

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009*

**Title of Matter:** Variation of awards on the initiative of the Commission: Electrical, Electronic and Communications Contracting Award 2010

**Section:** 157 – Variation of a modern award to achieve the modern award objective

**Matter Number:** AM2020/12

**Member**

### NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION SUBMISSIONS IN RESPONSE.

#### Introduction

1. In a statement issued on 1 April 2020<sup>1</sup> (the April 1 Statement) a Full Bench of the Commission, referred to a proposed schedule of limited duration to be inserted in 105 awards listed at [108]. The Electrical, *Electronic and Communications Contracting Award 2010* (the Electrical Award) was included in that list of awards.
2. At [119] of the April 1 Statement, the Full Bench noted at [119]:  
*“[119] There are 2 versions of Schedule X. The first version will:*
  1. *provide all employees (including full-time, part-time and casual employees) with a new entitlement of up to 2 weeks’ unpaid pandemic leave; and*
  2. *provide for employees by agreement with their employer to take twice the amount of their accrued annual leave at half pay.”*
3. The Full Bench then went on to state at [125]  
*[125] Any submission supporting or opposing the provisional views set out above must be lodged by 4pm on Monday 6 April 2020.*
4. NECA took the view that as it did not oppose them, it was not necessary to make a submission unless it was by way of reply to a submission made in opposition to the provisional views.
5. On 6 April 2020, the CEPU filed written submissions opposing the inclusion of the Electrical Awards in the awards to be varied as anticipated by the April 1 Statement (The CEPU Submissions)
6. The CEPU Submissions were not served on NECA.
7. On 8 April 2020, the Commission issued a Decision<sup>2</sup> (the 8 April Decision) varying 99 Awards to include the Schedule anticipated at [119] of the April 1 Statement.

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<sup>1</sup> See [2020]FWCFB 1760

<sup>2</sup> [2020] FWCFB 1837

8. The April 8 Decision did not include the Electrical Award and a number of construction industry awards among the 99 to be so varied.
9. NECA accepts that this submission in response to the CEPU Submissions is lodged after the date specified by the Full Bench at [125] of the April 1 Statement
10. Nevertheless, NECA requests that this Submission in Response be placed on the Commission's file in matter AM2020/12 as an answer to the CEPU submissions.
11. NECA apologises to the Commission for any inconvenience caused by the late lodgment of this Submission.

### **The CEPU Submission**

12. Paragraph 6 of the CEPU Submission after listing the 'essential services' supported by the Electrical Award concludes by submitting "*Currently, there is insufficient evidence to demonstrate that COVID-19 is having and adverse impact on the industries covered by Contracting [Electrical] Award.*"
13. *Paragraph [25] of the April 1 Statement includes a table titled Chart 2: Businesses adversely impacted by Coronavirus (COVID-19), current and expected, by industry, March 2020 sourced from the ABS<sup>3</sup>*
14. The table clearly shows that the Construction and Manufacturing industries are currently significantly affected and, importantly, are expected to be significantly more affected in the future.
15. Although it may be true that 'electrical contractors are significantly engaged in the construction industry' (although paragraph 10 of the CEPU Submission does not quantify the extent of that engagement), paragraph 6 of the CEPU Submission identifies a number of other 'essential services' in which the Electrical Award is the industrial instrument covering employees employed in those services.
16. Clause 4, Coverage of the Electrical Award states:  
*"This industry award covers employers throughout Australia in the industry of electrical services provided by electrical, electronics and communications contractors and their employees in the classifications within Schedule B – Classification Definitions to the exclusion of any other modern award."*
17. The Commission's 'Information Note – Modern Awards and Industries'<sup>4</sup>, includes the Electrical Award in the Manufacturing, Construction and Other Services industries. For example it is not uncommon for a manufacturing business to contract out its maintenance program to an electrical contractor.

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<sup>3</sup> ABS, Business Indicators, Business Impacts of COVID-19, March 2020, Catalogue No. 5676.0.55.003

<sup>4</sup> Fair Work Commission Information Note – Modern Awards and Industries

18. The CEPU's assertion made at paragraph 10 that "*The electrical contracting industry has not yet experienced a significant downturn in work and thus it ought to be categorised similarly to the construction awards at [109] of the Statement*, cannot be supported. Indeed the CEPU offers no evidence to support its assertion other than a reference to paragraph [25] of the April 1 Statement.
19. At paragraph 13 the CEPU maintains that "*The Electrical Contracting Industry is not an award reliant industry* and refers to Paragraph [89] of the April 1 Statement (which includes Chart 4 sourced from the Commission's Information Note – Modern Awards and Industries) to support this assertion.
20. It is submitted that 'Chart 4' does not assist the CEPU.
21. The Construction industry is more award reliant than several other industries identified on the table that are covered by awards listed in Attachment A of the April 8 Decision<sup>5</sup>
22. Page 6 of the 'Modern Awards and Industries Document'<sup>6</sup> shows that 96.4% of businesses in the construction industry and 85.4% of businesses in the manufacturing industry are small businesses. It follows then that a significant number of electrical contracting businesses are small businesses (1-19 employees)<sup>7</sup>.
23. A significant number of NECA's small business members are covered by the Award.
24. At paragraph 14 of the CEPU Submission, the union asserts that "*A significant number of electrical apprentices are employed pursuant to, or at least by reference to the Electrical Award*" without offering any evidence to support that assertion.
25. In any event it does not follow that the apprentice will be disadvantaged if he or she elects to take unpaid pandemic leave in the circumstances permitted by the Schedule as an alternative to being stood down.
26. Similarly, an apprentice electing to take unpaid pandemic leave will be in no worse position than if he or she was stood down.
27. The CEPU's assertion that the consent of apprentices '*will not be genuinely reached*' is not supported and should be disregarded.

### **Further Submissions**

28. NECA has provided the CEPU with a draft '*Schedule J – Award flexibility during the COVID-19 Pandemic.*' to operate for a limited period.
29. The CEPU has agreed to consult with NECA about the Schedule on 15 May.

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<sup>5</sup> See for example: Educational Services (Schools) General Staff Award 2010, Educational Services (Teachers) Award 2010, Local Government Industry Award 2010, Passenger Vehicle Transport Award 2010, Professional Employees Award 2010, Storage Services and Wholesale Award 2010, Telecommunications Services Award 2010, Water Industry Award 2020.

<sup>6</sup> Fair Work Commission Information Note – Modern Awards and Industries.

<sup>7</sup> Ibid page 3

30. Hopefully the parties will come to some agreement about the contents of such a Schedule.
31. NECA will make an application to the Commission under s.157 of the Act.
32. NECA believes that the attachment of a temporary schedule to the Award is necessary to allow employers to continue to operate (even if in only limited circumstances) and retain employees in employment.
33. As an interim measure, and for the reasons set out above, there should be no obstacle to the Commission attaching a Schedule to the Electrical Award dealing with Pandemic Leave and the Taking of Annual Leave at half pay that is in the same terms as those schedules attached to the 99 Awards listed in the April 8 Decision.
34. As noted above, both the Construction Industry and the Manufacturing Industry<sup>8</sup> are adversely affected by the COVID-19 pandemic currently and will be more adversely affected in the future.
35. A number of building projects have been deferred, or cancelled which adversely affects the availability of work for electrical contractors.
36. Even if new contracts are awarded, building projects (large and small) generally have long lead times. Work may not commence on a project for several months after the contract is signed. This is particularly true of electrical work which is commonly regarded as a 'finishing trade' in the industry.
37. Work may also not be completed within time exposing the contractor to liquidated damages.
38. Many contracts were entered into before the effects of the COVID-19 pandemic were known and limitations enforcing social distancing and travel restrictions were introduced.
39. Another issue is the supply of goods and materials, many of which are imported. Disrupted supply chains adversely affect an electrical contractor's capacity to complete work or complete it in a timely manner.
40. Electrical Contractors are prevented from working interstate because of border closures.
41. Attachment of a suitable schedule to the Electrical Award will conform to the Modern Awards objective set out at s.134 of the Act.

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NECA

8 May 2020

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<sup>8</sup> ABS, Business Indicators, Business Impacts of COVID-19, March 2020, Catalogue No. 5676.0.55.003

