
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSIONS IN REPLY

**4 YEARLY REVIEW OF MODERN AWARDS – CONSTRUCTION
AWARDS (AM2016/23)**

**AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

20 MARCH 2017

1. BACKGROUND

- 1.1 These submissions in reply are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members, while NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) with more than 18,000 members.
- 1.3 ABI and NSWBC have an interest in the following modern awards:
- (a) *Building and Construction General On-Site Award 2010 (On-Site Award)*;
 - (b) *Mobile Cranes Award 2010 (Mobile Cranes Award)*;
 - (c) *Joinery and Building Trades Award 2010 (Joinery Award)*; and
 - (d) *Plumbing and Fire Sprinklers Award 2010 (Plumbing Award)*.
- 1.4 On 22 August 2016, His Honour Justice Ross issued a Memorandum constituting a Full Bench to hear and determine matters relating to the Construction Awards. The “Construction Awards” cover the modern awards outlined in paragraph 1.3 above.
- 1.5 On 26 October 2016, the Commission issued Directions in respect of the filing of evidence and written material in the Constructions Awards. Item [2] of the Directions required the parties to file evidence and submissions in reply by 5pm on 10 March 2016.
- 1.6 On 9 March 2017, ABI and NSWBC wrote to Vice President Hatcher requesting an extension of time to file its evidence (if any) and submissions in reply. By email dated 13 March 2017, Vice President Hatcher granted ABI and NSWBC an extension of time until 5pm on 17 March 2017 to file its material.
- 1.7 These submissions in reply are filed in accordance with item [2] of the Directions and the extension granted by Vice President Hatcher on 13 March 2017.

2. DETERMINATION OF CLAIMS

- 2.1 Interested parties have filed applications seeking variations to the Constructions Awards as part of the 4 yearly review of modern awards. Many of the claims seek to substantially alter provisions of the existing Construction Awards or insert new provisions.
- 2.2 Pursuant to section 156 of the *Fair Work Act 2009* (Cth) (**FW Act**), the Commission may exercise its discretion to vary modern awards during the 4 yearly review. The Commission’s discretion to make determinations varying modern awards is expressed in general terms and is limited by other provisions of the FW Act.
- 2.3 When exercising its discretion, the Commission must consider a number of matters, including¹:
- (a) the need for modern awards, together with the NES, to provide a fair and relevant minimum safety net of terms and conditions;
 - (b) the need for a stable modern award system;

¹ *Four Yearly Review of Modern Awards* [2014] FWCFB 1788 at [23] to [48] and [60]

- (c) the modern award objective set out in section 134 of the FW Act, with no particular primacy attached to any of the matters outlined in section 134 of the FW Act;
- (d) whether the proposed variation is consistent with section 136 of the FW Act which sets out the terms that can be included in a modern award;
- (e) the requirement under section 138 of the FW Act that terms only be included in a modern award 'to the extent necessary to achieve the modern award objective';
- (f) the historical context applicable to each modern award;
- (g) previous decisions of the Commission, noting that previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so; and
- (h) contextual considerations, including the characteristics of the employer and employees covered by the modern award.

2.4 For an award to be varied, interested parties must advance a merit argument in support of the proposed variation. In the *Four Yearly Review of Modern Awards* [2014] FWCFB 1788, the Full Bench held, "*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*".² Accordingly, unless a change being sought is self-evident, an interested party must present submissions and probative evidence to the Commission in support of the proposed change.

2.5 Once the Award is varied, the Commission must also be satisfied that the terms go only so far as is necessary to meet the modern awards objective.

3. ON-SITE AWARD

HIA Submissions

3.1 In the 4 yearly review, the Housing Industry Association (**HIA**) is seeking the following variations to the On-Site Award:

- (a) The insertion of the model time off in lieu of overtime (**TOIL**) provision;
- (b) The removal of the industry specific redundancy scheme so that redundancy pay is in accordance with the National Employment Standards (**NES**). Alternatively, if that proposal is not accepted, it seeks to:
 - (i) amend the definition of redundancy so that it is consistent with the NES, insert a small business exemption clause and insert an incapacity to pay clause; or
 - (ii) amend the definition of redundancy so that it does not include situations where employment ends at the initiative of the employee, insert a small business exemption clause and insert an incapacity to pay clause.
- (c) The amendment of clause 20.1(a) of the On-Site Award concerning the tool and employee protection allowance;

² [2014] FWCFB 1788 at [60]

- (d) The deletion of the current clause 25 of the On-Site Award and insertion of a new clause 25 concerning fares and travel pattern allowances;
 - (e) The amendment of clause 31.3 of the On-Site Award (frequency of the payment of wages) to allow for the payment of wages on a monthly basis in circumstances where there is mutual agreement;
 - (f) The amendment of clause 33.1 of the On-Site Award concerning hours of work;
 - (g) The amendment of clause 38.2 of the On-Site Award so that the fares and travel patterns allowance is excluded from the calculation of annual leave loading;
- 3.2 We note that the variation referred to in paragraph 3.1(e) above is being dealt with by the Full Bench in AM2016/8.
- 3.3 On 2 December 2016, HIA filed submissions and evidence in support of the proposed variations outlined in paragraph 3.1 above. ABI and the NSWBC broadly support the variations proposed by the HIA for the following reasons:
- (a) HIA has advanced a merit case that the proposed variations are needed;
 - (b) HIA has demonstrated that the proposed variations meet the modern award objective; and
 - (c) HIA has demonstrated if the On-Site Award is varied in accordance with its proposal, the On-Site Award will only include terms that are necessary to achieve the modern awards objective.
- 3.4 Accordingly, ABI and NSWBC support the variations proposed by HIA.

CFMEU Claims

- 3.5 The Construction, Forestry, Mining and Energy Union (Construction and General Division) (**CFMEU**) have sought a number of substantive variations to the On-Site Award as part of the 4 yearly review. These variations include:
- (a) amendment of clause 4 of the On-Site Award to ensure the primacy of the award in the on-site building, engineering and civil construction industry;
 - (b) amendment of clause 19.3 of the On-Site Award concerning the hourly rate calculation for daily and weekly hire employees (**hourly rate calculation claim**);
 - (c) insertion of a new 'communications allowance' in clause 20 of the On-Site Award (**communications allowance claim**);
 - (d) insertion of a consolidated special rates allowance in clause 22 of the On-Site Award (**consolidated special rates claim**);
 - (e) amendment of clause 28.2 of the On-Site Award to allow for competency based wage progression;
 - (f) insertion of a new provision in clause 33.1 to clarify the daily ordinary hours of work for casuals (**hours of work claim**); and
 - (g) deletion of the current clause 24 of the On-Site Award and insertion of a new clause 24 concerning employee entitlements when living away from home on distant work (**living away from home claim**).

- 3.6 ABI and NSWBC oppose the CFMEU's proposed variations because it has provided insufficient evidence that:
- (a) There is a merit case in support of the proposed variation;
 - (b) The changes are consistent with the modern awards objective; and
 - (c) If the On-Site Award is varied in accordance with its proposal, the On-Site Award will only include terms that are necessary to achieve the modern awards objective.

3.7 In particular:

- (a) Hourly rate calculation claim.
 - (i) The CFMEU seeks to include all relevant allowances in the hourly rate calculation. The alleged purpose of this variation is to remove any ambiguity as to whether or not allowances are payable for all purposes and are to be included in the ordinary hourly rate.
 - (ii) The evidence filed by the CFMEU does not address how (if at all) the current clauses 19.3(a) and 19.3(b):
 - A are ambiguous; and
 - B have been interpreted such that they do not provide a fair and relevant minimum safety net.
 - (iii) In light of the submissions above and those raised by the HIA in relation to this claim (which ABI/NSWBC support), the CFMEU has not advanced a merit case in support of the change and ABI and NSWBC submit that the variation should be rejected.
- (b) Communications allowance claim.
 - (i) The CFMEU proposes to vary clause 20 of the On-Site Award to include a new communications equipment allowance. The CFMEU's rationale for including this new allowance is that there is an increase in the industry of mobile phones, smart phones and tablets being used in lieu of walkie talkies and two-way radios and while it is industry practice for employers to provide such equipment at no cost to employees, this does not always occur. As such, the On-Site Award needs to be varied to clarify who is responsible for the cost of providing such equipment.
 - (ii) This claim is not supported by the evidence filed by the CFMEU. In particular, the CFMEU has not adduced any evidence that:
 - A the proposed clause will meet the modern awards objective;
 - B there is an issue in the industry with employers failing to provide communication devices to employees at no cost to the employees;
 - C there is an issue within the industry that employers are failing to reimburse employees the cost of using their own communication devices when such devices are not provided by the employer.

- (iii) In light of the above, and in light of the submissions filed by the HIA in relation to this claim (which ABI/NSWBC support), this claim should be rejected.
- (c) Consolidated special rates claim.
 - (i) The CFMEU seeks to insert a new clause 22.1(f) into the On-Site Award. This clause will allow an employer and an employee to agree that a special rates allowance of 7.9% will be paid in lieu of particular allowances set out in the clause. The CFMEU claims that the variation will allow employers and employees to rationalise the allowances paid.
 - (ii) The evidence and submissions filed by the CFMEU do not address:
 - A how the proposed variation meets the modern awards objective; and
 - B the fact that the rationalisation of the relevant rates could be achieved by an employer an employee entering into an individual flexibility agreement under clause 7 of the On-Site Award.
 - (iii) In light of the above, and in light of the submissions filed by the HIA in relation to this claim (which ABI/NSWBC support), this variation should be rejected because the CFMEU has not advanced a merit case that demonstrates the change is needed and, once included, it will meet the modern awards objective.
- (d) Hours of work claim.
 - (i) The CFMEU proposes to insert a new provision into clause 33.1 of the On-Site Award so that the hours of work for a casual are specified in the On-Site Award. The CFMEU's rationale for this variation is that the Fair Work Ombudsman has received queries about hours of work for casuals and there is 'perceived ambiguity or uncertainty'.
 - (ii) This claim is not supported by the evidence filed by the CFMEU. In particular, the CFMEU has not adduced any evidence concerning:
 - A how the clause is perceived to be ambiguous/uncertain;
 - B who perceives the clause to be ambiguous/uncertain; and
 - C why the change is needed.
 - (iii) In light of the above submissions and those filed by the HIA in relation to this claim (which ABI/NSWBC support), the CFMEU has failed to advance a merit case in respect of the proposed variation and the claim should be rejected.
- (e) Living away from home claim.
 - (i) The CFMEU seeks the inclusion of an 'undue influence' provision in clause 24 to ensure that employees do not provide a false address to employers. The CFMEU relies on the witness statements of Frank O'Grady, David Kelly and Graham Pallot as evidence of the prevalence of this practice in the industry and the need for this amendment in the On-Site Award. These statements are from CFMEU officials and at their highest only provide anecdotal

evidence concerning the issue, including general observations and discussions with unnamed Union members. Given the general nature of the evidence, and the fact that the evidence of unnamed member cannot be tested by way of cross-examination, ABI and NSWBC submit that the CFMEU's evidence cannot be relied upon to demonstrate that the proposed change is necessary to achieve the modern awards objective.

(ii) Also, the proposed inclusion of the 'undue influence' provision in clause 25 is unnecessary because this issue is already dealt with in section 344 of the FW Act. Section 344(b) relevantly provides that, "*An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2)*". As such the requested change is unnecessary.

(iii) The CFMEU seeks a significant increase in the daily and weekly allowances paid under clause 24 because the current amounts specified in the On-Site Award have not been adjusted recently and are 'woefully inadequate'. Also, the CFMEU alleges that although there is a mechanism in clause 24 of the On-Site Award for employees to request an increase to the daily or weekly allowance, in practice, this does not occur and that employees are simply paid the specified amount in the On-Site Award. The evidence filed by the CFMEU addresses the average costs associated with reasonable accommodation. However, the CFMEU's witness statements do not provide any evidence substantiating that:

- A there is an issue in the industry where employees, who are not provided reasonable board and accommodation or camp facilities, are only paid the minimum allowance; and/or
- B employers are refusing to pay employees a higher daily or weekly allowance in circumstances where employees have advised the employer that they are required to outlay an amount greater than the award.

In light of those submissions raised above and those raised by the HIA in relation to this claim (which ABI/NSWBC support) there is insufficient evidence to demonstrate that the current amounts specified in clause 24 of the On-Site Award are not providing a fair and relevant minimum safety net of terms and conditions. Also, the CFMEU has not advanced a merit case that demonstrates the change is needed and, once included, it will meet the modern awards objective.

AWU Claim

- 3.8 The Australian Workers' Union (**AWU**) has sought one variation to the On-Site Award, namely an amendment to the broadband award classification for a CW/ECW2 in Schedule B. The AWU seeks the insertion of a reference to '*Tester - soil, concrete and aggregate*' so that persons who attend construction sites to perform testing work are covered by the On-Site Award.

- 3.9 ABI and NSWBC oppose the AWU's proposed variation because it has provided insufficient evidence that:
- (a) There is a merit case in support of the proposed variation;
 - (b) The changes are consistent with the modern awards objective; and
 - (c) If the On-Site Award is varied in accordance with its proposal, the On-Site Award will only include terms that are necessary to achieve the modern awards objective.
- 3.10 In particular, the AWU has:
- (a) Not presented any cogent reasons as to why the Commission should depart from the decision of the Full Bench in *The Australian Workers' Union v. Coffey Information Pty Limited* [2013] FWCFB 2894;
 - (b) Failed to address the issue that while employers such as Coffey may perform work on construction sites, the employers' business as a whole does not carry out on-site work. As such, the employers are not in the on-site building, engineering and construction industry³; and
 - (c) Provided narrow evidence in support of its claim, namely evidence from two Union officials (Jeff Buhler and Anthony Callinan) who give general observations related to Coffey and its work on the HEA Project and evidence from one employee of Coffey (Geoff Muller). Mr Muller's evidence deals with his particular circumstances, as opposed to the circumstances of the business as a whole. As such, the evidence filed by the AWU cannot be relied upon to substantiate industry-wide circumstances that necessitate amendment of the On-Site Award.
- 3.11 Accordingly, ABI and NSWBC submit that this claim should be rejected.

4. MOBILE CRANES AWARD

- 4.1 In the Mobile Crane Award, the CFMEU has proposed that clause 14.3(e) of the award is deleted and replaced with a new, more comprehensive clause covering the entitlements of employees when they are required to be away from home overnight. The proposed clause, with a few small exceptions, is essentially the same as the CFMEU's proposed variation to clause 24 of the On-Site Award. The CFMEU's relies on the same submissions and evidence in respect of the living away from home claim in the On-Site Award.
- 4.2 ABI and NSWBC oppose this change for the reasons outlined in paragraphs 3.6 and 3.7(e) above. Furthermore, ABI and NSWBC say that the variation should be rejected because:
- (a) The change significantly alters the current entitlement under the Mobile Cranes Award, in particular it extends the operation of the clause from an employee required to be 'away from home overnight' to an employee who is engaged on distant work; and
 - (b) The evidence filed by the CFMEU does not:
 - (i) specifically deal with the operation of clause 14.3(e) in the mobile cranes industry;

³ [2013] FWCFB 2894 at [86]

- (ii) demonstrate that the current clause 14.3(e) is not providing a fair and relevant minimum safety net of terms and conditions.

4.3 Accordingly, ABI and NSWBC submit that the CFMEU's claim to delete the current clause 14.3(e) and replace it with a new clause largely consistent with the living away from home clauses under the On-Site Award and the Joinery Award, should be rejected.

5. JOINERY AWARD

5.1 In the 4 yearly review, HIA is seeking one amendment to the Joinery Award, namely the insertion of the model TOIL provision. HIA has made an identical claim in the On-Site Award. For the reasons outlined in paragraphs 3.2 and 3.4 above, ABI and NSWBC support the proposed variation.

5.2 The CFMEU is also seeking an amendment to the Joinery Award. The CFMEU proposes that clause 24.5(a) of the Joinery Award is amended in terms similar to its proposed changes to clause 14.3(e) of the Mobile Cranes Award and clause 24 of the On-Site Award.

5.3 ABI and NSWBC oppose this change for the reasons outlined in paragraphs 3.6 and 3.7(e) above. Furthermore, ABI and NSWBC say that the variation should be rejected because:

- (a) The change significantly alters the current entitlement under the Joinery Award when an employee is engaged on distant work; and
- (b) The evidence filed by the CFMEU does not:
 - (i) specifically deal with the operation of clause 24.5(a) as distinct from the "corresponding" clauses under the On-Site Award and Mobile Cranes Award; and
 - (ii) demonstrate that the current clause 24.5(a) is not providing a fair and relevant minimum safety net of terms and conditions.

5.4 Accordingly, ABI and NSWBC submit that the CFMEU's claim to delete the current clause 24.5(a) and replace it with a new clause largely consistent with the living away from home clauses under the On-Site Award and the Mobile Cranes Award, should be rejected.

6. PLUMBING AWARD

6.1 In the 4 yearly review, the Master Plumbers Group (MPG) is seeking the following variations to the Plumbing Award:

- (a) The amendment of apprentice conditions in clause 15.11 of the Plumbing Award which deals with training fees and text books;
- (b) The removal of the industry specific redundancy scheme so that redundancy pay is in accordance with the National Employment Standards (NES). Alternatively, if that proposal is not accepted, an express exclusion in the clause that employees are not entitled to redundancy pay when they resign;
- (c) The amendment of clause 18.6 of the Plumbing Award concerning transfer of business;
- (d) The insertion of a new provision in clause 20 dealing with the payment of junior rates to persons employed in the Plumbing and Mechanical Services Worker / Sprinkler Fitting Worker Level 1(a), 1(b), 1(c) and 1(d) classifications;

- (e) The amendment of clause 32 (penalty rates) to simplify the obligations payable under that clause; and
- (f) The insertion of a new provision in clause 33 (overtime) stating that 'each day's overtime stands alone'.

6.2 On 20 December 2016, MPG filed submissions and evidence in support of the proposed variations outlined in paragraph 6.1 above. In the submissions, MPG notes that:

- (a) It considers the proposed variation outlined in paragraph 6.1(a) above to be settled and determined by the Commission. As such, it will make no further submissions on the matter;
- (b) It considers the proposed variation outlined in paragraph 6.1(c) above to be settled by the Commission. As such, it will make no further submissions on the matter; and
- (c) It is no longer pursuing the proposed variation outlined in paragraph 6.1(d) above.

6.3 ABI and the NSWBC broadly support the variations proposed by the MPG, but do not propose to lead any evidence in support of the variations.

7. CONCLUSION

7.1 For the reasons outlined above, ABI and NSWBC submit that:

- (a) HIA's proposed variations in respect of the On-Site Award and the Joinery Award should be allowed;
- (b) CFMEU's proposed variations in respect of the On-Site Award, Mobile Cranes Award and Joinery Award should fail;
- (c) AWU's proposed variation in respect of the On-Site Award should fail; and
- (d) MPG's proposed variations in respect of the Plumbing Award should be allowed.

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