From: Michael Nguyen [mailto:michael.nguyen@amwu.org.au]
Sent: Monday, 18 September 2017 3:04 PM
To: Chambers - Hatcher VP
Cc: Melissa Adler (m.adler@hia.com.au); Shaun Schmitke (shaun.schmitke@masterbuilders.com.au); Raul Baonza (rjb@ccfnsw.com); Louise.Hogg@ablawyers.com.au; Rebecca Sostarko (rebecca@masterbuilders.com.au); Stephen Crawford - AWU (stephen@crawforddecarne.com.au); Michael Wright; Stuart Maxwell; 'Vasuki Paul'; AMOD
Subject: RE: AM2016/23 - 4 Yearly Review - Construction Awards - AMWU submission to FWC provisional view

Dear Associate to Vice President Hatcher

The AMWU respectfully requests that the Full Bench receive the attached submissions and attachment in response to the Statement of the Full Bench 17 August 2017 [2017] FWCFB 4239.

The AMWU has also copied interested parties into this email to ensure that it is received by them as early as possible.

The AMWU was delayed in lodging the submission on time due to a number of matters arising over the past fortnight at short notice.

The AMWU submits that there should be minimal impact on the time afforded to other interested parties in responding to the AMWU's submissions. We also submit that excluding the AMWU's submissions would be a disproportionate penalty for the short delay.

Attached to this email is the AMWU's submissions in response to the Provisional View and an Attachment A which is the scanned decision from the Commonwealth Arbitration Reports *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736.

Regards

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IN THE FAIR WORK COMMISSION

Matter No.: AM2016/23 Construction Awards

Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Fair Work Commission in response to a Statement of the Full Bench 17 August 2017.[1]

2. The AMWU will be responding in these submissions to the following issues in the discussion paper:

    a. The abolition of the Lift Industry Allowance; and

    b. Rationalisation of industry allowances;

3. The AMWU supports and adopts the submissions of the Construction, Forestry, Mining and Energy Union – Construction Division (CFMEU) submissions in relation to the following changes proposed by the Statement:

    a. Living Away from Home – distant work entitlement;

    b. Tool Allowance; and

    c. Hours of Work clause.

4. The AMWU supports the submissions of the Australian Workers' Union.

Abolition of the Lift Industry Allowance

5. The Lift Industry Allowance is an important feature of safety net entitlements for workers in the Metal and Engineering Construction part of the industry covered by the *Building and Construction General On-site Award* 2010 that has existed since 26 April 1967.

6. The AMWU opposes the abolition of the Lift Industry Allowance for the following reasons:

    a. The lift industry allowances has been and continues to be a feature of the safety net of entitlements for workers;

    b. The reasons for the inclusion of the lift industry allowance as an Award entitlement have not changed;

    c. The significant reduction in the comparative value of Award entitlements as compared to average wages strongly weighs against any decision to cut remuneration from the safety net of entitlements; and

    d. Interested parties have not been provided with an opportunity to assess and provide submissions in favour or against the merit arguments, research, or evidence the Commission is relying upon to support the proposed abolition of the Lift Industry Allowance.

[1] [2017] FWCFB 4239

The Lift Industry Allowance is a long standing important feature of the industry safety net

7. The Lift Industry Allowance was established by a decision of Commissioner Winter settling a dispute following an application to vary the allowances in the *Metal Trades Award* 1952.[2] That decision is attached to these submissions at Attachment A.

8. That clause continued to exist in various iterations of the *Metal Trades Award* 1952, being retained in the *Metal Industry Award* 1971, and the *Metal Industry Award* 1984.

9. In 1989, a separate Award was granted for the metal and engineering trades working in the construction industry, with the *National Metal and Engineering On-site Construction Award* 1989 (MECA 1989) being granted. The MECA 1989 retained the Lift Industry Allowance in the same form.

10. When that Award was simplified in 2002, and the *National Metal and Engineering On-site Construction Award* 2002 (MECA 2002) was granted. The MECA 2002 retained the Lift Industry Allowance.

11. The Award Modernisation process consolidated the MECA 2002 Award into the current *Building and Construction General On-site Award* 2010. This award retained the Lift Industry Allowance.

The Reasons for the Inclusion of the Lift Industry Allowance Remain

12. The reasons given in the decision for creation of the Lift Industry Allowance continue to exist. The Commissioner noted that:

    "*The provision is sought as a lift industry allowance in consideration of the alleged peculiarities and disabilities associated with such work, and in recognition of the fact that employees engaged in such work may be required to perform, and/or assist to perform, as the case may be, any duties involved in such work.*"[3] (*emphasis added*)

13. This consideration was identified in the clause which the Commission granted at the time, with the final clause being granted by the Commission reproducing this rationale word for word.[4] This rationale has continued to exist in the clause as it migrated through to the present day clause, which is at clause 42.2(a) of the *Building and Construction General On-site Award* 2010.

14. It is self evident that working in the Lift Industry contains peculiarities and disabilities which continue to shape industrial arrangements around the work area distinctly from other areas in Construction. There continues to be Enterprise Agreements which revolve around work in the Lift Industry. The dominant businesses in the industry include Schindler, Otis, and Kone. Other significant

[2] *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736
[3] *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736 at page 736
[4] *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736 in the final clause reproduced at page 738 at paragraph (a)

businesses operating in the Lift Industry include Lifttronics and Thyssen Krupp. Enterprise Agreements in the industry either incorporate the terms of the Building and Construction General On-site Award 2010 and therefore incorporate the lift industry allowance or either expressly or implicitly through the Better Off Overall Test incorporate the Lift Industry Allowance into the ordinary hourly rate.

15. Some of the other reasons given in the decision have increased in significance. In particular, Commissioner Winter notes that the Lift Industry at the time was "assuming a new importance in the community with the erection of multi-storey building."[5] That prescient acknowledgment has increased force in the present day with many more multi-storey buildings becoming an entrenched feature of many Australian city skylines since 1967.

16. Commissioner Winter acknowledged back then that "*Lifts are essential to the effective industrial and commercial life of a large city and any anomaly which operates within such a field is bad in itself and could be productive of much harm. Therefore I have not any hesitation in deciding that this application has merit*."[6]

17. In contemporary Australian society, it is self evident that the increased population density in Australia's metropolitan cities has resulted in urban planning that increasingly accommodates not only multi-storey commercial buildings but also multi-storey residential buildings.

Award Entitlements are comparatively the lowest compared to Average Wages

18. The standard of living that can be supported by Award wages and conditions as compared to the standard of living that can be support by Average wages has diminished significantly over time. The ability for the Award system's safety net to capture a fair share of economic growth for workers without bargaining power has been slowly diminishing.

19. As the ACTU's submission from the 2016-17 Annual Wage Review[7] outlined:

> *"The NMW was 61.5% of the median full time earnings at 1996. This has fallen overall to 53.4%, stable at the two years 2014 and 2015, most recent median figures available. The fall in the minimum wage bite as a share of AWOTE is even starker, from 52.8% down to 44.8% at 2016."*

20. At the same time – the number of workers who are reliant on Awards for wages and conditions has increased dramatically. Statistics from the ABS reveal a massive jump of workers on Awards from 15.2% in 2010 to 23.9% in 2016.[8]

21. This is an important context that should weigh on any decision by the Commission to cut a monetary entitlement the size of the Lift Industry Allowance. The current Lift Industry Allowance is 14.8% of the standard rate per week. The 'standard

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[5] *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736 at page 737
[6] *Variation of Award- Allowances in the Lift Industry Metal Trades Award 1952* (1967) 118 CAR 736 at page 737
[7] https://www.fwc.gov.au/documents/sites/wagereview2017/submissions/actusub.pdf at page 109 to 110
[8] ACTU Rising Inequality Report at page 6

rate' is defined in clause 3 as "standard rate means either the weekly or hourly minimum wage as stated for a Level 3 (CW/ECW 3) employee in clause 19.1." The current Level 3 weekly wage is $809.10 per week.

22. This means that the Lift Industry Allowance is currently $119.75 per week.

23. A cut of $119.75 per week is a very significant amount which an Award reliant employee's personal budget.

24. The recent "Minimum Income for Healthy Living Budget Standards for Low-Paid and Unemployed Australians"[9] (MIHL) indicates that the total budget for low paid workers were as follow:

Healthy Living Budget Standard for:	Amount
Single Adult	$597.31
Couple, no children	$833.24
Couple, 1 child, girl age 6	$969.90
Couple, 2 children, girl age 6 boy age 10	$1,173.38
Sole parent, 1 child, girl age 6	$827.70[10]

25. A reduction of $119.75 from any of these budgets would be a very significant amount.

The Commission has not disclosed the underlying merit argument behind the proposal to abolish the Lift Industry Allowance

26. In common issue proceedings to date, the Commission has put forward proposals of its own motion, following evidence and submissions presented by the parties. Those preliminary proposals were accompanied by a decision on the merits of the core proposition being put by the Commission. There was in those proceedings a core merit argument which parties had already been given the opportunity to present their positions about and upon which the Commission had made a substantive decision. In conjunction with this substantive decision, a proposed model clause was released for parties to provide comment about on the operation or practical impact.

[9] New Minimum Income for Healthy Living Budget Standards for Low Paid and Unemployed Australians, Saunders P. and Bedford M, UNSW Social Policy Research Centre, Sydney August 2017

[10] New Minimum Income for Healthy Living Budget Standards for Low Paid and Unemployed Australians, Saunders P. and Bedford M, UNSW Social Policy Research Centre, Sydney August 2017 at page 103, Table 5.17

27. In the present proceedings, there have been no submissions or evidence put by any party about the abolition of the Lift Industry Allowance, its merit or otherwise. There are no reasons or rationale provided in the *Statement of the Full Bench*[11] that proposes to abolish the Lift Industry Allowance.

28. It is acknowledged that the Commission may initiate a process of varying or reviewing entitlements of its own motion or initiative unencumbered by the need for a party to have advanced a proposal. However, the manner in which proposals are advanced by the Commission is not entirely unencumbered.

29. The AMWU respectfully submits, that prior to advancing a proposition to abolish an entitlement, the Commission should publish in a Statement or Decision the merit arguments and evidence upon which it based its preliminary position.

30. In the performance of its functions, the FWC is directed by s.577 in the following manner:

> "***577 Performance of functions etc by the FWC***
>
> *The FWC must perform its functions and exercise its powers in a manner that:*
>
> *(a) is fair and just; and*
>
> *(b) is quick, informal and avoids unnecessary technicalities; and*
>
> *(c) is open and transparent; and*
>
> (d) *promotes harmonious and cooperative workplace relations.*"

31. A fair and just as well as open and transparent process should include a published statement with reasons or the rationale for the proposal which parties can respond to. Without a published decision about underlying merit argument, a party is not able to answer the core underlying reasons for the proposed change in a fair and just manner.

    The *4 yearly review of modern awards; Preliminary Jurisdictional Issues Decision*[12] sets out that the Commission should proceed with the task of the 4 yearly review of modern award:

    a. Requiring parties to advance a merit argument for proposed variations;

    b. Having regard to the historical context of the awards;

    c. Having regard to previous Full Bench decision of the Commission and its predecessors;

    d. Having regard to previous decisions relevant to a contested issue and the context of those decisions.[13]

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[11] [2017] FWCFB 4239
[12] [2014] FWCFB 1788

32. These considerations indicate that the Commission has itself set some further parameters to the performance of its functions under *Part 2-3 Modern Awards of the Fair Work Act 2009*, whether arising from applications or proposals from interested parties, or arising from the Commission's own motion or initiative. There does not appear to be any indication that these considerations would not apply in the instance of the Commission's own initiative.

33. The *Preliminary Jurisdictional Issues Decision*, along with s.577 supports a process which includes an announcement to interested parties, not only of the proposed change, but of the merit reasons and/or any evidence behind the proposed change.

34. While there is no strict requirement for the Commission to publish reasons for a decision, that must be looked at in the context of the requirement that proceedings be fair and just and open and transparent. It must also be looked at in the context of whether the decision is a decision resolving a dispute about which the parties are familiar, or whether it is resolving a dispute only within the Commission's mind, about which an interested party may have no prior warning or understanding and about materials or information undisclosed to parties.

Rationalisation of allowances

35. The AMWU opposes any changes to the allowances which would result in employee's having their take home pay reduced.

36. The Submissions advanced above in relation to the Lift Industry Allowance apply equally to any proposal to rationalise allowances.

37. In addition to the arguments which apply to the Lift Industry, the lack of an amount for the proposed industry allowances in relation to the proposal to makes the prospect of providing any meaningful submissions about the proposed change nearly impossible.

38. Without a proposed amount in the proposed rationalisation it is not possible to identify how workers may be impacted.

39. Enterprise agreement negotiations or negotiated consent positions in relation to Awards may at times result in swings and roundabouts which the parties may agree to. However, the parties are usually arriving at a consent position fully informed about the impact of the proposal which they bring before the Commission.

Conclusion

40. The AMWU submits that the Lift Industry Allowance should not be abolished.

41. The AMWU submits that the allowances in the Award should not be rationalised so as to result in workers being disadvantaged or have their take home pay cut.

18 September 2017

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[13] [2014] FWCFB 1788 at paragraphs [23] to [27]

IN THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION

In the matter of the *Conciliation and Arbitration Act* 1904-1966

and of

THE METAL TRADES AWARD, 1952

(Nos 11 of 1949; 430 and 439 of 1950; 254 of 1951)

(C No. 268 of 1967).

Variation of award—Allowance for employees in the lift industry—Award varied.

1967.
SYDNEY, April 26;
MELBOURNE, May 19; June 7.
—
Commr Winter.

On 17 April, 1967, an application was filed on behalf of the Electrical Trades Union of Australia and others for an order varying the above award dated 16 January 1952 as reprinted on 15 August 1963.[1]

The application came on for hearing before the Commonwealth Conciliation and Arbitration Commission (Commissioner Winter), in Sydney on 26 April 1967.

D. L. McBride for the Electrical Trades Union of Australia and another.

T. J. Murphy for The Federated Ironworkers' Association of Australia and others.

J. Hutson for The Amalgamated Engineering Union (Australian Section).

J. Roulston for The Boilermakers' and Blacksmiths' Society of Australia.

B. M. Morgan and *J. B. Holmes* for the Australasian Society of Engineers.

I. Little, R. C. Roach and *C. G. Mews* for The Metal Industries Association of Victoria.

J. L. McCue for the Metal Trades Employers' Association.

S. G. Apperley for the State Electricity Commission of Australia.

On 7 June 1967, the Commission issued the following decision and made the order hereinafter appearing:

The Electrical Trades Union and others seek a variation of the Metal Trades Award, 1952, by endeavouring to have provisions made in the appendix to Part I of the said award for a payment of $3.50 per week to those who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators.

The provision is sought as a lift industry allowance in consideration of the alleged peculiarities and disabilities associated with such work, and in recognition of the fact that employees engaged in such work may be required to perform, and/or assist to perform, as the case may be, any duties involved in such work.

The ground relied upon by the applicants is that the application is made to overcome anomalies between employees in the industry.

When the question of anomaly is considered, which does seem to be the principal matter actuating the applicants, indeed the only ground upon which this application is made is 'to overcome anomalies between employees in the industry', it does seem that what has been said concerning my experience in the industry is reasonably accurate and might be considered to be sufficient to enable me properly to come to a decision on this point.

At the time that I made my decision in the multi-storey building matter, I was conscious that that decision of itself must inevitably create certain anomalies. It was quite apparent to me then that within what might be termed the field of

(1) 103 C.A.R. 463

lift installation, servicing and repairing and the general maintenance of lifts, was to be found one of those areas. Consequently, I have a clear understanding that there is at present a field of anomaly that could on the one hand operate against the best interests of what might for present purposes be termed the lift industry, and also such that it would be productive of discontent in this industry—justifiable discontent.

It is well known to me that the lift industry is assuming a new importance in the community with the erection of multi-storey buildings, and once those buildings have been constructed certain provisions in the multi-storey construction allowance disappear.

Lifts are essential to the effective industrial and commercial life of a large city and any anomaly that operates within such a field is bad in itself and could be productive of much harm. Therefore I have not any hesitation in deciding that this application has merit.

I note that paragraph (b) of the application specifically provides that anyone who is to be paid under the terms of the application will not be entitled to payment under the additional margin prescribed by division S of clause 4(a) of the Metal Trades Award. Division S, of course, is the building construction allowance with respect to multi-storey buildings.

It is further noted that proper provision has been made for payment in accordance with clause 13 (mixed functions) of the award when and where applicable.

I also see that the application seeks to have the allowance claimed in the application paid for all purposes of the award. This provision set out in paragraph (d) of the application is one that causes me to hesitate somewhat, but reflecting upon the whole incidence of the industry, and with particular relation to that part of the industry having to do with matters affecting lifts and their effective operation, I consider that the claim with respect to an all-purpose rate is not excessive and not out of accord with what should properly apply to this expressly limited field.

For all these reasons, therefore, I come to the decision that the application should be granted and I so decide.

It seems to me that it is proper that the matter should be prescribed within the appendix to part I of the award and that its terms should operate as from the beginning of the first pay period to commence on or after the 26th day of April, 1967.

Order and prescribe:

That the said award as consolidated and as varied be and the same is hereby further varied in manner following that is to say:

I By adding at the end of clause 31—Specified Employers and Undertakings—the following:

Members of the Metal Industries Association of Victoria and the Metal Trades Employers Association engaged in the lift industry in various States of the Commonwealth.

Commr Winter]

II By adding to the Appendix to Part I—Wages Employees—the following new part:

PART XIX—MEMBERS OF THE METAL INDUSTRIES ASSOCIATION OF VICTORIA AND THE METAL TRADES EMPLOYERS ASSOCIATION ENGAGED IN THE LIFT INDUSTRY IN VARIOUS STATES OF THE COMMONWEALTH

(a) In addition to the basic wage and margin prescribed respectively by clause 2 and clause 4(a) of this award metal tradesmen and their assistants employed by members of the Metal Industries Association Victoria and the Metal Trades Employers Association who are parties to the Lift Industry Agreement, being an agreement lodged in the Conciliation and Arbitration Commission as the terms of settlement reached by the parties in relation to matter C No. 966 of 1967, who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employers' workshops, shall be paid an amount of $3.50 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform, and/or assist to perform, as the case may be, any of such work.

(b) An employee in receipt of the lift industry allowance prescribed by sub-clause (a) hereof shall not be entitled to the additional margin prescribed by Division 5 of clause 4(a) of this award or to any of the special rates prescribed by clause 8 of this award.

(c) An employee who is ordinarily engaged in the employers' workshop and who, from time to time, is required to perform any of the work prescribed in sub-clause (a) hereof shall in respect of such work, be entitled to payment of portion of the lift industry allowance prescribed by this clause in accordance with the provisions of clause 13 (Mixed Functions) of this award.

(d) The lift industry allowance prescribed by sub-clause (a) hereof shall be paid for all purposes of the award.

III The foregoing variations shall come into operation as from the beginning of the first pay period to commence on or after the 26th day of April, 1967 and shall remain in operation for a period of six months.

IN THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION

In the matter of the *Conciliation and Arbitration Act* 1904-1966

and of

THE BUILDING WORKERS' INDUSTRIAL UNION OF AUSTRALIA

and

THE FEDERATED SHIP PAINTERS AND DOCKERS UNION OF AUSTRALIA and another

(C No. 496 of 1966)

Industrial dispute—Laying and surfacing of floor tiles in vessels at Garden Island Dockyard—Decision issued.

1967. SYDNEY, June 7. Commr Horan.

Notification of a dispute between the above parties was given pursuant to section 28 of the *Conciliation and Arbitration Act* 1904-1966 by The Building Workers' Industrial Union of Australia.

The dispute was listed before the Commonwealth Conciliation and Arbitration Commission (Commissioner Horan), in Sydney on 7 June 1967.

H. Rees and *N. Boyd* for The Building Workers' Industrial Union of Australia.

T. B. Gordon for The Federated Ship Painters and Dockers Union of Australia.

W. R. Watkins for the Minister of State for the Navy.

On the same day the following decision was issued by the Commission:

I can quite understand the attitude of the bricklayers in this; this is a reasonable and common attitude for a workman when he is losing some work. I can understand the attitude of the Department too, because the Department wants to have workmen to do anything at all they want them to do. It would be a good thing in our ship building and ship repair industry if every man could do every job that was to be done on board the vessel. This to a big extent does happen in countries other than Australia, but in Australia we have lines of demarcation and the breaking of these lines of demarcation very often does cause industrial disputes.

I feel on this occasion that the weight would be with the ship painters and dockers with respect to who should do this work.

I have recently varied the Ship Painters and Dockers Award to put in an additional rate for using this material on a naval vessel being built at Cockatoo Dock. I know that in other shipyards in Australia ship painters and dockers are used without question.

I feel that ship painters and dockers consider they have the right to the work, which I do, and if on occasion some of this work is to be given to another trade —in other words, bricklayers—it would create industrial unrest at Garden Island of a nature that could be a greater disadvantage to management than the disadvantage perhaps of finding some other temporary employment for bricklayers.

The decision of the Commission, gentlemen, in this matter is that the laying of the '*Hornflor*' is more properly carried out by ship painters and dockers than by bricklayers at Garden Island.
