

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Number: AM2019/17

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Construction Awards*
(AM2019/17)

**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND
ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON THE FINAL DRAFT
VARIATION DETERMINATIONS**

17th December 2020

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Introduction

1. On 4th December 2020 the Full Bench issued a Decision ([2020] FWCFB 6040) concerning the finalisation of the variation determinations for the group of awards collectively referred to as the Construction awards. In the decision the Full Bench invited interested parties to file any comment in relation to the amendments to the Construction awards to be affected by that decision and the earlier statements and decisions of the Full Bench, by 4.00pm on Thursday 17th December 2020.
2. Final draft determinations for the Construction awards were issued on 7th December 2020. The CFMMEU (Construction and General Division) (CFMMEU C&G) has reviewed the determinations and the decision and makes this brief submission in response to the Full Bench invitation.
3. Before making comment on specific clauses in the determinations there is one issue that has been identified that applies to all of the determinations (that the CFMMEU C&G has an interest in) issued on 7th December 2020 and published on the FWC website¹, and that is the inconsistent use of bold text. For example in the determinations for the *Building and Construction General On-site Award 2010*, *Joinery and Building Trades Award 2010* and *Mobile Crane Hiring Award 2010*, none of the terms defined in clause 3 of the awards are highlighted in bold text but terms defined in other clauses of the awards are. There is also inconsistency in the use of bold text for the dollar amounts of allowances in various clauses in the awards. The CFMMEU C&G can provide a full list of clauses affected by the inconsistent application of bold text if required.

Comments on the Final Draft Determination for the Building and Construction General On-site Award 2010

4. In clause 17.1(e) the words “early morning” should have been inserted not just the word “early”² so that all of the shift arrangements are mentioned (i.e. early morning, morning, early afternoon, afternoon and night shift).

¹ See <https://www.fwc.gov.au/documents/awardsandorders/html/pr724779.htm>, <https://www.fwc.gov.au/documents/awardsandorders/html/pr724784.htm> and <https://www.fwc.gov.au/documents/awardsandorders/html/pr724787.htm>

² See the 10th dot point in paragraph [10] of [2020] FWCFB 6040

5. In paragraph [82] of the decision, issued on 4th December 2020, the Full Bench stated a provisional view that clause 29.6 Work during meal break- day workers, be changed to reflect a proposal from the HIA set out in paragraph [81] of the decision.
6. The CFMMEU C&G does not object to the proposed clause however submits that in clause 29.6(a) the words “start of the” should be inserted before “meal break under clause 18.1” to ensure there is no uncertainty as to what time is used. Also in 29.6(b) the words “be not” appearing before the word “required” should be reversed. With the CFMMEU C&G proposed amendments the clause would then read:

29.6 Work during meal break – day workers

(a) If an employer requires an employee to work during the time prescribed by clause 18.1 for the meal break, the employee must be paid at the rate of **200%** of the ordinary hourly rate for the period worked between the prescribed time for the start of the meal break under clause 18.1 and the beginning of the time allowed in substitution for the meal break.

(b) If the meal break provided in accordance with clause 29.6(a) is shortened at the request of the employee to the minimum of 30 minutes prescribed in clause 18.1 or to any other extent (not being less than 30 minutes) the employer will not be required to pay more than the ordinary hourly rate of pay for the time worked as a result of such shortening, but such time will form part of the ordinary working time of the day.”

Comments on the Final Draft Determination for the Joinery and Building Trades Award 2010

7. In paragraphs [134] to [136] of the decision³ the Full Bench deals with changes to column titles in clauses B.2.3, B.2.6, B.3.3 and B.3.6 proposed by ABI. The CFMMEU C&G does not support this change and submits that the column titles for shiftwork should remain as set out in the draft determination published on 8th October 2020⁴.
8. The CFMMEU C&G has identified a significant error in clause 25.4 of the final draft determination (which was also contained in the 8th October 2020 draft variation) which has only come to light when considering the changes to the column titles. The re-drafting of clause

³ [2020] FWCFB 6040

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/ma000029-ed-draft-determination-081020.pdf>

28.3(d) of the current *Joinery and Building Trades Award 2010* into clause 25.4 as set out in the draft determination has dramatically altered the clause.

9. Clause 28.3(d) in the current *Joinery and Building Trades Award 2010* is as follows:

“(d) Shift rates

(i) Other than for work on a Saturday, Sunday or public holiday, the rate of pay for afternoon or night shift is 150% and the rate of pay for early morning and early afternoon shift is 125%, provided that the employee is employed continuously for five shifts Monday to Friday in any week. A public holiday in any week is not a break in continuity for the purposes of clause 28.3(d)(i).

(ii) An employee who is employed for less than five consecutive shifts Monday to Friday must be paid for each day the employee works on shiftwork at the rate of 150% for the first two hours and 200% thereafter, provided that when a job finishes after proceeding on shiftwork for more than one week, or the employee terminates their services during the week, the employee must be paid at the rate specified in clause 28.3(d)(i) for the time actually worked.”

Under this clause the respective shift rates as set out in clause 28.3(d)(i) for afternoon or night shift and early afternoon shift apply where an employee is employed continuously for five shifts Monday to Friday in any week. If an employee is employed for less than 5 consecutive shifts Monday to Friday then clause 28.3(d)(ii) applies. Clause 28.3(d)(ii) applies to all shift work, i.e. work on an afternoon, night, early morning or early afternoon shift.

10. The re-drafted clause as set out in the draft determinations (clause 25.4) has split clause 28.3(d) into 5 paragraphs as follows:

“25.4 Shift rates

(a) Other than for work on a Saturday, Sunday or public holiday, the rate of pay for afternoon or night shift is 150% of the ordinary hourly rate.

(b) The rate of pay for early morning and early afternoon shift is 125% of the ordinary hourly rate, provided that the employee is employed continuously for 5 shifts Monday to Friday in any week.

(c) A public holiday in any week is not a break in continuity for the purposes of clause 25.4(b).

(d) An employee who is employed for less than 5 consecutive shifts Monday to Friday must be paid for each day the employee works on shiftwork at 150% of the ordinary hourly rate for the first 2 hours and 200% thereafter.

(e) When a job finishes after proceeding on shiftwork for more than one week, or the employee terminates their services during the week, the employee must be paid at the rates specified in clause 25.4(a) and 25.4(b) for the time actually worked.”

This re-draft of the clause has the following effect:

- Paragraph (a) removes the provision that the rate of pay for afternoon or night shift only applies if an employee is employed continuously for 5 shifts Monday to Friday.
- Paragraph (b) removes the exception for work on a Saturday, Sunday or public holiday for early morning and early afternoon shifts.
- Paragraph (c) would only apply to early morning or early afternoon shifts.
- Paragraphs (d) and (e) both apply to weeks in which an employee can be employed for less than 5 consecutive shifts yet provide for different pay rates.

11. There has been no decision of the Fair Work Commission, during the 4 yearly review of awards, to change the shift rates provision in the *Joinery and Building Trades Award 2010*, therefore the re-drafted version of the clause in the draft determination must be rejected.

12. The CFMMEU C&G would prefer to keep the current wording of clause 28.3(d), however if the new format is preferred by the Full Bench the re-drafted clause could be amended in the following way to retain the current entitlements:

25.4 Shift rates

(a) Other than for work on a Saturday, Sunday or public holiday, the rate of pay for afternoon or night shift is 150% of the ordinary hourly rate and the rate of pay for early morning and early afternoon shift is 125% of the ordinary hourly rate.

(b) The shift rates in clause 25.4(a) apply when the employee is employed continuously for 5 shifts Monday to Friday in any week.

(c) A public holiday in any week is not a break in continuity for the purposes of clause 25.4(b).

(d) Subject to clause 25.4(e), an employee who is employed for less than 5 consecutive shifts Monday to Friday must be paid for each day the employee works on shiftwork at 150% of the ordinary hourly rate for the first 2 hours and 200% thereafter.

(e) When a job finishes after proceeding on shiftwork for more than one week, or the employee terminates their services during the week, the employee must be paid at the rates specified in clause 25.4(a) and 25.4(b) for the time actually worked.

13. The only other issue identified in the final draft determination for the *Joinery and Building Trades Award 2010* is that the title of Schedule X refers to “Schedule 24” at the top of the Schedule. This needs to be corrected.

Comments on the Draft Determination for the Mobile Crane Hiring Award 2010

14. The only issue identified in the final draft determination for the *Mobile Crane Hiring Award 2010* is that the title of Schedule X refers to “Schedule 24” at the top of the Schedule. This also needs to be corrected.