CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2014/196 and 197
Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Common issues - Casual employment and Part-time employment
(AM2014/196 and AM2014/197)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) IN REPLY TO MBA REPLY

10 August 2016

Construction, Forestry, Mining and Energy Union (Construction and General Division) ABN 46 243 168 565	**Contact Person:** Philip Boncardo National Legal/Industrial Officer	**Address for Service:** Level 9, 215-217 Clarence Street Sydney NSW 2000	**T:** **F:** **E:**	(02) 8524 5800 (02) 8524 5801 hearings@fed.cfmeu.asn.au pboncardo@cfmeu.org

CFMEU's Submissions in Reply to MBA submissions of 25 July 2016

1. Pursuant to leave of the Commission granted on 15 July 2016, Master Builders' Australia (**MBA**) have made submissions in reply to the CFMEU's submissions opposing their claim to radically amend clause 12.3 of the *Joinery and Building Trades Award 2010* (**Joinery Award**). The submissions the MBA were granted leave to file were limited to submissions in reply to those made by the CFMEU. To the extent the MBA submissions stray beyond being in reply and raise new and additional issues the CFMEU submits they ought be disregarded.

2. That being the case, if the Commission is minded to consider submissions that are not strictly 'in reply', the CFMEU makes the following submissions:

The failure of the MBA to lead any evidence

3. It is trite (and has been trite since 2014) that any application to significantly vary a modern award – which is presumed to be consistent with the modern awards objective – must be accompanied by probative evidence supportive of the proposed variation.[1] Curiously, and bravely, the MBA, with all its resources, doubtless significant membership and in full cognisance of what was said by the Full Bench in the *Preliminary Jurisdictional Issues Decision* decided it would not file a scintilla of evidence to support its proposed fundamental alteration to clause 12.3 of the Joinery Award.

4. The MBA now seek to explain (or excuse) this fundamental oversight (or dilatoriness) by making a bald, unsubstantiated assertion – again with no evidentiary foundation – that <u>*all*</u> employers in the construction industry are a cowed and subdued bunch who are reticent to adopt views contrary to those promulgated by the CFMEU. This eleventh hour act of litigious desperation should be rejected by the Commission.

5. Firstly, it cannot be gainsaid that there are a large number of well-resourced, sophisticated and virulently anti-union employers in the building and

[1] [2014] FWCFB 1788 at [23]-[24].

construction industry who hold views at odds with those promoted by the CFMEU and are not restrained in communicating and prosecuting them in the Commission and other Courts and tribunals throughout the country. Further, countless employers utilise industrial tactics to counter positions proposed by the CFMEU on a daily basis, without any reluctance. Finally, multiple employers speak out in the news media against positions promoted by the CFMEU.

6. Secondly, the Commission has facilities available to it to take evidence confidentially under ss 593-594 of the *Fair Work Act.* The fact the MBA made no application for orders under these sections demonstrates the speciousness of their feeble attempt to excuse the evidentiary vacuum that is their case.

7. Finally, the MBA's claim supposedly benefits employees as well, with it contending – without any evidentiary foundation – that clause 12.3 of the award has led to employees missing out on work and has operated as a barrier to the employment of women. If this was in fact the case, one would expect disgruntled employees and women to have been knocking at the MBA's door offering to give statements in support of the MBA claim. Patently, no such persons exist. These bald assertions belie the absurdity of the proposition put forward at paragraph 19 of the MBA's submissions.

8. In all the circumstances, the contention that there is something unique or special about the building and construction industry that allows an employer organisation to run cases without evidence is embarrassing. It is, with respect, nonsense on stilts.

Conclusions without any evidentiary foundation

9. The propositions put at paragraphs 11-12, 18, 29 and 30(c) of the MBA 'reply' submissions are not matters of common or general knowledge that the Commission can take judicial notice of. They are eminently contestable, highly specific factual conclusions that must be proved by probative direct and expert opinion evidence. No evidence has been led by the MBA at all. The

propositions are not capable of acceptance at face value. There are no facts on which the Commission can rely to support the MBA's proposed variation.

The alleged nullification of casual employment

10. The MBA make the curious contention that current clause 12.3 operates to eviscerate or nullify casual employment by somehow converting casual employees into daily hire employees. This submission should be rejected.

11. Firstly, there is no concept of daily hire employment under the *Joinery Award.* Clauses 10-12 determine that employees who are covered by the award are either full-time, part-time or casual. Secondly, casual employees are able to be dismissed under clause 12.4 of the award by one hour's notice. This is essence of casualness. Thirdly, unlike part-time employees (who must agree with their employer on the hours and days they will work at the time of engagement), there is no requirement for an employer to roster a casual employee on at all or provide them any commitment to working certain days or at all. Fourthly, as the Full Court of the Federal Court has pointed out, the essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days the employee will work.[2] There is nothing about casual employment under clause 12 of the *Joinery Award* that mandates or requires an employer to give an employee a firm commitment as to the duration of the employee's employment or the days they will work. Casual employment under clause 12 stands, in this respect, in contradistinction to full-time and part-time employment under clauses 10 and 11.

12. The MBA's bald contention about the operation of clause 12 is conceptually flawed and fails at the threshold. Further, and perhaps more fundamentally, the notion that the clause operates to nullify the essence of casualness is something about which evidence could and should have been called. The failure of the MBA to bother calling any evidence on what appears to be one of the prongs to

[2] *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38].

its case in arguing the clause is anomalous means that there is no foundation for the flawed propositions set out at paragraph 48 of its 'reply' submissions.

The ACTU claim

13. In what is ostensibly its 'fall-back' position, the MBA asks the Commission, if it rejects its application to vary the *Joinery Award,* to proceed to vary it in line with the common claim being run by the ACTU. This fall-back position is nonsensical and should be rejected.

14. Firstly, the ACTU claim seeks to insert into awards that have less beneficial provisions concerning casual engagement for employees a 4-hour minimum engagement period. It does not seek to bring awards with more beneficial provisions down to this base level. Secondly, the *Joinery Award* is not included in the ACTU's claim. Thirdly, and fundamentally, there is no evidence in the proceedings concerning the ACTU's claim (much like in the MBA's claim in this matter) that would enable the Commission to find that clause 12.3 – which is taken to *prima facie* meet the modern award objective – does not meet the modern awards objective.

15. In all the circumstances, the MBA's claim should be dismissed.

P Boncardo
National Legal/Industrial Officer
CFMEU
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