMEU's claim to include a new expense related allowance is unsupported by any evidence that such a proposal would meet the modern awards objective or is necessary to achieve the modern awards objective. The CFMEU's submissions state that various major construction companies are using modern communications. These are all companies that the CFMEU negotiates enterprise agreements with. This claim is an attempt to flow provisions from some enterprise agreements into the Award.

Amendment to Clause 22 - Special Rates:

- The CFMEU's claim is to include a new consolidated special rates allowance. Ai Group is opposed to such consolidation as it is likely that employers paying such a consolidated rate would pay more than that payable when simply applying the allowances as and when they fall due.

Amendment to Clause 28 – National Training Wage:

- The CFMEU’s claim for competency based wage progression, despite some modification, is a claim that the CFMEU has ventilated previously. Ai Group opposes the claim. The CFMEU has failed to provide any evidence that such a proposal would meet the modern awards objective or is necessary to achieve the modern awards objective.

Amendment to clause 33- Hours of Work:

- The CFMEU’s claim for a new provision to specify the daily ordinary hours of work for casual employees is opposed. The only evidence it provides for seeking the change is “perceived ambiguity or uncertainty as proposed by the FWO”. Ai Group has not identified any difficulties with the existing provision.

5. CONCLUSION

30. The AMWU and the CFMEU have failed to provide the necessary evidence to support that their respective claims are necessary to ensure that the relevant Awards achieve the modern awards objective, or are consistent with the modern awards objective
31. Accordingly, the unions’ claims should be rejected.