FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.160—Variation of modern award

Master Builders Australia Limited
(AM2011/51)

SENIOR DEPUTY PRESIDENT WATSON MELBOURNE, 4 JANUARY 2012

Application to vary a modern award.

[1] An application has been made by Master Builders of the Australian Capital Territory, Master Builders Association of New South Wales, Master Builders Association of the Northern Territory, Master Builders Association of South Australia, Master Builders Association of Tasmania, Master Builders Association of Victoria, Master Builders Association of Western Australia and Queensland Master Builders Association (collectively referred to hereafter as MBA) for the variation of the *Building and Construction General On-site Award 2010*[1] (the Building and Construction Award) under s.160 of the *Fair Work Act 2009* (the Act).

[2] The application was dealt with by written submissions and consultations in Melbourne on 16 November 2011 and Sydney on 7 December 2011.

[3] Submissions were received from the MBA, the Housing Industry Association (HIA), Australian Business Industrial (ABI), the Construction, Forestry, Mining and Energy Union (CFMEU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), The Australian Workers' Union and the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (AMWU). Each of these organisations participated in the consultations.

[4] The application sought five variations to the Building and Construction Award:

Variation 1.

[5] By renumbering clauses 15.2(a), 15.2(b) and 15.2(c) as clauses 15.2(b), 15.2(c) and 15.2(d) and by inserting a new clause 15.2(a) in the following terms:

> "In any State or Territory in which any statute or regulation relating to apprentices is in force, that statute or regulation will operate in that State or Territory provided that the provisions of the statute or regulation are not inconsistent with this award in which case the provisions of this award will apply."

Variation 2.

[6] By replacing the words "based on the wage rate contained in this clause" in clause 15.3(a) with the words "based on the wage rates indicated in clauses 19.7 and 19.8".

Variation 3.

[7] By deleting clause 15.5(a) and replacing it with the following words:

> "Apprentices are required to serve an additional day for each day of absence during each year of their apprenticeship, except where an absence is taken as paid leave. The following year of their apprenticeship does not commence until the additional days have been worked."

Variation 4.

[8] By deleting clause 19.8 and replacing it with the following words:

> "**19.8 Adult apprenticeship**
>
> Apprentices previously employed in the metal and engineering on-site industry
>
> (a) Where a person was employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice with that employer, such person will not suffer a reduction in the rate of pay by virtue of becoming an apprentice.
>
> (b) For the purpose of fixing a rate of pay only, the adult apprentice will continue to receive the rate of pay that is applicable to the classification or class of work specified in clause 19.1, and in which the adult apprentice was engaged immediately prior to becoming an apprentice.
>
> Apprentices in all sectors
>
> (c) Other than for the persons described in clause 19.8(a), the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1(a) or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater."

Variation 5.

[9] In clause 25.12(b) by deleting the second reference to "clause 25.12(a)" and replacing it with "clauses 25.2, 25.3 and 25.4".

[10] The consultations of 16 November 2011 adjourned into conciliation. Upon resumption on transcript, I announced:[2]

> "In discussions between those in attendance in conference, the outcome of all of that is as follows. First, this matter will be relisted at 10 am on Wednesday 7 December in Sydney, at which time we will first take the evidence of Mr Thomas, Mr Reid, and then hear submissions in relation to outstanding matters. The outstanding matters are the second variation proposed by the MBA in respect of clause 15.3 and the fourth variation proposed in respect of clause 19.8. The other matters have been dealt with in this manner. First, in respect to the fifth variation, clause 25.12, the MBA has withdrawn that part of its application and the application to make the variation to clause 25.12, subject to reserving its position to re-agitate that variation in the two year review in 2012.
>
> In respect of the other two variations to propose, variation one clause 15.2, and variation three in respect of clause 15.5. The AWU in conference raised jurisdictional issues going to the clauses and the variations proposed arising out of the operation of Part 1-3 of the Act, and section 139 of the Act. The MBA has withdrawn the application in respect of variation one clause 15.2, a [sic] subject to reserving its right to re-agitate that variation, or some variant of it, in the two year review commencing 2012.
>
> In respect of clause 15.5 there is agreement between the parties as to an uncertainty which will require immediate resolution, notwithstanding the issues raised by the AWU. In respect to that variation the parties propose to discuss an agreed variation to remove that uncertainty, which they will address on 7 December or earlier in writing. The variation proposed in that respect will be dealt with without prejudice to the position of the AWU in respect to the jurisdictional issues raised and its right to ventilate them in the two year review in relation to this award, or more generally, and in respect to the MBA's right to further agitate this issue in the two year review. Now, unless I have misrepresented anything or anyone's position, I would propose at this stage to adjourn until 7 December."

[11] Accordingly, the MBA withdrew its application to the extent that it deals with variations 1 and 5.

[12] Only two variations remain for determination in the context of the current variations: variations 2, 3 and 4, with a common position arising in respect of variations 2 and 3.

VARIATION 2

[13] Clause 15.3(a) of the Building and Construction Award prescribes overtime and shiftwork payments for apprentices in the following terms:

> **"(a)** When overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by the award will apply, based on the wage rate contained in this clause. No apprentice/trainee will work overtime or shiftwork on their own or without supervision."

[14] MBA submitted that clause 15.3(a) states that "when overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by this award will apply, based on the wage rate contained in this clause" (emphasis added). However, no wage rate is contained in clause 15. Rather apprentice wages are found in clauses 19.7 and 19.8. MBA submitted that clause 15.3(a) plainly contains a mistaken reference which falls easily within the ordinary meaning of the term 'error' and the ambit of s.160.

[15] The MBA submission as to the existence of the error and the means of rectifying the error identified were supported by all the organisations appearing in respect of the variation.

[16] I am satisfied that the reference within clause 15.3(a) to "the wage rate contained in this clause' is in error and should refer to 'the wage rates indicated in clauses 19.7 and 19.8".

[17] Clause 15.3(a) will be varied to read:

> **"(a)** When overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by the award will apply, based on the wage rates indicated in clauses 19.7 and 19.8. No apprentice/trainee will work overtime or shiftwork on their own or without supervision. "

VARIATION 3

[18] Subject to reserving the rights of the AWU to raise in the 2012 review of the modern awards the jurisdictional basis of clause 15.5, which deals with aspects of apprenticeship arrangement, agreement was reached as to a variation to clarify the terms of clause 15.5(a). It was agreed[3] that there was uncertainty as to the current provision which should be addressed by amending clause 15.5(a) to read:

> "**(a)** Apprentices are required to serve an additional day for each day of absence during each year of their apprenticeship, except in respect of absences due to either paid leave or leave without pay (taken in accordance with clause 38.3(a)). The following year of their apprenticeship does not commence until the additional days have been worked."

[19] The remainder of clause 15.5 remains unaltered under that proposal.

[20] I accept the position of the parties that there is an uncertainty, which should be rectified in the terms agreed. Clause 15.5(a) will be varied in the terms indicated above.

VARIATION 4

[21] Variation 5 seeks to delete the current clause 19.8, which states:

> "**19.8 Adult apprenticeship**
>
> **(a)** Where a person was employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice with that employer, such person will not suffer a reduction in the rate of pay by virtue of becoming indentured**.**

(b) For the purpose of fixing a rate of pay only, the adult apprentice will continue to receive the rate of pay that is applicable to the classification or class of work specified in clause 19.1, and in which the adult apprentice was engaged immediately prior to entering into the contract of indenture.

(c) Subject to clauses 19.8(a) and (b), the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1 or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater."

[22] MBA proposes that the current clause 19.8 be replaced with the following:

"**19.8 Adult apprenticeship**

Apprentices previously employed in the metal and engineering on-site industry

(a) Where a person was employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice with that employer, such person will not suffer a reduction in the rate of pay by virtue of becoming an apprentice.

(b) For the purpose of fixing a rate of pay only, the adult apprentice will continue to receive the rate of pay that is applicable to the classification or class of work specified in clause 19.1, and in which the adult apprentice was engaged immediately prior to becoming an apprentice.

Apprentices in all sectors

(c) Other than for the persons described in clause 19.8(a), the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1(a) or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater. "

[23] It may be seen that the variation proposed by MBA had several elements:

1. To separate the current clause, by the use of subheadings into two distinct components dealing with adult apprentices previously employed in the metal and engineering on-site industry and adult apprentices in all sectors, whereas the current clause contains a general provision within clause 19.8(c), which is subject to the specific arrangements in respect of adult apprentices previously employed in the metal and engineering on-site industry in clause 19.8(a) and (b);

2. To replace within clause 19.8(a) the concluding words "by virtue of becoming indentured" with "by virtue of becoming an apprentice"; and

3. Altering the current general prescription within clause 19.8(c) from "the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1 or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater" to "the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1(a) or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater".

[24] Following a conference on 7 December 2011, I announced that MBA had withdrawn its application to the extent that it sought the variations identified in point 2 above, on the basis that it reserved its right to further pursue the variation in the 2012 review and/or a broader review of modern awards in respect to apprentices.[4]

The scope of clause 19.8

[25] The issue identified in point 1, above, is whether the adult apprentice provision in clause 19.8 is a general provision in respect of adult apprentices engaged under the Building and Construction Award (19.8(c)), subject to particular additional arrangements in relation to persons employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice with that employer (19.8(a) and (b)) or whether the provision, as a whole, only applies to adult apprentices employed by an employer in the metal and engineering on-site construction industry.

[26] I am unable to identify any uncertainty as to the scope of the clause. On its face, clause 19 clearly prescribes the rate of pay of an adult apprentice in all sectors of the industry covered by the Building and Construction Award, in clause 19.8(c). The introductory words in clause 19.8(c) and the terms of clauses 19.8(a) and (b) record an additional provision, applicable only to persons employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice, providing an entitlement for an adult apprentice in that sector who was employed by their employer immediately before entering into the adult apprenticeship to retain the benefit of a higher rate of pay payable under their classification immediately before entering into the adult apprenticeship.

[27] The proposition advanced by MBA, ABI and HIA that the reference in clause 19.8(c) to an adult apprentice is a reference only to an adult apprentice within the class dealt with in clauses 19.9(a) and (b) is unsustainable. The reference to an/the adult apprentice in clauses 19.8(a) and (b) is clearly to a narrower group of persons - an adult apprentice who was employed by an employer in the metal and engineering on-site construction industry immediately prior to becoming an adult apprentice with that employer.

The rate of pay and all-purpose allowances

[28] The only remaining issue, and the substantive issue for determination, is that identified in point 3, above, which goes to the rate of pay and all-purpose allowances, payable to adult apprentices under clause 19.8, with the MBA seeking to alter the current general prescription within clause 19.8(c) from "the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1 or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater" to "the rate of pay of an adult

apprentice will be the rate prescribed for the lowest paid classification in clause 19.1(a) or the rate prescribed by clause 19.7 for the relevant year of apprenticeship, whichever is the greater". The MBA proposed variation seeks to amend clause 19.8(c) to restrict the reference to the rate prescribed for the lowest paid classification in clause 19.1 to clause 19.1(a), removing reference to, relevantly, clause 19.8(b) and clause 19(c).

[29] Clause 19.1 reads:

"**19.1 General**

(a) An adult employee within a level specified in the following table will be paid not less than the rate per week assigned to the appropriate classification, as defined in Schedule B—Classification Definitions, in which such an employee is working:

(Table of minimum classification wages omitted)

(b) The rates in clause 19.1(a) prescribe minimum classification rates only. The payment of additional allowances is required by other clauses of this award in respect of both weekly and hourly payments. For the hourly rate calculations, see clause 19.3.

(c) CW refers to construction workers in the general building and construction and civil construction sectors. ECW refers to engineering construction workers in the metal and engineering construction sector."

[30] Clause 19.7 reads:

"**19.7 Apprentice wages**

(a) A person who has completed a full apprenticeship must not be paid less than the standard rate.

(b) An apprenticed employee will be paid the percentage of the standard rate, as follows:

(Table of percentages of the standard rate omitted)

(Transitional provisions in Clauses **19.7(c)** and **(d)** omitted)

(e) In addition to the above rates apprentices will be paid amounts prescribed in:

- clause 21.2—Industry allowance;
- clause 20.1—Tool and employee protection allowance;
- the relevant percentage (as identified in clauses 19.7(a) and (d) for the year of the apprenticeship) of the Special allowance contained in clause 21.1;

and, where applicable,

- clause 21.3—Underground allowance; and
- for refractory bricklaying apprentices the relevant percentage (as identified in clause 19.7(a) for the year of the apprenticeship) of the Refractory bricklaying allowance contained in clause 21.8.

as part of the ordinary weekly wage for all purposes."

[31] Clause 19.3, which is also relevant to the positions argued, states:

"**19.3 Hourly rate calculation**

(a) Daily hire employees—follow the job loading

(i) The calculation of the hourly rate will take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.

(ii) For this purpose the hourly rate, calculated to the nearest cent (less than half a cent to be disregarded), will be calculated by multiplying the sum of the appropriate amounts prescribed in:

- clause 19.1—Minimum wages;
- clause 21.2—Industry allowance;

and where applicable,

- clause 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance,

by 52 over 50.4 (52/50.4) rounded to the nearest cent, adding to that subtotal the amount prescribed in clause 21.1—Special allowance, and dividing the total by 38.

Provided that in the case of a carpenter-diver, the divisor will be 31, and for refractory bricklayers and their assistants the allowance contained in clause 21.8—Refractory bricklaying allowance, will be added to the hourly rate.

(b) Weekly hire employees

The hourly rate will be calculated by adding the amounts prescribed in:

- clause 19.1—Minimum wages;
- clause 21.1—Special allowance;
- clause 21.2—Industry allowance;

and, where applicable:

- clauses 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance;
- clause 21.11—Air-conditioning industry and refrigeration industry allowances;
- clause 21.12—Electrician's licence allowance; and
- clause 21.13—In charge of plant allowance;

and dividing the total by 38."

[32] In the particulars within its application, MBA described an ambiguity or uncertainty in the following way:

"5.10 Clause 19.8(c) indicates that adult apprentices must be paid the greater of either:

- the 'rate prescribed for the lowest paid classification in clause 19.1' (i.e. for a CW/ECW 1 (level a) worker); or

- the 'rate prescribed by clause 19.7 for the relevant year of apprenticeship' (i.e. for a junior apprentice in a given year of progression).

5.11 It is unclear whether the first comparative rate indicated in clause 19.8(c) (i.e. for a CW/ECW 1 (level a) worker under clause 19.1) also includes the allowances listed at clause 19.3. Clause 19.3 provides hourly rate calculations for daily and weekly hire employees and incorporates various allowances, such as the special, industry and tool allowances. While it is clear that such allowances are payable to junior apprentices (clause 19.7(e)) whether they must to be paid to adult apprentices under clause 19.8(c) is less certain.

5.12 The ambiguity principally arises because of the uncertain phrasing of clause 19.8(c), which refers only to clause 19.1 rates, rather than clause 19.3 rates. Master Builders submits that the intention of clause 19.8(c) was to exclude allowances arising under clause 19.3. This is evident from the fact that clause 19.8(c) does not refer to clause 19.3 rates and because rates calculated under clause 19.3 (for daily and weekly hire employees) would always be higher than those calculated under clause 19.7 (for junior apprentices). This means that the comparative exercise under clause 19.8(c) would have no work to do. It is also uncertain whether, if allowances are payable, they would be those due to a CW/ECW 1 (level a) worker or to a CW/ECW 3 tradesperson (in other words whether the tool allowance would be payable). "

[33] MBA submitted that clause 19.8(c) should be amended to clearly exclude the payment of allowances to adult apprentices.

[34] MBA submitted that its application had been brought in advance of the 2012 modern award review to be undertaken by Fair Work Australia principally due to the large contingent liability being generated by uncertainty over adult apprentice wages. It submitted that it application has primarily been brought under s.160 of the Act but also in the alternative under s.157. Section 160 provides Fair Work Australia with the discretion to "make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error". It submitted that its calculation of adult apprentice wages is supported by the minimum wages objective.

Is there an uncertainty or ambiguity?

[35] MBA submitted that uncertainty was evident in:

- a different interpretation, and advice to members, by it to that advanced by the CFMEU and other unions;
- the omission of adult apprentice rates from the Base Rate Calculator wage tool of the Fair Work Ombudsman (FWO) in relation to the Building and Construction Award;
- evidence of Mr David Callan, Chairman of the Board of Directors of the Master Builders Group Training Scheme (MBGTS), an employer of 192 group training apprentices in South Australia, as to uncertainty by MBGTS as to the rates payable to adult apprentices; and
- if the tool, industry and special allowances under clause 19.3 are added to base rates under clause 19.1(a), then they will always be higher than the rates indicated at clause 19.7, leaving the comparative formula at clause 19.8(c) with no work to do.

[36] The HIA focused on the proposition that increases in the minimum wage for adult apprentices under the CFMEU interpretation were significant, arguing that such an outcome suggested that an alternate interpretation was intended, given the inclusion in the modern awards objective of a requirement to have regard to employment costs[5] and employment growth.[6] It also pointed to the omission of adult apprentice rates from the Base Rate Calculator wage tool of the Fair Work Ombudsman in respect of the award.

[37] The CFMEU submitted that the reference in clause 19.8(c) to clause 19.1 is clear - it refers to clause 19.1 as a whole. To calculate an adult apprentice's rate of pay it is necessary first to determine the rate in accordance with clause 19.1. To do this, the procedure identified in clause 19.1(b) which is that set out in clause 19.3 is used. As apprentices are not daily hire then the weekly hire method of calculation in 19.3(b) is used. This requires the hourly rate to be calculated by adding the minimum wage in clause 19.1, the special allowance in clause 21.1, the industry allowance in clause 21.2 and, where applicable, the tool and employee protection allowance (clause 20.1), underground allowance (clause 21.3), air-conditioning industry and refrigeration industry allowances (clause 21.11), electrician's licence allowance (clause 21.12) and in charge of plant allowance (clause 21.13), and dividing the total by 38.

[38] The CEPU submitted that the MBA's interpretation of clause 19.8 is inconsistent with the ordinary or natural meaning of that provision in the context of the Building and Construction Award as a whole. It submitted that clause 19.8(c) refers to 19.1 not 19.1(a). Clause 19.1 includes a reference to clause 19.3, which refers to the payment of allowances. Clauses 15.2(a) and 15.7 provide that the terms of the Building and Construction Award apply unless otherwise "stated" or "specifically provided". The CEPU submitted this would include the payment of allowances in clauses such as 21.1 and 22.2. It submitted that if the intention of the Award Modernisation Full Bench was that adult apprentices should not be paid allowances, given the wording of clause 15.2(a) and clause 15.7, that intention surely would have been clearly stated.

[39] The approach to determining whether an agreement or award contains an uncertainty or ambiguity was usefully summarised by Senior Deputy President Marsh in *Re Beltana No.1 Salaried Staff Certified Agreement 2001*[7] as follows:

> "• the correct approach to identifying an ambiguity or uncertainty requires the making of an objective judgment as to whether, on the proper construction of the relevant provision of an agreement, the wording of that provision is susceptible to more than one meaning (PR917548 at para.49, PR903843 at para.7, Print M2454 at p.3);
>
> • the words used in the provision are construed in their context including where appropriate the relevant parts of the parent award with which a complementary provision is to be read (Print Q2603 at para.30 per Munro J);
>
> • s.170MD(6)(a) is not confined to the identification of which words of a clause give rise to an ambiguity or uncertainty. A combination of clauses may have that effect (Print R2431 at para.12);
>
> • the Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention (Print M2454 at p.4, Print R2431 at para.14);
>
> • the Commission's task is to make an objective judgment as to whether the wording of a provision is susceptible to more than one meaning. It must avoid contentions that are 'self serving' (PR924146 at para.20 and PR903843 at para. 7)."

[40] There are rival contentions advanced by the unions and the employer associations as to the meaning and effect of clause 19.8. Putting aside the interpretation that clause 19.8 is limited in its scope to an adult apprentice who was employed by an employer in the metal and engineering on-site construction industry, which I have dealt with above, the competing interpretations are that the comparison, to determine the higher rate, is between the rate prescribed by clause 19.7 for the relevant year of apprenticeship on one hand with, on the other hand:

- the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1(a), exclusive of the special, industry and tool allowances prescribed in clauses 21.1, 21.2 and 20.1, as argued by the MBA; or

- the rate of pay of an adult apprentice will be the rate prescribed for the lowest paid classification in clause 19.1, which by reference to clause 19.8(b) includes the special, industry and tool allowances prescribed in clauses 21.1, 21.2 and 20.1, as argued by the unions.

[41] The issue in relation to clause 19.1 arises in the context where clause 19.7 in respect of non-adult apprentices, through subclause 19.7(e), clearly provides for payment to apprentices in respect of the industry, tool and special allowances.

[42] In my view the interpretation advanced by the MBA is unsustainable when the relevant terms of the Building and Construction Award are objectively assessed. The reference in clause 19.8(c) to clause 19.1 is clear - it refers to clause 19.1 as a whole. Clause 19.1(b) makes it clear that the 19.1(a) rates are minimum classification rates only and that the payment of additional allowances is required by other clauses of the Building and Construction Award, referencing the hourly rate calculations in clause 19.3 of the Building and Construction Award. Clause 19.3(b) makes it clear that the special allowance, the industry allowance and the tool allowance, where applicable, form part of the rate of pay prescribed for the lowest paid classification.

[43] The clear reference to clause 19.1, rather than clause 19.1(a) in clause 19.8(c) is consistent with the provisions of clause 15.2(a) which provides that the terms of the Building and Construction Award apply to apprentices except where otherwise stated and the terms of clause 21 which applies the special allowance to all employees, clause 21.2 which applies the industry allowance to all employees and the terms of clause 20.1 which prescribes the tool allowance for all purposes in respect of employees incurring an expense in relation to the provision and maintenance of tools.

[44] Looked at objectively, there can be no seriously arguable suggestion that adult apprentices would be excluded from the benefit of the industry, special and tool allowances or that the comparison with the non-adult apprentice rate in clause 19.7 of the Building and Construction Award should be conducted on the basis of a comparison on one hand of the lowest classification rate, exclusive of allowances and, on the other hand, non-adult apprentice rates, inclusive of the allowances. The comparison must be consistent, comparing rates under clause 19.1 as a whole, incorporating relevant all-purpose allowances as clause 19.1(c), with rates for non-adult apprentices in clause 19.7(e). The MBA position is untenable in the context of the range of all-purpose allowances applicable in the industry, the separate prescription of the special, industry and tool allowances payable in respect of all employees in clauses 21.1, 21.2 and 20.1 and the strange outcome which MBA suggests in that adult apprentices would be the only employees under the award not entitled to the special, tool and industry allowances.

[45] MBA and the other employer associations support its contention on several grounds, none of which are persuasive.

[46] First, MBA submitted that clause 19.8(c) does not include reference to clause 19.3 because rates calculated under clause 19.3 (for daily and weekly hire employees) would always be higher than those calculated under clause 19.7 (for junior apprentices). This proposition was not universally true during the operation of the Building and Construction Award. At various times since the Building and Construction Award commenced operation, higher wage rates applied to apprentices in New South Wales[8] and in Queensland[9] than

applied to adult apprentices under the modern award. Even if the MBA proposition was correct, it cannot be assumed that it would always be true. Future Annual Wage Reviews will change the wage rates payable to CW/ECW 1 and CW/ECW 3 employees, which may affect the outcome of the comparative exercise under clause 19.8(c). Further, a general review of conditions of employees subject to training arrangements by Fair Work Australia which has been proposed[10] in the context of the broader *Apprenticeships for the 21st Century* review of apprenticeship arrangements might disturb that outcome. Such a review was clearly within the contemplation of the Award Modernisation Full Bench, when it considered the making of the Building and Construction Award.[11]

[47] Second, the MBA relied on the evidence of Mr David Callan, Chairman of the MBGTS, as to uncertainty as to the rates payable to adult apprentices. Mr Callan's evidence was that it is not clear whether allowances are meant to be included in the CW/ECW 1 (level a) wage to be compared against the junior apprentice rate and that MBGTS has taken the view that the reference in clause 19.8(c) is to the CW/ECW 1 (level a) rate without any allowance being loaded into the rate. Whilst I accept that Mr Callan is uncertain as to the interpretation of clause 19.8(c) and has received conflicting advice, that uncertainty is not supported by an objective reading of clause 19.8 in the context of the award as a whole, for the reasons given above.

[48] Third, the MBA relied on the omission of adult apprentice rates from the Base Rate Calculator wage tool of the FWO in relation to the Building and Construction Award. That omission is explained by the FWO in Attachment C to the MBA 26 October 2011 Submission in support of the application to vary the *Building and Construction General On-Site Award 2010* in these terms:

> "FWO has decided it will remove these adult apprentice rates from the Base Rate Calculator (for the Building Trades (Construction) Award 1987 [AN160034]) as clause 19.8 of Building and Construction General On-site Award 2010 [MA000020] has not been considered."

[49] That explanation provides no support for the proposition that clause 19.8 of the Building and Construction Award is uncertain.

[50] Fourth, the MBA and HIA submitted that increases in the minimum wage for adult apprentices under the Building and Construction Award are significant under the CFMEU interpretation, arguing that such an outcome suggested that an alternate interpretation was intended, having regard to the consideration of employment costs in the modern awards objective. This consideration does not establish uncertainty in clause 19.8. As the Award Modernisation Full Bench observed,[12] the various considerations within the modern awards objective were potentially conflicting and some cost increases (and reductions) would arise, requiring transitional provisions. In that context, the Full Bench included employees to whom training arrangements apply within the matters within the model provisions relating to phasing.[13] In that context, the proposition that a modern award provision resulting in increased costs to some employers could not have been intended is not sustainable.

[51] In my view, the alternate interpretation of clause 19.8 suggested by the MBA is not arguable having regard to the terms of clause 19.8 and the broader context of the Building and Construction Award in which all-purpose allowances are payable as part of the rate of pay and the specific award prescriptions for the allowances which apply them generally to employees under the Building and Construction Award.

[52] I am not satisfied that the interpretation of clause 19.8 advanced by the MBA, objectively assessed, is arguable and that the wording of that provision is susceptible to more than one meaning. I am not satisfied as to the existence of an ambiguity or uncertainty in respect to clause 19.8. There is no jurisdiction to vary the clause under s.160 of the Act.

Work Value?

[53] The MBA and the HIA submitted that if I was not satisfied that there was an uncertainty or ambiguity in respect of clause 19.8, the clause should be varied to give effect to the variation proposed by the MBA on work value grounds under s.157(2) of the Act. Section 157(2) permits Fair Work Australia to make a determination varying modern award minimum wages if it is satisfied that:

> "(a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective."

[54] Section 156(4) defines work value reasons as:

> "reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
>
> (b) the level of skill or responsibility involved in doing the work;
>
> (c) the conditions under which the work is done."

[55] It is difficult to conceive that work value reasons could support the MBA proposition that adult apprentices are not entitled to the benefit of allowances, applicable to all other employees under the Building and Construction Award, payable in respect of the particular conditions under which the work is done or to reimburse tool costs.

[56] More fundamentally, however, no substantive case has been put to support the variation on work values grounds. The MBA work value cases rested on the broadly stated propositions that adult apprentices are often less productive in their early years, due to the fact that they require training, cannot be used as general hands and work fewer hours (attending off-the job training) and they do not approach full productivity until their later years.[14] The HIA advanced its work value submission on the proposition that "It is commonly understood that apprentices have a considerably lower work value than other adult employees (including labourers) due to their lower levels of skill and productivity".[15] No substantive argument or

evidence was brought to support the broadly stated propositions as to work value. Further, given the MBA proposition as to work value is that adult apprentices are often less productive in their early years and do not approach full productivity until their later years, the variation proposed, under which all adult apprentices - first year to fourth year - would be entitled to the same hourly rate of $16.30, is not consistent with its proposed variation.

[57] These broad propositions fall markedly short of meeting the tests in *Re Public Hospitals Nurses (State) Award (No 4),*[16] described in the MBA submissions as the leading case on work value principles:

> "The work value principle allows for award wages to be increased if it can be demonstrated that there have been changes in the nature of the work, skill and responsibility required or the conditions under which work is performed to such an extent that the changes constitute a significant net addition to work requirements so as to warrant the creation of a new classification or upgrading to a higher classification. The principle refers to this test as a 'strict test'".

[58] It is not clear that the work value principles of the past apply automatically to work value in the context of s.157(2) of the Act. This issue was not addressed before me.

[59] However, it is clear that the limited basis put to me in support of the MBA variation based on work value grounds provides no sound basis for reassessing the adult apprentice rates, on work value grounds, outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards.

[60] On the extremely limited material before me, I am not satisfied that the MBA proposed variation of adult apprentice rates is justified by work value reasons or that making such a variation outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

[61] The application to vary clause 19.8 on work value grounds is refused.

Conclusion in respect of Variation 4

[62] The application is refused.

Conclusion

[63] Clause 15.3(a) of the Building and Construction Award will be varied to read:

> **"(a)** When overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by the award will apply, based on the wage rates indicated in clauses 19.7 and 19.8. No apprentice/trainee will work overtime or shiftwork on their own or without supervision."

[64] Clause 15.5(a) of the Building and Construction Award will be varied to read:

> "**(a)** Apprentices are required to serve an additional day for each day of absence during each year of their apprenticeship, except in respect of absences due to either paid leave or leave without pay (taken in accordance with clause 38.3(a)). The following year of their apprenticeship does not commence until the additional days have been worked."

[65] Each variation will come into force on the first full pay period commencing on or after 4 January 2012.

SENIOR DEPUTY PRESIDENT

Appearances:

R Calver for Master Builders Australia.

A Matheson for the Housing Industry Association.

A Patison for Australian Business Industrial.

S Maxwell for the Construction, Forestry, Mining and Energy Union.

A Kentish for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.

G Noble for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

D Broanda for The Australian Workers' Union.

Hearing details:

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Final written submissions:

HIA, 9 December 2011.

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[1] MA000020.

[2] Transcript, at paras 186-8.

[3] Transcript, at paras 387-8.

[4] Transcript, at para 389.

[5] *Fair Work Act*, s.134(1)(f).

[6] *Fair Work Act*, s.134(1)(h).

[7] PR932468, at para 23.

[8] Exhibit CFMEU 1: Extract from the *Building and Construction Industry (State) Award* [AN120089 - NSW].

[9] Exhibit CFMEU 3 : copy of the Pay Scale Summary derived from the *Building and Construction Industry Award - State 2003* [AN140043 - Qld].

[10] Australian Apprenticeships Reform, Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, 6 December 2011.

[11] [2008] AIRCFB 1000, at para 134.

[12] [2009] AIRCFB 800, at paras 1-5.

[13] [2009] AIRCFB 800, at para 24.

[14] MBA submission of 26 October 2011, at para 9.29.

[15] HIA submission of 9 November 2011, at para 64.

[16] (2003) 131 IR 17