Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

AM2016/23 - Construction Awards

AM2014/260

Building and Construction General On-Site Award 2010

Submissions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)

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Introduction

1. These submissions are lodged in accordance with the directions issued on 26 October 2016 by the Full Bench that was established to determine the claims sought as particularised in the Memorandum issued by the President on 22 August 2016. These submissions are directed solely to the Building and Construction General On-Site Award 2010 (the On-site Award). The CEPU is not seeking any variation and is making these submissions in reply as an interested party who has members who are covered by the On-site Award.

2. Three unions, the CFMEU, AMWU and the AWU have filed submissions in support of variations they are seeking.[1] The CEPU does not oppose any of the variations sought by the union parties, they are largely directed to discreet provisions of the On-site Award and would have limited application if the variations so sought were granted.

3. With the exception of the variation sought by the Australian Industry Group (AIG), the same cannot be said of the variations sought by the employer parties. The Civil Contractors Federation (CCF), the Housing Industry Association (HIA) and Master Builders Australia (MBA) are all seeking multiple variations, which if granted, would see substantial changes to the On-site Award. We note that some of the variations sought are for the same provision of the On-site Award, but are in different terms.

Legislative Background and Considerations

4. The Commission is obliged under s 156 of the Fair Work Act 2009 (FW Act) to conduct a review of modern awards every four years (the Review). Each modern award is to be reviewed in its own right, although, as here, the Commission may review two or more modern awards at same time (s 156(5)).

5. The scope of the Review was comprehensively considered in *the 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues Decision*[2] and a number of propositions from that decision were distilled in the recent *Penalty Rates Decision*[3] in the following manner:

> (i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.
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> (ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award.
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> (iii) The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.

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[1] Any reference made to a document in this submission pertaining to the On-site Award which has been filed by other parties are available for download on the dedicated webpage at the following address: https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review/award-stage/award-review-documents/MA000020?m=AM2014/260.

[2] [2014] FWCFB 1788.

[3] [2017] FWCFB 1001.

(iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.[4]

6. Unsurprisingly, it was also held in those two decisions that the modern awards objective as set out in s.134 of the FW Act applied. This objective, together with the NES, prescribes that the Commission has to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions and that the modern award system itself is 'simple, easy to understand, stable and sustainable.'[5] In the *Preliminary Jurisdictional Issues Decision* the Full Bench held:

> 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. 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. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[6]

7. In the *Penalty Rates Decision* the Full Bench stated in its summary of the Legislative Framework applying to the Review that the following propositions apply to the Commission's task in the Review:

> 1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
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> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation.153 Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible,154 probative evidence.
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> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

[4] Ibid [111].
[5] Section 134(1)(g).
[6] [2014] FWCFB 1788 [60.3].

> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the FW Act;
> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.[7]

8. With the above in mind, in reviewing the submissions and material in support of their proposed variations, it is the CEPU's contention that the CCF, HIA and MBA have fallen woefully short of what is required of them in this Review. Below the variations sought and the submissions supporting those variations of these three parties are considered.

Time Off In Lieu Of Overtime

9. The MBA and HIA both seek to have a model Time Off In Lieu Of Overtime (TOIL) inserted into the On-site Award. The primary position of the CEPU is that a provision dealing with TOIL is not appropriate for the On-site Award containing as it does daily and weekly hire, workers frequently on short term contracts and the project nature of the work in the industry.

10. In the *4 yearly review of modern awards—Common issue—Award Flexibility*[8] of July 2015 the insertion of the model TOIL clauses into the On-site Award was dealt with by the Full Bench. After noting that 37 of the 55 Federal and State awards that were considered during the Part 10A process that led to the making of the On-site Award did not contain a TOIL provision and that it was absent from the National Building and Construction Industry Award the Full Bench then briefly summarised the arbitral history relating to failed attempts to insert TOIL provisions into the On-site Award. It concluded by stating:

> [307] Given the unusual arbitral history and the particular features of the industry covered by the two construction awards (including the operation of daily hire) we think the most expeditious course is to deal with any application to insert a TOIL provision in these awards during the award stage rather than in the settlement of any orders which may arise from our further consideration of the provisional model term.

11. It is clear from the above that the Full Bench was not persuaded at the time of the decision that it was appropriate for the TOIL provisions to be inserted into the On-site Award and that it was left open for the parties to bring applications for their insertion. In bringing those applications it is necessary for the parties to bring evidence in support of the insertion of a TOIL provision. This is especially so where previous Full Bench consideration as to this

[7] [2017] FWCFB 1001 [269].
[8] [2015] FWCFB 4466.

contested issue has occurred in this case. The MBA and HIA have clearly failed to do this. Despite the Full Bench's the observations and referencing the arbitral history, the MBA asserts at 4.5 of their submission 'that there are no particular features of the industry that would prevent the inclusion of the TOIL provision.'

12. The CEPU submits that little reliance or weight should be given to the HIA Member Survey; it is unprofessional and clearly flawed-the number of responses at 290 is too low to produce a confidence level that could be relied upon. In the Survey there appear to be as many negative responses as positive and also quite a high number of neutral or undecided responses. This is hardly conclusive and cannot be relied upon by the HIA as a ground for the inclusion of a TOIL provision.
13. Unlike the MBA, the HIA at 3.3 of their submissions attempt to address the Modern Awards Objective, but in so doing merely refer to the *Award Flexibility Decision* where it was discussed and rely on the comments in that decision-a decision which refrained from inserting a model clause into the On-site Award. This can hardly be what the Full Bench intended in that Decision when it commented that the issue of TOIL can be dealt with by this Full Bench.
14. The CEPU recognises that despite the shortcomings of the employer groups submissions that the Commission has the power to insert a variation of its own volition if it deems it appropriate. The CEPU submits that if it is to do so, for reasons of fairness, it should be calculated at the overtime rate. As the HIA Survey shows, 66% of respondents said that they would not change their answer to the TOIL question at this rate (higher than 61% on the hour for hour basis).

Redundancy

15. The three employer groups have all made applications to vary the Industry Specific Redundancy Scheme contained in the On-site Award. The variations are differently expressed, from the outright deletion (the HIA's preferred option) to changes to the definitions, to bring them more into line with those in the relevant sections of the NES. As observed above in relation to TOIL this provision has also been previously arbitrated on a number of occasions, not the least of which was during the award modernisation process under Part 10A itself[9]. The Stage 2 decision of that process explicitly recognised that redundancy provisions in the building and construction industry had taken a different path

[9] [2009] AIRCFB 345.

to that set down in the Termination, Change and Redundancy Case (1984) 8 IR 34; 9 IR 115 and further enhanced in the Redundancy Case (2004) 129 IR 155; 134 IR 57.[10]

16. Senior President Deputy Watson during the 2012 Review process in rejecting the HIA's application then commented:

> [T]he Award Modernisation Full Bench considered and rejected the suggestion that the definition of "redundancy" should be modified to reflect the NES, the very argument agitated in the current proceedings by the HIA, without identifying any changed circumstances or any other cogent reason to support variation of the Building On-site Award. [11]

17. The CEPU submits that none of the parties have advanced any cogent reasons in support of the variations they are seeking; the past decisions must stand.

Junior Rates

18. The MBA and CCF both seek a variation to the On-site Award to include provisions for junior rates. During the award modernisation process the MBA and HIA made submissions regarding provisions relating to juniors, but ultimately, they were not included in the On-site Award.

19. The CCF assertion on page 23 of their submission that junior rates 'were universally utilised in the civil construction industry prior to the making of modern awards,' is at best misleading. The CEPU has only identified junior rates being available in limited circumstances in pre-modern construction awards affecting Western and South Australia. The CCF does not elaborate on its assertion. The Stage 2 Award Modernisation decision[12] makes no mention of juniors in the five construction awards it made, and the silence is telling as it does include them in that decision where they existed in previous awards (see the Graphic art group at paragraph 143 and the Sanitary and garbage disposal services awards at paragraph 189).

20. The survey presented by the CCF as evidence in support of inserting junior rates should be given no weight. The CEPU submits that the applications lack merit and be should be rejected.

Ordinary Hours of Work

21. The MBA and HIA seek to vary the Ordinary hours of work clause. Again this was a matter that was before the Full Bench in the Part 10A Award Modernisation process and by SDP Watson during the 2012 Review in response to an application by the HIA (and another by the CCIWA). To give effect to the HIA application would potentially result in a diminution of pay for workers. Where currently overtime rates apply the variation they seek would allow for

[10] See paragraph 78 onwards of [2009] AIRCFB 345.
[11] [2013] FWC 4576 [203].
[12] [2009] AIRCFB 345.

payment to be made at ordinary rates. The CEPU submits that neither of the parties have provided any probative evidence or cogent reasons for the variations sought and consequently their claims should be rejected.

Coverage

22. The CCF seeks a variation to the coverage of the On-site Award, namely the deletion of clause 4.10(b)(ii), where civil construction is defined to encompass, "road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt."

23. As above, this was a matter that was before the Full Bench in the Part 10A Award Modernisation process and by SDP Watson during the 2012 Review, this time through an application made by the ABI. In making the On-site Award the Full Bench determined that the three broad sectors within the construction industry could be adequately dealt with under the one award because of the similarity of the nature of the work and the conditions that apply.

24. In the Stage 3 process of the award modernisation process the Full Bench made the Asphalt Award, saying:

> We have retained roadmaking within the coverage clause of the award. Roadmaking, in this context, is intended to comprehend those elements of roadmaking associated with the asphalt industry and undertaken by employers within the industry as defined. Other roadmaking activity, undertaken by employers within the civil construction sector of the building, engineering and civil construction industry, will fall within the coverage of the *Building, Engineering and Civil Construction Industry General On-site Award 2010*.[13]

25. In his 2012 Review decision, SDP Watson referred favourably to the above paragraph[14] and rejected the variation which was then being sought on the basis that the distinction between the Asphalt and the On-site Award is clear and that no cogent reasons had been advanced for the variation. The same applies in the present instance and the application should be rejected.

Work Health and Safety Allowances

26. The MBA seeks to remove allowances and award clauses that deal with matters that would otherwise be covered by relevant WHS laws. The CEPU submits that this application is misconceived; the functions that awards and Work Health and Safety legislation perform are distinct and separate. The allowances in the On-site Award are permitted on the basis that they deal with allowable subject matters as contained in ss.139 and 142 of the FW Act. This

[13] [2009] AIRCFB 826 [43].
[14] 2013 FWC 4576 [128].

was explicitly recognised in the 2012 Award Review Full Bench decision [2012 FWAFB 10080. By way of illustration, the Full Bench held at paragraph 72:

> We are satisfied that each clause is about allowances, including disabilities associated with the performance of particular tasks or work in particular conditions or locations (s.139(1)(g)(iii)). The proposition alluded to by the MBA that such allowances sanction work in unsafe conditions, is inconsistent with employer obligations under OHS legislation and is untenable. The allowances are paid to compensate for the disability associated with the work in particular conditions, which work is presumed safe but subject to disabilities nonetheless, in circumstances where the disabilities/conditions are not otherwise taken into account through the rates of pay provided in the modern award.

27. It is apparent that the matters have been previously contested and that the Full Bench did provide sufficient reasons in its Decision. On this basis the application should be rejected.

28. The CEPU recognises that the Full Bench in 2012 Award Review decision noted in conclusion, 'The desirability of a rationalisation of allowance terms in the On-site Award raised by the Australian Industrial Relations Commission Full Bench in January 2009 remains.' However, what is being proposed by the MBA does not satisfy that desirability.

Other Variation Applications

29. The HIA are again seeking to vary the tool allowance provision as they did in the 2012 Review. At paragraph 217 of the his decision, SDP Watson rejected the HIA application in the following terms:

> I am not persuaded that the HIA has established cogent reasons for the variation. Clause 20.1(a) was included in the Building On-site Award in terms reflecting the NBCIA provision which has a longstanding history. The HIA has sought to justify its variation by way of a "'fresh assessment' unencumbered by previous Tribunal authority" without little regard to the approach to the 2012 Review set out in the 29 June 2012 decision of the Award Modernisation Full Bench. The HIA has not established cogent reasons for departing from the provision incorporated into the Building On-site Award having regard to the submissions put to it and the provisions within pre-modern instruments.
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> (References omitted)

30. The CEPU submits that the Commission should come to same conclusion.

31. The CCF has applied to vary the provision relating to Dirty Work at clause 22.2(h), but have not provided any evidence that would support a variation and for this reason the claim should be rejected.

32. The MBA have sought to vary the shiftwork clause 30.4 and in so doing seek to rely on the same basis as they did during the 2012 Award Review process. This was rejected by SDP Watson then for lack of evidence[15] and should be rejected now for the same reason.

33. The HIA are seeking to vary the annual leave loading clause in respect of the payment of a loading for the fares and travel patterns allowance. The HIA also previously sought this

[15] [2013 FWC 7478 [33].

variation in the 2012 Award Review process. It was rejected then[16], and without any supporting evidence or cogent reasons for such a variation it should be rejected now.

34. The employer groups seek variations to the payment of wages clause, but other than the HIA Member Survey, the limitation of which have already been mentioned provide no probative evidence despite being invited to do so by the Full Bench during the 2012 Review Process in decision [2013] FWCFB 2170[17]. For this reason, the applications should be rejected.

END

[16] The Modern Awards Review 2012—Annual Leave Decision [2013] FWCFB 6266 by majority SDP Acton and DP Gooley.
[17] At paragraph 149.