DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Construction awards
(AM2016/23)

Building, metal and civil construction industries
VICE PRESIDENT HATCHER
DEPUTY PRESIDENT HAMILTON
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER GREGORY
COMMISSIONER HARPER-GREENWELL SYDNEY, 26 SEPTEMBER 2018

4 yearly review of modern awards – Group 4 Awards – Construction awards – Building and Construction General On-site Award 2010 – Joinery and Building Trades Award 2010 – Mobile Crane Hiring Award 2010 – Plumbing and Fire Sprinklers Award 2010 – substantive matters.

1. INTRODUCTION

[1] Section 156 of the *fair Work Act 2009* (Cth) (the Act) provides that the Fair Work Commission (the Commission) must conduct a 4 yearly review of modern awards (the Review) as soon as practicable after 1 January 2014. As detailed in a statement issued on 6 February 2014,[1] the Review consists of an Initial stage, dealing with jurisdictional issues, a Common issues stage and an Award stage.

[2] The *Building and Construction General On-Site Award 2010* (Building Award), the *Joinery and Building Trades Award 2010* (Joinery Award), the *Mobile Crane Hiring Award 2010* (the Mobile Crane Award) and the *Plumbing and Fire Sprinklers Award 2010* (Plumbing Award), collectively the "Construction Awards", are in Group 4 of the Award stage.

[3] Interested parties have lodged a number of substantive claims for variations to the Construction Awards. A mention was held on 14 December 2015 to consider the programming of the substantive claims made in relation to Group 3 and Group 4 awards. In a statement issued on 24 February 2016,[2] the President, Justice Ross, noted that there were a number of claims to vary provisions of the Construction Awards. The Construction Awards were referred to Senior Deputy President Watson to convene a conference to categorise the various issues raised; to seek to resolve matters in dispute; and to identify matters that required referral to a separately constituted Full Bench.[3]

[4] Senior Deputy President Watson subsequently conducted a series of conferences with interested parties during March, April, June, July and August 2016.

---

[1] [2014] FWCFB 916

[2] [2016] FWC 1191

[3] [2016] FWC 1191 at [13]

[5] In a report issued on 5 August 2016,[4] the Senior Deputy President advised on the outcome of the conferences. The report outlined the claims with respect to the Construction Awards that remained outstanding, categorised those claims that were common across multiple awards, and proposed a process for determining the outstanding matters. A summary of proposed variations as at 5 August 2016 recording the outcomes of the conciliation process was attached to the report.[5]

[6] In a statement issued on 15 August 2016,[6] the President confirmed that a Full Bench would be constituted in respect of the Construction Awards based on the recommendations arising from the Senior Deputy President's report.[7] The President subsequently issued a memorandum on 22 August 2016[8] (the Memorandum) directing this specially constituted Full Bench to deal with the outstanding substantive Construction Awards claims as outlined in the attachment to the Memorandum.

[7] Directions in this matter were issued on 26 October 2016.[9] Parties seeking variations were directed to file comprehensive written submissions and any witness statements or documentary material by 2 December 2016. Evidence and/or submissions in reply were required to be filed by 10 March 2017. A number of parties seeking variations applied for and were granted extensions of time to file their material. Submissions and/or evidence in support of, or in opposition to, proposed variations were filed by the following parties:

- Housing Industry Association (HIA);[10]
- Australian Workers' Union (AWU);[11]
- Australian Industry Group (Ai Group);[12]
- Australian Manufacturing Workers' Union (AMWU);[13]
- Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU);[14]
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU);[15]
- Civil Contractors Federation (CCF);[16]
- Master Builders Australia (MBA);[17]
- Master Plumbers and Mechanical Contractors Association of NSW (MPMCA);[18]

---

[4] Report to the Full Bench – Construction Awards

[5] Summary of proposed variations – construction awards 5 August 2016 at attachment A to Report to the Full Bench – Construction Awards

[6] [2016] FWC 5694

[7] [2016] FWC 5694 at [3]

[8] Memorandum – construction awards

[9] AM2016/23 – Directions

[10] Submission, 2 December 2016; Submission in Reply, 16 March 2017

[11] Submission, 2 December 2016; Submission in Reply, 10 March 2017

[12] Submission, 2 December 2016; Submission in Reply, 14 March 2017

[13] Submission, 9 December 2016 , Submission in Reply, 17 March 2017; Submission in Reply, 24 March 2017

[14] Submission, 9 December 2016; Submission in Reply, 10 March 2017

[15] Submission in Reply, 10 March 2017

[16] Submission, 9 December 2016

[17] Submission, 12 December 2016; Submission, 16 December 2016; Submission in Reply 27 March 2017

- Australian Business Industrial and the NSW Business Chamber;[19]
- Master Plumbers Group (MPG);[20]
- Beston Group (Vic) P/L (Beston Group);[21] and
- Mr Thomas Walsh.[22]

[8] The matter was heard on 3-5 April and 10-12 April 2017. After the completion of the hearing, on 17 August 2017, we issued a statement[23] (August 2017 Statement) in which we expressed provisional views as to the potential resolution of a number of claims. This statement invited interested parties to file written submissions in relation to those provisional views, and additionally offered that if any party desired the opportunity to make oral submission as to those provisional views, a hearing date was reserved for that purpose on 17 November 2017.

[9] A number of written submissions were filed in response to the invitation in the statement, and there was a request for a further hearing. Accordingly we conducted a further hearing on the reserved date of 17 November 2017, at which a number of parties made oral submissions in response to the August 2017 Statement.

[10] On 6 December 2017 we issued a further statement[24] (December 2017 Statement) advancing a provisional proposal for the resolution of one particular issue. Conferences with the parties about that provisional proposal were conducted by Deputy President Gostencnik on 19 December 2017 and 25 January 2018.

[11] Before turning to the substantive claims before us, we propose to set out briefly the legislative context for the Review.

2. THE LEGISLATIVE CONTEXT

[12] Section 156(2) of the Act deals with what must be done in the Review:

> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:
>
> (i) one or more determinations varying modern awards; and

---

[18] Submission – 9 December 2016

[19] Submission in Reply, 20 March 2017

[20] Submission, 20 December 2016

[21] Submission, 2 February 2017

[22] Submission, 17 March 2017

[23] [2017] FWCFB 4239

[24] [2017] FWCFB 6487

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards.

(c) must not review, or make a determination to vary, a default fund term of a modern award.

[13] Section 156(5) of the Act provides that in a Review each modern award must be reviewed in its own right. This does not however prevent the Commission from reviewing two or more modern awards at the same time.

[14] In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made.[25] Variations to modern awards should be founded on merit based arguments that address the relevant legislative provisions, accompanied by probative evidence directed to what are said to be the facts in support of a particular claim. The extent of the argument and material required will depend on the circumstances.

[15] The modern awards objective set out in s.134 applies to the performance or exercise of the Commission's modern award powers, which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is contained in Part 2-3 of the Act and so will involve the performance or exercise of the Commission's 'modern award powers'. The modern awards objective therefore applies to the Review.

[16] The modern awards objective is set out in s.134(1). It states:

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

[25] *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24]

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

[17] The modern awards objective is very broadly expressed,[26] and is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide "*a fair and relevant minimum safety net of terms and conditions*", taking into account the matters in ss.134(1)(a)–(h) of the Act.[27] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[28] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[29] No particular primacy is attached to any of the s.134 considerations, and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award. [30] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[31] The s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[32] In giving effect to the modern awards objective the Commission is

[26] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[27] [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[28] [2018] FWCFB 3500 at [21]-[24]

[29] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[30] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[31] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[32] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. What is necessary is for the Commission to review a particular modern award and, by reference to the s.134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.[33] In that task the matters which may be taken into account are not confined to the s.134 considerations.[34]

[18] Section 138 of the Act is also relevant. It emphasises the importance of the modern awards objective, in these terms:

> **138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[19] Section 138 provides that terms may only be included in a modern award to the extent necessary to achieve the modern awards objective. That which is "*necessary*" to achieve the modern awards objective is a value judgment to be made taking into account the s.134 considerations, to the extent that they are relevant, having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[35] Where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.[36]

[20] Section 136 sets out the terms that may or must be included in a modern award.

[21] We will now deal with each of the substantive claims before us, divided into their broad subject matter, in turn.

3. INDUSTRY-SPECIFIC REDUNDANCY SCHEME

Current provisions

[22] The Building Award, the Plumbing Award and the Joinery Award contain provisions for industry-specific redundancy schemes.

[23] The current industry-specific redundancy scheme in the Building Award is contained in clause 17, which provides:

---

[33] Ibid at [28]-[29]

[34] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [48]

[35] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[36] Ibid at [46]

17. Industry-specific redundancy scheme

17.1 The following redundancy clause for the on-site building, engineering and civil construction industry (as defined) is an industry-specific redundancy scheme as defined in s.12 of the Act. In accordance with s.123(4)(b) of the Act the provisions of Subdivision B—Redundancy pay of Division 11 of the NES do not apply to employers and employees covered by this award.

17.2Definition

For the purposes of this clause, redundancy means a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty. Redundant has a corresponding meaning.

17.3Redundancy pay

(a) A redundant employee will receive redundancy/severance payments, calculated as follows, in respect of all continuous service with the employer:

Period of continuous service with an employer	Redundancy/severance pay
1 year or more but less than 2 years	2.4 weeks' pay plus for all service in excess of 1 year, 1.75 hours pay per completed week of service up to a maximum of 4.8 weeks' pay
2 years or more but less than 3 years	4.8 weeks' pay plus, for all service in excess of 2 years, 1.6 hours pay per completed week of service up to a maximum of 7 weeks' pay
3 years or more than but less than 4 years	7 weeks' pay plus, for all service in excess of 3 years, .73 hours pay per completed week of service up to a maximum of 8 weeks' pay
4 years or more	8 weeks' pay

(b) Provided that an employee employed for less than 12 months will be entitled to a redundancy/severance payment of 1.75 hours per week of service if, and only if, redundancy is occasioned otherwise than by the employee.

(c) Week's pay means the ordinary time hourly rate at the time of termination multiplied by 38. Hour's pay means the ordinary time hourly rate at the time of termination.

(d) If an employee dies with a period of eligible service which would have entitled that employee to redundancy pay, such redundancy pay entitlement will be paid to the estate of the employee.

(e) Any period of service as a casual will not entitle an employee to accrue service in accordance with this clause for that period.

(f) Service as an apprentice will entitle an employee to accumulate credits towards the payment of a redundancy benefit in accordance with this clause if the employee completes an apprenticeship and remains in employment with that employer for a further 12 months.

17.4Redundancy pay schemes

(a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.

(b) Provided that where the employment of an employee is terminated and:

(i) the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this clause and the amount of the redundancy pay scheme benefit the employee receives which is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 17.3 then the employee will receive no redundancy payment under clause 17.3; or

(ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 17.3, and payments to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both

(c) The redundancy pay scheme must be an Approved Worker Entitlement Fund under the Fringe Benefits Tax Regulations 1992 (Cth).

17.5 Service as an employee for the Crown in the Right of the State of Western Australia, the Crown in the Right of the State of New South Wales, Victorian Statutory Authorities, or the Crown in the Right of the State of Victoria will not be counted as service for the purpose of this clause.

17.6 Employee leaving during notice period

An employee whose employment is to be terminated in accordance with this clause may terminate their employment during the period of notice and if this occurs, the employee will be entitled to the provisions of this clause as if the employee remains with the employer until expiry of such notice. Provided that in such circumstances, the employee will not be entitled to payment instead of notice.

17.7 Transfer of business

(a) Where a business is, before or after the date of this award, transferred from an employer (in this subclause called the old employer) to another employer (in this subclause called the new employer) and an employee who at the time of such transfer was an employee of the old employer in that business becomes an employee of the new employer:

(i) the continuity of the employment of the employee will be deemed not to have been broken by reason of such transfer, and

(ii) the period of employment which the employee has had with the old employer or any prior old employer will be deemed to be service of the employee with the new employer,

for the purpose of redundancy pay entitlements under this clause.

(b) In this subclause, business includes trade, process, business or occupation and includes part of any such business and transfer includes transfer, conveyance, assignment or succession whether by agreement or by operation of law. Transferred has a corresponding meaning.

[24] The above provision contains three critical features which were at the heart of the contested claims in these proceedings:

(1) The definition of redundancy in clause 17.2 applies to a termination of employment, even where initiated by the employee. However, it does not include a termination of employment for reasons of misconduct or refusal of duty. It is not limited, as is the NES redundancy entitlement in s 119, to a situation where the employee's employment is terminated at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone (except where this is due to the ordinary and customary turnover of labour) or because of the employer's bankruptcy or insolvency.

(2) The scale of redundancy payments in clause 17.3(a) is, at a number of service points, less than that provided for in the NES scale in s.119.

(3) There is no exemption from the obligation to pay redundancy pay for small business employers (employers employing fewer than 15 employees), unlike the NES provision in s.121(1)(b).

[25] It should be noted at this point that s.123(4)(b) provides that the NES redundancy provisions do not apply to an employee to whom an industry-specific redundancy scheme in a modern award applies.

[26] Clause 18 of the Plumbing Award also contains an industry-specific redundancy scheme which is substantially the same as that in the Building Award and in particular has the same three features as identified above. Clause 12 of the Mobile Crane Award contains a very different industry-specific redundancy scheme which, in clause 12.2, defines retrenchment as meaning the termination of an employee who is made redundant in identified circumstances. Clause 12.4(a) of the Mobile Crane Award provides for retrenchment payments which are less generous than the NES scale at one year's service but significantly more generous for longer periods of service. It contains no exemption for small business employers. Finally, clause 17.1 of the Joinery Award simply provides that "*redundancy pay is provided for in the NES*", but clause 17.3 also provides for redundancy entitlements for employees of "*small employers*" as follows:

17.2 Small employer

(a) For the purposes of clause 17.2(b), **small employer** means an employer to whom Subdivision B of Division 11 of the NES does not apply because of the provisions of s.121(1)(b) of the Act.

(b) Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions A, B and C of Division 11 of the NES apply in relation to an employee of a small employer covered by this award except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:

Employee's period of continuous service with the employer on termination	**Redundancy pay period**
Less than 1 year	Nil
At least 1 year but less than 2 years	4 weeks pay
At least 2 years but less than 3 years	6 weeks pay
At least 3 years but less than 4 years	7 weeks pay
At least 4 years and over	8 weeks pay

The claims

[27] The HIA's primary claim was that clause 17 of the Building Award should be removed in its entirety, so that the NES redundancy provisions would be applicable. Its alternative position was that the provision should be varied to replace the definition of redundancy in clause 17.2 and to add an exemption for small employers and an incapacity to pay provision. It proposed two versions of a replacement clause 17.2. The first was:

> "For the purpose of this clause, redundancy means:
>
> - a situation where employment ceases at the initiative of an employer other than for reasons of misconduct or refusal of duty, or
>
> - where employment ceases because of the insolvency or bankruptcy of the employer.
>
> Redundant has a corresponding meaning."

[28] The second version was:

> "Clause 17 does not apply where the employment ends at the initiative of the employee."

[29] The HIA's proposed small employer exemption was:

> "For the purposes of this clause small employer means an employer to whom the NES does not apply because of the provisions of s.121(1)(b) of the Act."

[30] The HIA's proposed incapacity to pay provision was:

> "**(a)** If an employee is entitled to be paid an amount of redundancy pay by the employer because of clause 17; and
>
> **(b)** the employer:
>
> **(i)** obtains other acceptable employment for the employee; or
>
> **(ii)** cannot pay the amount.
>
> **(c)** On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
>
> **(d)** The amount of redundancy pay to which the employee is entitled under clause 17 is the reduced amount specified in the determination."

[31] The MBA advanced a claim that clause 17 of the Building Award should be varied in a number of respects. Firstly it proposed that the definition of "*redundancy*" in clause 17.2 should be removed and replaced with the following:

"**17.2 Definition**

For the purpose of this clause, redundancy means a situation where an employee is dismissed, other than for reasons of misconduct or refusal of duty:

(a) At the initiative of the employer because they no longer require the work performed by the employee to be done by anyone;

(b) At the initiative of the employer because operational or similar circumstances at the project or site on which the employee is working are such that the employer no longer requires the employee to perform work and there is not an agreement between the employer and the employee for future employment on an alternative or site or project; or

(c) The employer ceases to exist and/or no longer requires the engagement of employees.

Redundant has a corresponding meaning."

[32] Secondly, it proposed that the severance pay scale in clause 17.3 be removed and replaced with the following:

"**17.3 Redundancy Pay**

17.3(a) A redundant employee will receive redundancy/severance payments, calculated as follows, in respect of all continuous service with the employer:

Period of continuous service with an employer	**Redundancy/severance pay**
Less than 2 years	Nil
2 years or more but less than 3 years	4.8 weeks' pay plus, for all service in excess of 2 years, 1.6 hours pay per completed week of service up to a maximum of 7 weeks' pay
3 years or more than but less than 4 years	7 weeks' pay plus, for all service in excess of 3 years, .73 hours pay per completed week of

	service up to a maximum of 8 weeks' pay
4 years or more	8 weeks' pay

17.3(b) Week's pay means the ordinary time hourly rate at the time of termination multiplied by 38. Hour's pay means the ordinary time hourly rate at the time of termination.

17.3(c) Redundancy/severance entitlements under clause 17.3 do not apply if, immediately before the time of the termination due to redundancy, or at the time when the person was given notice of the termination due to redundancy:

(a) the employee's period of continuous service with the employer is less than 24 months; or

(b) the employer employs fewer than 5 employees."

[33] The CCF's primary proposal was that clause 17.2 of the Building Award be replaced with the following definition:

"**17.2** For the purposes of this clause, redundancy means a situation where an employee ceases to be employee by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty or if the employee terminates the employment relationship of his/her own accord. Redundant has a corresponding meaning."

[34] Alternatively, the CCF proposed either the provision be varied to provide that an employee would only receive redundancy pay if the redundancy was occasioned other than by the employee, or that clause 17 be removed entirely and replaced with a provision that simply referred to the NES.

[35] The MPG sought the variation of the industry-specific redundancy provisions of the Plumbing Award by either the removal of clause 18, limiting its application, or altering the definition of redundancy to ensure that employees who resign are not entitled to the payment of redundancy pay. Its preferred outcome was a variation to limit the application of clause 18 of the Plumbing Award to plumbing and mechanical services employees employed on a daily hire basis, a sprinkler fitter and/or a sprinkler fitter's assistant, leaving plumbing and mechanical services employees employed on a weekly hire basis reliant on the NES redundancy provisions.

Evidence

HIA witnesses

[36] The HIA called evidence from two witnesses in support of its claim. Rick Sassin, who held the position of HIA Executive Director - Tasmania, gave evidence in his witness

statement[37] that most businesses operating in the residential construction sector were small businesses. He said that in his time at the HIA, he had spoken with at least half a dozen members about the industry-specific redundancy scheme and provided them with information and advice about their obligations. He said members were often shocked and surprised that the redundancy payment obligations applied even if an employee resigned, and felt that this was unfair and very onerous. Mr Sassin said that he had discussed with members the option of making payments into a redundancy fund, and it seemed difficult to them to contemplate further regular payments on top of the 9.5% superannuation contribution and 2% into TasBuild for long service leave.

[37] Huan Do, the HIA Workplace Advisor for the South Australian and Northern Territory region, said in his witness statement[38] said that the HIA had about 3000 members in the region, and he spoke to about 80 members per week and also engaged with members at member events. He said he took about 5-10 calls from members per month about the industry-specific redundancy scheme, mostly from small businesses. Some operated in the residential construction industry and some in the commercial sector, and they often had long term employees. He reported that members were shocked and surprised that they were required to pay redundancy pay to an employee who was resigning, and often advised that they simply could not afford the payment. He said that members felt that it was "double dipping" for employees who had left for another job to have a redundancy pay entitlement, and the overwhelming feedback was that members would not take on employees because of the obligations imposed by the industry-specific redundancy scheme.

MBA witnesses

[38] The MBA called evidence from Peter Glover, the Director of Construction for the Master Builders Association of NSW. In his witness statement[39] he said that he strongly supported the MBA's application to vary the Building Award and the Joinery Award to establish an exemption for businesses with 5 employees or less from paying redundancy pay for their employees. He said that in his experience employers with very small numbers of employees were often faced with less regular work and needed more flexibility in managing their staffing arrangements. Currently all employers had to make redundancy contributions for their employees through monthly payments into an industry redundancy scheme or set aside redundancy payments for any employee who had resigned from employment after 12 months. Mr Glover opined that small businesses had reduced cash flow compared to larger ones, and having to make regular redundancy contributions could deter them from employing more staff. He said there was no reason why the FW Act exemption for employers with 15 or less employees should not apply to very small businesses in the building and construction sector. Mr Glover was not cross-examined in relation to the redundancy issue.

CCF evidence

[39] David Castledine, the Chief Executive Officer of the NSW Branch of the CCF, gave evidence by affidavit concerning the CCF's proposal to vary the definition of redundancy in

[37] Exhibit 26, Statement of Rick Sassin dated 30 November 2016.

[38] Exhibit 27, Witness Statement of Huan Do dated 29 November 2016.

[39] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

the Building Award.[40] Mr Castledine described his engagement with members on the CCF on the issue of redundancy, and such members had repeatedly expressed the view that the current redundancy provisions were not equitable insofar as they required redundancy payments to employees who resigned of their own volition, constituted an unreasonable financial burden on employers and the industry, cause considerable negative employee management issues, and dissuaded the employment of full-time staff in favour of labour hire and casual staff. He said that his CCF equivalents in other states had advised of similar feedback from members. He referred to a survey of NSW members in the civil construction and maintenance industry which he had managed that supported the view that the redundancy provisions of the Building Award were unreasonable, not achieving any of the modern award objectives and should be changed, and said the survey of all CCF branches confirmed that this view was widely held across Australia. He opined that the redundancy provisions were not equitable, permitted a person who had resigned to receive redundancy pay, increased the cost of infrastructure and discouraged full-time employment and investment in the workforce. The CCF's proposed variation would help address the issues raised and would help make the infrastructure industry much more efficient and thus deliver value for money for much needed public and private infrastructure in Australia. Mr Castledine was not required to attend for cross-examination.

[40] David O'Connor, the Executive General Manager of Diona Pty Ltd (Diona), a design and construction service provider for medium-to-large utility infrastructure projects, also gave evidence by affidavit.[41] He said that civil construction workers employed by Diona were covered by an enterprise agreement underpinned by the Building Award, and that the redundancy obligations in the Building Award imposed an unreasonable financial burden on business. The provisions did not enable Diona to minimise its redundancy obligations despite its policy of ensuring employer-initiated redundancies were minimised by proactively retaining its crews during periods of downturn. The provisions did not encourage a stable workforce, discouraged investment in workplace skills, discouraged engagement of permanent employees, provided no incentive to commit to long term employment, and was contributing to the current skills shortage in the industry. It was also particularly unfair on small businesses which Diona utilised as subcontractors. The CCF's proposed amendment would ensure protection for workers when they were made redundant, cause employers in the industry to engage permanent employees in preference to casuals, remove the financial incentive for employees to move from one employer to another after only one year's service, and result in a more stable workforce and encourage businesses to train and develop their workforces. Mr O'Connor was not required to attend for cross-examination.

[41] John Hovey, the Managing Director of the Hovey Group of Companies, gave evidence[42] that his business had recently lost a Certificate IV trained employee, who had been on a 457 visa and was now a permanent resident, to a Local Government body. The employee had left of his own accord, and the requirement to pay a redundancy package to the employee placed an unreasonable financial burden on the business. Mr Hovey referred to 2015 HILDA data which showed that average job tenure was 3.3 years, making an average of 14-15 employers from age 18 to retirement, and said that flexibility was fast becoming more

[40] Exhibit 24, Affidavit of David Castledine affirmed 7 December 2016.

[41] Exhibit 19, Affidavit of David O'Connor affirmed 6 December 2016.

[42] Exhibit 21, Affidavit of John Hovey affirmed 7 December 2016.

important than stability and loyalty. Mr Hovey went so far as to say: "*Industry is being milked by the employee to better themselves at the expense of the employer. It could be viewed as being unethical and immoral*". Mr Hovey was not required for cross-examination.

[42] Peter Middleton, the former Managing Director and the current Director of Woden Contractors, gave evidence concerning problems with the definition of redundancy in the Building Award.[43] Mr Middleton noted that the current definition of redundancy is "*perverse*"; operates as a disincentive to companies to invest significant time and money to training young industry entrants; and undermines the aim of encouraging long-term employment.

[43] Mr Middleton contended that the employers who strive to act responsibly in terms of offering employees stable work are hampered by employees who are motivated to leave their employment for the purpose of accessing a bonus of up to eight weeks of pay, despite not being made redundant in the true sense. Mr Middleton also noted that this leads to a culture where employers decide against training young employers, and instead seek to poach skilled workers as required.

[44] Mr Middleton said that Woden Contractors has been severely financially burdened by the redundancy provision, and in 2016 alone the company was required to pay a total of 45 weeks redundancy pay to eight employees who left of their own accord. He said that this was a major cost impost and worked against the company's desire to continue with its long-term policy of training industry entrants when other competitors were able to avoid these overhead costs. Mr Middleton proposed that the current redundancy provisions be amended to exclude those employees who resign on their own accord. Mr Middleton further proposed that an accompanying mechanism be implemented in relation to the redundancy trust to ensure that payments made by an employer on behalf of an employee are returned where an employee resigns.

[45] During cross-examination by the AWU, Mr Middleton clarified that in 2016 at Woden Contractors the redundancy payments resulted in a cost of approximately $50,000.00, along with having to wear the significant cost of retraining replacement employees. Mr Middleton further conceded that 2016 was a "*particularly bad year*" and that those employees likely resigned from Woden Contractors in order to access higher wages on another project, rather than just on the basis of accessing the redundancy payment.

[46] Mr Middleton was not able to provide evidence about any redundancies in the years other than 2016 or of a specific employee who had left on the basis of accessing a redundancy payment. Mr Middleton noted that there was a long history of people in the industry from time to time accessing that redundancy money for whatever personal reason.

[47] The CCF also undertook a survey of its members' opinions concerning the definition of redundancy.[44]

[43] Exhibit 2, Witness Statement of Peter Middleton dated 8 December 2016; Transcript 3 April 2017 PN341-PN430

[44] Exhibit 6

Submissions

HIA submissions

[48] HIA submitted that clause 17 as it currently stands no longer met the modern awards objective, and that the award safety net should be reflective of the safety net established by the legislature in the NES. The industry-specific redundancy scheme when first introduced into building and construction awards in 1989 was a system not dissimilar to portable long service leave which enabled an employee to accrue service in the industry and be paid a "redundancy payment" when they decided to leave the industry, not when employment ended with a particular employer. This changed with a consent variation in 1990 which provided for payment at the end of service with an employer, but it was never intended that it be triggered at the initiative of the employee. However the result was a definition of redundancy that meant that the employer was obliged to pay severance whether the employee was terminated by the employer, resigned, retired, lost a required qualification, became totally incapacitated for work, died or was retrenched. Disputation in the industry had moved away from the circumstances that led to the inclusion of the industry-specific redundancy scheme and as such the premise on which it was introduced no longer prevailed. The HIA submitted that its proposed variations were consistent with the modern awards objective; in particular the existing provision did not promote the flexible work practices and the efficient and productive performance of work, adversely affected business costs (up to $7,000 depending upon the length of service) leading to the possibility of business closure and creating a disincentive to employ, in circumstances where there was no incapacity to pay exemption.

ABI and NSWBC submissions

[49] ABI and NSWBC support the HIA's proposed variations, submitting that the HIA had advanced a meritorious case and demonstrated that the variations met the modern awards objective.

MBA submissions

[50] The MBA submitted that its proposed variations did not affect the operation of existing redundancy pay schemes, and was limited to the industry-specific scheme in the Building Award. The proposed small employer exemption in particular would not change the industry-specific character of the scheme, and was appropriate for an industry in which, ABS data showed, businesses employing less than 5 employees made up about 90% of the industry on a national scale. The definition of redundancy in clause 17.2 was not an accurate definition of circumstances conventionally accepted as representing a redundancy and was out of step with other modern awards.

CCF submissions

[51] The CCF submitted that the redundancy standards established by the Termination, Change and Redundancy Case were based on compensating employees who had been terminated at the initiative of the employer when the employee was no longer required. The current provisions in the Building Award had been historically justified as necessary to meet the unique characteristics of the industry including the itinerant, intermittent and project-

based nature of employment. However, the CCF submitted, the employment landscape had changed dramatically with a more mobile workforce and less reliance by employees on long term permanent employment, and was now not significantly different to other industries. Redundancy trust funds such as ACIRT, ReddiFund and BIRST which were created to protect employee redundancy entitlements against rogue employers and company insolvency had furthered the inappropriate idea that in the construction industry employees should be entitled to redundancy entitlements upon termination of employment for any reason other than misconduct. Since the Building Award had been made in 2009, the nature of the work in the industry had changed with far more work undertaken by large contractors using, in lieu of employed staff, smaller employers in sub-contractor arrangements. These smaller employers were less prone to the highs and lows of the industry. Employers were also less willing to release employees on whom they had invested heavily in terms of training and development. Construction was not the only industry which included project based activities, but was the only sector which utilised this definition of redundancy. The provisions encouraged employees to resign to avoid misconduct proceedings, to gain access to the redundancy money for personal reasons or to resign and then reapply for their old jobs. As a result, many employers preferred to use casual employees as a risk minimisation strategy. There was overwhelming industry support for an alteration to the current redundancy definition which, the CCF submitted, was contrary to the modern awards objective.

MPMCA submissions

[52] The MPMCA supported the submissions of MBA in relation to clause 17 of the Building Award, and supported the variation of the industry-specific redundancy scheme as it appears in both the Building Award and Plumbing Award.

MPG submissions

[53] MPG submitted that its preferred outcome earlier described for the Plumbing Award would recognise the unique circumstances that apply to daily hire employment whilst also recognising that employees on a weekly hire basis are no different to employees covered by other awards.

CFMMEU submissions

[54] The CFMMEU opposed the proposed variations of the HIA, the MBA and the CCF. It submitted that the current redundancy provision had received extensive consideration during the award modernisation process conducted under Pt 10A of the *Workplace Relations Act 1996* (WR Act) in 2009, and also during the transitional review of awards in 2013. In decisions issued during both processes, the continuing validity and appropriateness of the industry-specific redundancy scheme was affirmed, and no new argument had now been raised. It was not contended that the previous decisions were wrong. The proposals advanced constituted significant changes to the Building Award, but cogent reasons had not been advanced for departing from the previous decisions nor had there been probative evidence advanced justifying the significant change proposed.

AWU submissions

[55] The AWU opposed the proposed variations, and submitted that the case presented by the HIA, the MBA and the CCF amounted to no more than a preference from some employers for the current redundancy entitlements to be reduced and a complaint that the scheme covered dismissals beyond the standard definition.

CEPU submissions

[56] The CEPU submitted that none of the employer parties had advanced any cogent reasons in support of the variations they were seeking, and as a result the past decisions in relation to the industry-specific redundancy scheme must stand.

Consideration

[57] The inclusion of industry-specific redundancy schemes in modern awards is authorised by s.141 of the Act, which provides:

> **141 Industry-specific redundancy schemes**
>
> *When can a modern award include an industry-specific redundancy scheme?*
>
> (1) A modern award may include an industry-specific redundancy scheme if the scheme was included in the award:
>
> (a) in the award modernisation process; or
>
> (b) in accordance with subsection (2).
>
> Note: An employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2.
>
> *Coverage of industry-specific redundancy schemes must not be extended*
>
> (2) If:
>
> (a) a modern award includes an industry-specific redundancy scheme; and
>
> (b) the FWC is making or varying another modern award under Division 4 or 5 so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by the scheme;
>
> the FWC may include the scheme in that other modern award. However, the FWC must not extend the coverage of the scheme to classes of employees that it did not previously cover.

Varying industry-specific redundancy schemes

(3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:

(a) by varying the amount of any redundancy payment in the scheme; or

(b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).

(4) In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:

(a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and

(b) must retain the industry-specific character of the scheme.

Omitting industry-specific redundancy schemes

(5) The FWC may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.

[58] Section 142 received some consideration in two Full Bench decisions made in the conduct of the 4 yearly review required by s.156 of the Act concerning the industry-specific redundancy scheme contained in the *Black Coal Industry Award 2010*. Two propositions can be derived from those decisions. First, in the latter of those two decisions issued on 22 January 2017,[45] the Full Bench said:

> "[59] We also reject the notion that having an industry-specific redundancy scheme with provisions that are more generous than the NES is inherently inconsistent with the modern awards objective. The legislative scheme, when combined with the award modernisation request made by the Minister, makes clear provision for such arrangements in modern awards where they are an established feature of an industry."

[59] That is, there is nothing inherently illegitimate about the maintenance of an industry-specific redundancy scheme in a modern award that is more generous, in part or whole, than the NES standard established in s 119 of the Act and which had properly been included in the award pursuant to s 141(1) or (2). Merely because it is more generous than the NES does not by itself mean that it offends the modern awards objective.

[60] Second, the limited power in s.141(3)(a) to vary an industry-specific redundancy scheme by varying the amount payable was discussed in the first of the two *Black Coal Industry Award* decisions issued on 10 April 2015.[46] In that matter, there was a question of

[45] [2017] FWCFB 584

[46] [2015] FWCFB 2192

whether there was power under s.141(3)(a) or any other provision of the Act to remove a discriminatory aged-based cap on the scale of redundancy payments in the award provision. The Full Bench said (emphasis added):

> "[43] Contrary to the submissions of the CMIEG, there are ample sources of power in the FW Act to remove clause 14.4(c): under our general power in s.156(2)(b)(i) to vary modern awards as part of the 4 yearly review, *under the power in s.141(3)(a) to vary an industry-specific redundancy scheme to vary the amount of any redundancy payment in the scheme (which would necessarily occur by removal of the age cap)*, and under s.160(1) to correct the error of clause 14.4(c)'s inclusion in the Award."

[61] Any variation which has the necessary effect of reducing the amount of any redundancy payment payable under the industry-specific scheme would therefore be authorised by s 141(3)(a). That would encompass the proposed variations before us to change the definition of redundancy in clause 17.2, and to introduce a small-business exemption, because if granted they would have the necessary effect of reducing, to zero, the redundancy payment entitlements of those categories of employees affected by the variations.

[62] In the course of conducting the award modernisation process under Pt 10A of the WR Act, a full bench of the Australian Industrial Relations Commission (AIRC) also issued a decision in which consideration was given to that which was capable of constituting, or being included in, an industry-specific redundancy scheme under s 141. We will refer to that decision in the context of the history of the scheme in the Building Award, to which we now turn.

[63] The industry-specific scheme in the Building Award originated from a decision of an AIRC Full Bench issued on 22 March 1989.[47] The Full Bench dealt with applications to vary a number of awards operating in the building and construction industry to provide for redundancy entitlements. The Full Bench characterised the applications this way:

> "With the main exception of the period of notice, and the application of the clause to employers with less than fifteen employees, the applicants seek a clause which is in many other respects, similar to that determined by a Full Bench of this Commission on 2 August 1984 in the Termination, Change and Redundancy Case (TCR).
>
> In respect of these two areas, the applicants seek, firstly, alteration to the period of notice to reflect, it is submitted, the special characteristics of the building and construction industry and secondly, the elimination of the restriction on the size of the enterprise before the employer is bound by the terms of the clause."

[64] It is apparent from the decision that when the Full Bench was referring to the "periods of notice", it meant the scale of severance payments. The Full Bench's primary conclusions about the claim were as follows:

> "No party or intervener opposed the concept of a redundancy scheme in the building and construction industry.

[47] [1989] AIRC 175

We have decided to adopt a redundancy payment scheme designed to meet the needs of this industry.

Given the decision we make, we do not propose to detail the various arguments on each point, suffice to say however, that we have considered each of those points and weighed them against the argument presented by the applicants.

We now turn to consider the type of redundancy provision which should be awarded.

As outlined earlier, the principal argument put by Mr Rothman was the unique pattern of employment in the building and construction industry. Although there is some substance to this argument, it does not have universal application and there are many areas which have a stable long-term workforce.

Nevertheless, the extent of interface between diverse forms of contracts of employment create the need for appropriate provisions to be applied. Further, when consideration is given to the fact that in many instances employees of subcontractors journey into other sectors of industry, it can be seen that care must be taken not to provide fertile ground for the creation of disputes in those other sectors.

Because of the nature of this industry and the mixture of types of employers with the range of employment practices, together with their impact on other sectors, we are not prepared to order two standards to operate essentially side by side. Such an approach, in our view, would be naive and conducive to industrial disputes.

Further, we remain unconvinced against the background of the inquiry, that the itinerant employment patterns, as evidenced in some sectors, are appropriate for long-term industrial relations stability and employer/employee relations.

Accordingly, we will only provide one general standard of benefits, namely that determined by the Full Bench in the TCR Case. This, of course, will have appropriate modifications made to suit the employment terms and conditions applying in this industry.

It is clear that many employees work in the building and construction industry for extended periods and are employed by many employers in the normal course of employment. This fact is supported by a number of agreements about employment related matters, for example, the treatment of superannuation, long service leave in some States, and the redundancy agreements made by the Australian Federation of Construction Contractors (AFCC) and the Master Builders' Association of Victoria (MBAV), all of which recognise labour mobility.

We have decided to recognise this concept of employment and to make special provision for the accrual of redundancy benefits for employees working in this industry and therefore we determine:

- An employee will be entitled to accrue redundancy benefits up until he or she leaves the industry.

- An employer will be required to provide a statement of service of an employee on each occasion that employee's service is terminated.

- When an employee decides that he or she no longer wishes to work in the industry, he or she shall produce to his or her current employer a statutory declaration to that effect.

- The employee will then be entitled to redundancy benefits commensurate with his/her years of service in the industry.

- For the purposes of implementation, credit will be given for service which an employee has given to his/her current employer.

[65] The Full Bench dealt specifically with the proposed exemption for small employers:

> "We now consider the argument advanced by the applicants that the scheme should not contain an exemption for employers who employ fifteen or less persons.
>
> In this connection, we find the arguments advanced by Mr Rothman persuasive. Indeed, a number of employers have been prepared to concede this claim. Accordingly, and given the special characteristics of employment in this industry, the scheme to be provided in the various awards will not provide an exemption for employers who engage fifteen or fewer employees."

[66] The "arguments advanced by Mr Rothman" were summarised earlier in the decision as follows:

> "As to the claim that the clause should apply to enterprises with less than fifteen employees, Mr Rothman submitted that the nature of employment in the building and construction industry was quite different from an established business in other industry sectors. He submitted that unlike other sectors, the nature of subcontracting produced fluctuations in employee numbers.
>
> Further, it was submitted that on any building site there could be several contractors and/or subcontractors with widely varying employee numbers. As a consequence, if the Commission adopted the "fifteen or less" criterion, its application could cause disputes because of different conditions applying on the one site."

[67] Two propositions emerge from the Full Bench's reasoning:

- the structure of the scheme was tailored for industry employment made up of a sequence of relatively short engagements with a number of different employers; and

- there was no exemption for employers with 15 or less employees because subcontractor employers had significant fluctuations in the number of their

> employees (depending on the work cycle) and because the potential of disputes arising from large and small contractors working on a single construction site.

[68] The 1989 decision was subsequently the subject of proceedings initiated in the High Court for judicial review, and the AIRC was initially restrained from making orders to give effect to its decision. The restraint was subsequently lifted. Then, in a decision issued on 19 October 1989, the AIRC (Grimshaw C) dealt with employer applications to vary the same awards to provide for redundancy entitlements. It is apparent that the proceedings covered much of the same ground as had been traversed by the Full Bench; in this respect the Commissioner said:

> "The Commission is satisfied that the parties, interveners and much of the **s**ubmissions, evidence and exhibits presented in the current case are similar if not identical in many respects to what was before the Full Bench and it is for that reason I do not intend to identify laboriously all that has been presented again, suffice to say the presentation of material documentary and orally was exhaustive."

[69] The Commissioner reiterated a number of the conclusions of the Full Bench, and granted a redundancy clause for the relevant awards which contained the following features. First, it defined "redundancy" as "*a situation where an employee ceases to be employed for any reason and the employee elects to no longer seek work in the industry (as defined in clause 38A(2)(c) hereof).*" The definition in (c) relevantly provided that "continuous service" for the purpose of the clause was to mean "*the accumulated periods of continuous service (as elsewhere defined in this award) of an employee in the industry covered by this award which various periods will accumulate until the employee elects to no longer seek work in the industry*", and that "industry" meant "*all work covered by this award, or other Federal and State awards, which make provisions for payment of severance pay benefits calculated by reference to an employee's accrued service in the building and construction industry*" subject to identified exceptions including in respect of employees for periods in which contributions had been made into any of a number of named redundancy/severance pay funds. The severance pay scale was that determined in the *Termination, Change and Redundancy Case*.

[70] There followed employer applications to vary the clause, which were dealt with in a decision of Commissioner Palmer issued on 10 October 1990.[48] The employer applications were rejected, but the Commissioner identified a number of problems in the operation of the provision awarded by Commissioner Grimshaw the year before. In relation to the definition of redundancy, the Commissioner said that it needed alteration because "[i]n its current form it lends itself to ambiguous applications well beyond redundancy - even being said to extend entitlements in circumstances of (termination for) serious misbehaviour where no case for redundancy exists." The Commissioner described a number of events in the proceedings before the AIRC which it is not necessary to recount here before referring to the fact that the parties had ultimately reached a unanimous agreement concerning variations to the existing redundancy provision. That agreement, which the Commissioner adopted, amended the award definition of redundancy in a way which, as he described it, "places the initiation of the redundancy provision with the employer rather than the employee as at present and which exempts dismissal for misconduct or refusal of duty from the redundancy provision", and

[48] [1990] AIRC 1101

involved "reversion to "service with an employer" as the basis for the accrual of redundancy entitlements as opposed to service "in the industry" as at present". The agreement also involved a scale of severance payments which was described as a "pro rata application of the TCR scale with a maximum payment of eight weeks pay after four or more years of service" and as one which "in economic terms ... reduces the benefit otherwise payable to employees in almost all circumstances".

[71] Notwithstanding the Commissioner's characterisation of the agreed position as requiring the redundancy provision to be initiated by the employer, this was not reflected in the terms of the final award variation order developed by the parties and made by the AIRC. The order issued on 24 October 1990,[49] which replaced the existing clause 38A, *Redundancy* of *The National Building Trades Construction Award 1975* with a new provision, in all substantial respects was the same as the current clause 17 of the Building Award, including its definition of redundancy.

[72] The industry-specific redundancy scheme established in 1990 was next the subject of consideration by the AIRC during the award simplification process conducted pursuant to item 51 of Pt 2 of Sch 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*. Two decisions are relevant. In respect of the scheme as it appeared in a number of plumbing awards, Commissioner Wilks issued a decision on 11 November 1998 in which he dealt with a submission that the provision was not, properly speaking, a redundancy provision constituting an "*allowable award matter*" under s.89A(2)(m) of the WR Act capable of being retained in an award. This submission was advanced on the basis that the redundancy definition in the provision made it applicable beyond a situation of genuine redundancy. The Commissioner rejected the submission, relevantly stating that:

> "True it is that the term 'redundancy' has a general meaning, however, as shown above, full benches of this Commission as well as single members have differentiated the employment circumstances in this industry from the general application of the concept.
>
> ...
>
> The statute itself therefore distinguishes between the particular condition of employment of employees covered by this award and those elsewhere. This demonstrates in my view, the correctness of the view that there is not a one-size-fits-all definition of any of the `concepts' contained in s89A(2) in industrial relations practice in Australia, but at least several within at least some of those concepts.
>
> Principle 9 of the Award Simplification decision states in part-: '*In each award, account will need to be taken of any special circumstances which might be relevant.*'
>
> Relevant special circumstances taken into account in the circumstances of this award, in particular in relation to this clause are those which have been the subject of consideration by full benches of the Commission over the development of the redundancy provision, for example the large number of small employers, the itinerant nature of the work, the fact that employees may be employed by many different employers each of whom may be engaged for relatively short periods in plumbing and

[49] Print J5115

related work in projects which have a relatively short life. In reaching the conclusion I have, all of these factors have been taken into account, as has all of the other material put to me."

[73] In the second decision issued on 23 July 1999,[50] the approach taken by Commissioner Wilks described above was followed by Commissioner Merriman in relation the *National Building and Construction Award 1990*. The Commissioner said:

"**Clause 15 – Redundancy**

[17] All parties agree that the subject of redundancy is allowable, however, the definition as contained within this award was argued by the Government and some Employers to be inconsistent with the Test case and not "*consistent with the use of concepts in industrial practice in Australia"*. Commissioner Wilks in the *Plumbing Industry Award* decision [Print Q8609 p33] provides a number of reasons as to why he believes the redundancy provision in that award, which is consistent with this award, is consistent with the use of the concepts in industrial practice in Australia and, therefore, consistent with the Full Bench decision in the CBOA case. In addition to the reasons provided by Commissioner Wilks, the Commission is of the view that a substantial part of the redundancy provisions and entitlements within this award would be allowable under s.89A(n) - notice of termination. The entitlements, given the reasons that they are paid, flow in some circumstances following the giving of notice where in other circumstances they flow from the cessation of the work. For these reasons the Commission is prepared to maintain the existing clause in the award in its current form because, in the Commission's view, it is allowable pursuant to s.89A(2)(m) and (n)."

[74] When the award modernisation process required by Pt 10A of the WR Act was conducted by the AIRC, the continuation of the redundancy provision as an industry-specific redundancy provision in the building and construction industry modern award in development arose for consideration. The Award Modernisation Full Bench said (omitting footnotes):

"[75] We have decided to include the current industry award redundancy provisions in the modern award as an industry-specific redundancy scheme.

[76] Section 141 of the Fair Work Bill 2009 permits the inclusion of such a scheme in a modern award. The consolidated request deals with industry-specific redundancy schemes in the following way:

'Termination and Redundancy

36. The NES excludes employees from redundancy entitlements where their award contains an 'industry-specific redundancy scheme'. An 'industry-specific redundancy scheme' in a modern award will operate in place of the NES entitlement in these circumstances.

[50] Print R7494

> 37. An 'industry-specific redundancy scheme' is one identified as such in a modern award.
>
> 38. The Commission may include an 'industry-specific redundancy scheme' in a modern award.
>
> 39. In determining whether particular redundancy arrangements constitute an 'industry-specific redundancy scheme', the Commission may have regard to the following factors:
>
> - when considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
>
> - whether the scheme is an established feature of the relevant industry.'

[77] We are satisfied that the redundancy scheme in the building industry award redundancy provisions is an established feature of the building and construction industry. Having regard to the arbitral history and general application of the current redundancy prescriptions within awards in the building and construction industry the scheme is properly described as an industry-specific redundancy scheme.

...

[80] Whilst, as noted in our 23 January 2009 statement, the current award prescription does not reflect the standard for larger employers arising from the *Redundancy Case 2004* decision, when regard is had to the slightly more beneficial scale of benefits in earlier years, the broader application of the benefit and the pattern of limited periods of continuous service within the industry to which the building and construction redundancy provisions were directed we are also satisfied that when considered in totality, the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES. In relation to the pattern of service in the industry, we have relied on to the data supplied by Incolink, BERT and CoINVEST contained in the CFMEU submission of 11 March 2009.

[81] The Master Builders Australia (MBA) and some other employer bodies contended that the building industry arrangements cannot constitute an industry-specific redundancy scheme. It was pointed out that the application of the scheme extends beyond redundancy as defined by the NES. Some suggested that the definition of redundancy in the current award provisions should be modified to reflect the NES. We do not accept these submissions. There are several reasons. First, in determining whether a particular scheme is an "industry-specific redundancy scheme" the Commission can have regard to the factors mentioned in the passage we have set out above. Having regard to those factors, we are satisfied that they apply to the scheme. Secondly the definition of redundancy in the NES does not apply to an industry-specific scheme. Clause 64, which is in Subdivision C—Limits on scope of this Division – of the NES, provides that Subdivision B does not apply to an employee covered by a modern award which includes an industry-specific redundancy scheme. While Subdivision B sets out the circumstances in which the NES entitlement to redundancy pay arises and to the amount of the entitlement that sub-division does not apply to an industry-specific redundancy scheme. It follows that an industry-specific

redundancy scheme can deviate from the NES redundancy prescription in relation to both the circumstances in which the benefits arise and the amount of the benefits. Thirdly, the ability to include an industry-specific redundancy scheme in a modern award implies that the scheme as a whole can be included. A modified scheme might not meet the criterion, found in the consolidated request, that the scheme be a feature of the industry. Finally, the building industry scheme clearly falls within the definition of industry-specific redundancy scheme in s.12 of the Fair Work Bill 2009, the relevant part of s.12 reads:

> 'industry-specific redundancy scheme means redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme.'

[82] The modern award has clarified provisions permitting some other payments to be offset against payments required under the industry-specific redundancy scheme. Payments made to an employee from a redundancy pay fund, where such payments are made, or contributions on behalf of an employee to such a fund where no payments are made upon termination can be offset."

[75] The following critical propositions can be derived from the above decision:

(1) The existing redundancy provision could validly constitute an industry-specific redundancy scheme under s 141 of the FW Act (as it is now) notwithstanding its broad definition of redundancy, in large part because of the definition of the expression "*industry-specific redundancy scheme*" in s 12. That is, the scheme could differ from the NES provisions both as to the circumstances in which the entitlement to redundancy pay arose and the amount of the benefits to be paid.

(2) In determining whether the provision satisfied the requirement in the consolidated Ministerial request that the scheme, considered in totality, be no less beneficial to employees in the industry than the NES provisions, the Full Bench took into account not just the severance pay scale but also the broader application of the provision and the pattern of limited periods of continuous service in the industry to which the provision was directed. The broader application of the provision was of course the result of its definition of redundancy and its application to employers with less than 15 employees. That is, these were matters which were justified by the pattern of service in the industry and were necessary to reach the conclusion that the provision was no less beneficial than the NES.

(3) The Full Bench's conclusion concerning the pattern of service in the industry was reached on the basis of data supplied by some of the industry redundancy funds.

(4) The Full Bench expressed doubt as to whether a modified version of the existing scheme would constitute a "*feature of the industry*" as required in the consolidated request. It was satisfied that the existing scheme was an established feature of the building and construction award.

[76] Finally, clause 17 was considered in the transitional review conducted pursuant to Schedule 5 Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in the context of applications made by the HIA to alter the redundancy definition to one reflective of the NES definition in s.119 of the Act and to exempt from the redundancy pay obligations employers who employ less than 20 employees. In a decision issued by Fair Work Australia (FWA) (Senior Deputy President Watson) on 15 July 2013,[51] this application was rejected for the following reasons:

> "[203] The decision of the Award Modernisation Full Bench in respect of the terms of the industry-specific redundancy scheme, including its broader application arising from the definition of "redundancy", specifically considered the terms and history of the redundancy prescriptions within modern awards in the building and construction industry and deviations within it from the NES. Most significantly the Award Modernisation Full Bench considered and rejected the suggestion that the definition of "redundancy" should be modified to reflect the NES, the very argument agitated in the current proceedings by the HIA, without identifying any changed circumstances or any other cogent reason to support variation of the Building On-site Award.
>
> [204] The decision of the Award Modernisation Full Bench in respect of the small business exemption in the Building On-site Award is consistent with its general approach to the small business exemption within modern awards, reflected in its 19 December 2008 decision in relation to the making of Priority modern awards. The approach taken—that as a general rule the small business exemption will be maintained, except for pre-modern awards and industries in which there was no small business exemption prior to the *Redundancy Case 2004* - had regard to the full arbitral and legislative history of redundancy pay for employees of small business.
>
> [205] The HIA has done nothing more than to re-argue some of the issues raised and determined by the Award Modernisation Full Bench in including in the Building On-site Award the industry-specific redundancy scheme, in the terms of clause 17. The HIA has put no cogent reasons for altering the terms of clause 17 of the Building On-site Award which were the product of extensive debate and a considered decision by the Award Modernisation Full Bench. This claim by the HIA is refused."

[77] The claims of the HIA, the MBA and the CCF before us must be considered in light of the history described above.

[78] We do not consider that the evidence adduced by the claimant organisations has sufficient probative value to cause us to conclude that there has been any change of significance in the building and construction industry since the Building Award took effect on 1 January 2010. Apart from generalised assertions and opinions lacking an identifiable foundation, there was no actual evidence that the patterns of employee service that characterise the industry - that is, the commonality of relatively short periods of service for sequential employers across a longer period of industry service - have altered significantly since the industry-specific scheme was established in its current form in 1990 or since the

[51] [2013] FWC 4576

Building Award was made in 2009. The two HIA witnesses gave evidence that a number of HIA members were hostile to the current provisions, which may well be the case, but no objective information was provided as to the way in which the industry-specific scheme operated in practice which demonstrated adverse effects liable to be taken into account under s 134(1) of the Act. There was no evidence, for instance, about the frequency with which redundancy payments had to be made to employees who had resigned from their employment, the cost that might actually be involved in this, and how that related to the cost structure of the business as a whole. There was no evidence that the operation of the industry-specific scheme in its totality across an entire workforce would exceed the cost of the NES provisions in their totality.

[79] The evidence of the MBA and CCF witnesses was of a similar character and did not take the matter any further. In particular the assertion of the CCF witnesses that the industry-specific scheme discouraged full-time employment and investment in the workforce were not supported by any factual material showing the makeup of the workforce in terms of the various types of employment utilised, the training expenditure of employers in the industry, or any changes in these matters over time (including since when the Building Award was first made). Nor were the assertions that the scheme contributed to the cost of infrastructure supported by any financial analysis which quantified its overall costs in the context of the total cost of infrastructure vis-a-vis the NES entitlements. Mr Hovey was the only witness who gave an actual example of a resigning employee receiving a redundancy payment under the industry-specific scheme, but his assertion that this constituted an "*unreasonable financial burden*" was not quantified by reference to the cost of the payment in the context of the costs of the business as a whole. Nor was there any evidence about the frequency of redundancy payments to resigning employees, or indeed whether this had ever occurred before. The CCF survey was merely a collection of opinions and not of factual information.

[80] It has therefore not been demonstrated that the presumption that the inclusion of clause 17 in the Building Award satisfied the modern awards objective in s 134(1) at the time the award was made should be displaced, or that there has been any relevant change in circumstances since the award was made. We have no reason to conclude that the original rationale for the features of the scheme, including the frequency of short periods of employee service across sequential employers in the industry, the significant fluctuations in the size of employee numbers in a business depending upon work demand, and the prevalence of small contract businesses working alongside larger contractors on building and construction sites, does not remain wholly valid today. Nor has it been established, having regard to the totality of the industry-specific scheme including its partially less beneficial severance pay scale, that the scheme has an overall cost that would be significantly in excess of the NES scheme if at all.

[81] We do not consider therefore that there is any basis to conclude that the removal of clause 17 of the Building Award is necessary to meet the modern awards objective, having regard to the considerations identified in s 134(a)-(h) of the Act. Indeed there is one matter which causes us to conclude that the removal of the scheme would not achieve the objective, having regard in particular to the consideration of "*employment costs*" in s 134(1)(f). Although it was not the subject of any significant evidence, we understand it not to be in dispute that a significant number of employers in the industry make payments into an industry redundancy scheme. Clause 17.4 provides that redundancy pay entitlements under the clause

may be offset by contributions to any such scheme. No such provision is made in Pt 2-2 Div 11 of the Act in respect of the redundancy payments required by s.119, leading to the result that absent clause 17 employers contributing to redundancy schemes will effectively be required to make a double payment for any redundancy which occurs.

[82] In respect of the claim to alter the definition of redundancy, it may be accepted that the definition adopted in the form of the 1990 variation did not apparently match the intention of Commissioner Palmer that the scheme only apply to employer-initiated terminations of employment. However that may be, the definition is a foundational element of the industry-scheme which itself, as the Award Modernisation Full Bench found in 2009, has become an established feature of the building and construction industry. Moreover it is part of the broader application of the scheme which the Full Bench found it necessary to take into account in order to reach the conclusion that the scheme was not less beneficial than the NES provisions. That is a matter relevant to the requirement for fairness in the modern awards objective. Changing the definition would, we consider, alter the industrial balance of the scheme and its historic industry-specific character. The same conclusion may be reached in respect of the proposed exemption of small employers, as proposed in different forms by the HIA and the MBA. Further, as already stated, it has not been demonstrated that the rationale for not excluding small employers does not remain as valid in today's circumstances as it was found to be in 1990.

[83] As was found to be the case in the Transitional Review, we consider that the cases advanced by the HIA, the MBA and the CCF amount to little more than a re-agitation of the issues heard and determined by the Award Modernisation Full Bench. No cogent reasons have been advanced to depart from the conclusions reached by the Full Bench, and the evidence has not demonstrated any relevant change in circumstances. We do not consider that any variation to clause 17 is necessary in order for the Building Award to meet the modern awards objective, or that the variations proposed by the claimants would necessarily achieve the objective. The claims to vary clause 17 of the Building Award are therefore rejected.

[84] With respect to the Plumbing Award, we consider that the same conclusions apply for the same reasons, and the MPG claims are rejected.

4. LIVING AWAY FROM HOME

Current provisions

[85] Clause 24 of the Building Award contains a comprehensive suite of provisions applying to employees required to perform construction work on sites sufficiently distant from their usual place of residence that the employees cannot return home each night. Clause 24 currently provides:

> **24. Living away from home–distant work**
>
> **24.1 Qualification**
>
> **(a)** This clause operates when an employee is employed on construction work at such a distance from the employee's usual place of residence or

any separately maintained residence that the employee cannot reasonably return to that place each night, provided that:

(i) the employee is not in receipt of relocation benefits;

(ii) the employee is maintaining a separate place of residence to which it is not reasonable to expect the employee to return each night; and

(iii) the employee has provided the details of their usual place of residence, or any separately maintained address to the employer.

(b) The employee is not entitled to payment under this clause if the employee has knowingly made a false statement regarding the details required in clause 24.2.

24.2 Employee's address

(a) On engagement, an employee must provide the employer with their address at the time of application, the address of any separately maintained residence and, if requested, reasonable documentary proof of those details.

(b) No subsequent change of address will entitle an employee to the provisions of this clause unless the employer agrees.

24.3Entitlement

(a) Where an employee qualifies under clause 24.1 the employer will:

(i) pay a living away from home allowance of $494.94 per complete week. In the case of broken parts of the week the living away from home allowance will be $70.81 per day. This allowance may be increased if the employee satisfies the employer that the employee reasonably incurred a greater outlay than that prescribed; or

(ii) provide the worker with reasonable board and lodging in a well kept establishment with three adequate meals each day; or

(iii) where employees are required to live in camp, provide all board and accommodation free of charge.

(b) The accommodation provided will be of a reasonable standard having regard to the location in which work is performed, including the provision of reasonable ablution/laundry, recreational and kitchen

facilities, as well as reasonable external lighting, mail facilities, radio or telephone contact and fire protection.

24.4Messing system

(a) Where 10 or more employees are engaged, the employer will provide a cook. If there are less than 10 employees, the employer must reimburse employees for food reasonably purchased by them for their own use or must reimburse the reasonable cost of meals consumed in the nearest recognised centre, provided this subclause will not apply where the employee is provided with three meals per day in accordance with clause 24.3(a)(ii).

(b) In camps over 30 people the employer must employ a camp attendant.

Camp attendant means an employee engaged for the purpose of maintaining a camp in a clean and hygienic condition.

(c) In all camps the employer must provide labour for the purpose of maintaining the camp in a clean and hygienic condition.

(d) Where an employer has established a camp site and provides facilities for employees living in their own caravan, the employer must provide reasonable space for the caravans.

24.5Camping allowance

An employee living in a construction camp where free messing is not provided must receive a camping allowance of $201.48 for every complete week the employee is available for work. In the case of broken weeks, the camping allowance will be $28.76 per day including any Saturday or Sunday if the employee is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance will not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance will not be payable for the Saturday and Sunday.

24.6Camp meal charges

Where a charge is made for meals in a construction camp, the charge will be fixed by agreement between the employer and the majority of affected employees.

24.7 Travelling expenses

An employee who is sent by an employer to a job which qualifies the employee for the provisions of this clause will not be entitled to any of the

allowances prescribed by clause 25—Fares and travel patterns allowance, for the period occupied in travelling from the employee's usual place of residence to the distant job, but instead will be entitled to the following benefits:

(a) Forward journey

(i) An employee must:

- be provided with appropriate transport or be paid the amount of a fare on the most appropriate method of public transport to the job (bus, economy air, second class rail with sleeping berths if necessary), and any excess payment due to transporting tools if such is incurred; and

- be paid for the time spent in travelling, at ordinary rates up to a maximum of eight hours per day for each day of travel; and

- be paid $15.06 per meal for any meals incurred while traveling.

(ii) The employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues employment within two weeks of commencing on the job and who does not immediately return to the employee's place of engagement.

(b) Return journey

(i) An employee will, for the return journey, receive the same payments provided for the forward journey (see clause 24.7(a)). In addition, daily hire employees will receive an amount of $20.81 to cover the cost of transport and transporting tools from the main public transport terminal to the employee's usual place of residence.

(ii) The return journey payments will not be paid if the employee terminates or discontinues employment within two months of commencing on the job or is dismissed for incompetence within one working week of commencing on the job, or is dismissed for misconduct at any time.

(c) Travelling time calculations

For the purpose of this clause, travelling time will be calculated as the time taken for the journey from the central or regional rail, bus or air terminal nearest the employee's usual place of residence to the locality of the work (or the return journey, as the case may be).

(d) Daily fares allowance

An employee engaged on a job who qualifies under the provisions of this clause and who is required to reside elsewhere than on the site (or adjacent to the site and supplied with transport) must be paid the allowance prescribed by clause 25—Fares and travel patterns allowance.

(e) Weekend return home

(i) An employee who notifies the employer, no later than Tuesday of each week, of their intention to return to their usual place of residence at the weekend and who returns to such usual place of residence for the weekend, must be paid an allowance of $35.28 for each occasion provided that the employee does not miss any ordinary hours of work.

(ii) An employee who is receiving the living away from home allowance pursuant to clause 24.3(a)(i) or camping allowance pursuant to clause 24.5 is not entitled to payment under clause 24.7(e)(i).

(iii) When an employee returns to their usual place of residence for a weekend or part of a weekend and is not absent from the job for any of the ordinary working hours, no reduction of the allowance in clause 24.3 will be made.

(f) Rest and recreation

(i) Rail or road travel

An employee working on a job which qualifies the employee for the provisions of this clause, may, after two months' continuous service and thereafter at three monthly periods of continuous service, return to the employee's usual place of residence at the weekend. If the employee does so, the employee will be provided with transport or be paid the amount of a bus or second class return railway fare to the bus or railway station nearest the employee's usual place of residence on the pay day which immediately follows the date on which the employee returns to the job; provided no delay not agreed to by the employer takes place in connection with the employee's commencement of work on the morning of the working day following the weekend.

(ii) Air travel

- Notwithstanding any other provisions contained in clause 24.7(f)(i) and instead of such provisions, the following

conditions will apply to an employee who qualifies under clause 24.1 where such construction work is located in any other area to which air transport is the only practicable means of travel. An employee may return home after four months' continuous service and will in such circumstances be entitled to two days' leave with pay in addition to the weekend, provided that the entitlement in respect of an employee in the civil construction sector will arise after 10 weeks' continuous service.

- Thereafter the employee may return to the employee's usual place of residence after each further period of four months' continuous service, and in each case will be entitled to two days' leave of which one day will be paid leave.

- Payment for leave and reimbursement for any economy air fare paid by the employee will be made at the completion of the first pay period commencing after date of return to the job.

(iii) Clauses 24.7(f)(i) and 24.7(f)(ii) do not apply where the work the employee is engaged upon will terminate in the ordinary course within a further 28 days after the expiration of any such period of two or three months.

(iv) Limitation of entitlement

An employee will be entitled to either clauses 24.7(f)(i) and 24.7(f)(ii) and such option will be established by agreement as soon as practicable after commencing on distant work. The entitlement will be available as soon as reasonably practical after it becomes due and will lapse after a period of two months, provided that the employee has been notified in writing by the employer in the week prior to such entitlement becoming due of the date of entitlement and that such entitlement will lapse if not taken before the appropriate date two months later. Proof of such written notice will lie with the employer.

(v)Service requirements

For the purpose of clauses 24.7(f)(i) and 24.7(f)(ii), service will be deemed to be continuous notwithstanding an employee's absence from work as prescribed in this clause.

(vi) Variable return home

In special circumstances, and by agreement with the employer, the return to the usual place of residence entitlements may be

granted earlier or taken later than the prescribed date of accrual without alteration to the employee's accrual entitlement.

(vii) No payment instead

Payment of fares and leave with pay as provided for in clauses 24.7(f)(i) and 24.7(f)(ii) will not be made unless utilised by the employee.

(viii) Alternative paid day off procedure

If the employer and the employee so agree, any accrued rostered days off (RDO) as prescribed in clause 33—Ordinary hours of work, may be taken, and paid for, in conjunction with and additional to rest and recreation leave.

(ix) Termination of employment

An employee will be entitled to notice of termination of employment in sufficient time to arrange suitable transport at termination or must be paid as if employed up to the end of the ordinary working day before transport is available.

The claims

[86] The CFMMEU claim was that the following clause should replace clause 24 of the Building Award in its entirety and that, save for some exclusions, minor word changes and different numbering, the same clause should be inserted in the Joinery Award and Mobile Crane Award:

"**24 Living away from home – distant work**

24.1Qualification

(a) This clause operates when an employee is employed on construction work at such a distance from the employee's usual place of residence or any separately maintained residence that the employee cannot reasonably return to that place each night, provided that:

(i) the employee is not in receipt of relocation benefits; and

(ii) the employee has provided the details of their usual place of residence, or any separately maintained address to the employer.

(b) The employee is not entitled to payment under this clause if the employee has knowingly made a false statement regarding the details required in clause 24.2.

24.2Employee's address

(a) On engagement, an employee must provide the employer with their address at the time of application, the address of any separately maintained residence and, if requested, reasonable documentary proof of those details.

(b) No subsequent change of address will entitle an employee to the provisions of this clause unless the employer agrees. Provided that the employer will not unreasonably refuse any request by an employee to change their address.

(c) An employer must not exercise undue influence for the purpose of avoiding the obligations under this clause, in persuading an existing employee to give a false address.

24.3Entitlement

(a) Where an employee qualifies under clause 24.1 the employer will:

(i) pay a living away from home allowance of $913.88 per complete week. In the case of broken parts of the week the living away from home allowance will be $130.55 per day. This allowance will be increased if the employee satisfies the employer that the employee reasonably incurred a greater outlay than that prescribed; or

(ii) provide the employee with reasonable board and lodging in a well-kept establishment with three adequate meals each day; or

(iii) provide the employee with accommodation and pay the following allowances for meals each day:

- Breakfast $15.00
- Lunch $15.00
- Dinner $30.00; or

(iv) where employees are required to live in camp, provide all board and accommodation free of charge.

(b) The accommodation provided will be of a reasonable standard having regard to the location in which work is performed, including the provision of:

(i) a single room (not shared) which is quiet with air conditioning/heating, suitable ventilation, comfortable and clean bedding, appropriate lighting and furnishings, an ensuite

with a toilet, shower and basin both with running hot and cold water, a television and tea and coffee making facilities;

(ii) reasonable ablution/laundry, recreational and kitchen facilities, as well as reasonable external lighting and fire protection;

(iii) communication facilities including email and internet access, and mobile phone coverage or other radio or telephone contact where mobile coverage is unavailable.

(c) Where the accommodation provided is in a camp type arrangement at a remote location for a specific construction project, an employee shall retain their own specific room for the duration of the time spent living away from home.

24.4 Messing system where employees are required to live in camp at any one site

(a) Where 10 or more employees are engaged, the employer will provide a cook. If there are less than 10 employees, the employer must reimburse employees for food reasonably purchased by them for their own use or must reimburse the reasonable cost of meals consumed in the nearest recognised centre, provided this subclause 9 will not apply where the employee is provided with three meals per day in accordance with clause 24.3(a)(ii).

(b) In camps over 30 people the employer must employ a camp attendant.

Camp attendant means an employee engaged for the purpose of maintaining a camp in a clean and hygienic condition.

(c) In all camps the employer must provide labour for the purpose of maintaining the camp in a clean and hygienic condition.

(d) Where an employer has established a camp site and provides facilities for employees living in their own caravan, the employer must provide reasonable space for the caravans.

24.5Camping allowance

An employee accommodated at a camping site or caravan park where free messing is not provided must receive a camping allowance of $420.00 for every complete week the employee is available for work. In the case of broken weeks, the camping allowance will be $60.00 per day including any Saturday or Sunday if the employee is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance will not be payable for that day and if such unauthorised absence occurs on the

working day immediately preceding or succeeding a Saturday or Sunday, the allowance will not be payable for the Saturday and Sunday.

24.6Camp meal charges

Where a charge is made for meals in a construction camp, the charge will be fixed by agreement between the employer and the majority of affected employees.

24.7Travelling expenses

An employee who is sent by an employer to a job which qualifies the employee for the provisions of this clause will not be entitled to any of the allowances prescribed by clause 25 – Fares and travel patterns allowance, for the period occupied in travelling from the employee's usual place of residence to the distant job, but instead will be entitled to the following benefits:

(a) Forward journey

(i) An employee must:

- be provided with appropriate transport from the employee's usual place of residence to the job, or be paid the amount of a fare on the most appropriate method of public transport (including bus, economy air, taxi, and rail with sleeping berths if necessary), and any excess payment due to transporting tools if such is incurred; and

- be paid for the time spent in travelling, at ordinary rates up to a maximum of eight hours per day for each day of travel; and

- be paid the allowances set out in clause 23.3(a)(iii) for any meals incurred while traveling.

(ii) The employer may deduct the cost of the forward journey fare from an employee who terminates or discontinues employment within two weeks of commencing on the job and who does not immediately return to the employee's place of engagement.

(b) Return journey

(i) An employee will, for the return journey, receive the same payments provided for the forward journey (see clause 24.7(a)). In addition, daily hire employees will receive an amount of $20.81 to cover the cost of transport and

transporting tools from the main public transport terminal to the employee's usual place of residence.

(ii) The return journey payments will not be paid if the employee terminates or discontinues employment within two months of commencing on the job or is dismissed for incompetence within one working week of commencing on the job, or is dismissed for misconduct at any time.

(c) Travelling time calculations

For the purpose of this clause, travelling time will be calculated as the time taken for the journey from the main bus or rail terminal nearest the employee's usual place of residence to the locality of the work (or the return journey, as the case may be).

(d) Daily fares allowance

An employee engaged on a job who qualifies under the provisions of this clause and who is required to reside elsewhere than on the site (or adjacent to the site and supplied with transport) must be paid the allowance prescribed by clause 25 – Fares and travel patterns allowance.

(e) Weekend return home

(i) An employee who notifies the employer, no later than Tuesday of each week, of their intention to return to their usual place of residence at the weekend and who returns to such usual place of residence for the weekend, must be paid an allowance of $35.28 for each occasion provided that the employee does not miss any ordinary hours of work.

(ii) An employee who is receiving the living away from home allowance pursuant to clause 24.3(a)(i) or camping allowance pursuant to clause 24.5 is not entitled to payment under clause 24.7(e)(i).

(iii) When an employee returns to their usual place of residence for a weekend or part of a weekend and is not absent from the job for any of the ordinary working hours, no reduction of the allowance in clause 24.3 will be made.

(f) Rest and recreation

Where an employee is engaged on a job which qualifies the employee for the provisions of this clause and the duration of work on the job is

scheduled for more than 8 weeks the employee will be entitled to rest and recreation in accordance with the following:

(i) After each continuous 3 week period of work away from home the employee will be entitled to a period of 7 days unpaid rest and recreation leave at the employee's usual place of residence. The 7 day period will be exclusive of any days of travel from the job to the employee's usual place of residence and return to the job. On each occasion that the employee returns to their usual place of residence they will be paid for travel expenses in accordance with clause 24.7(a), (b) and (c) above.

(ii) After 12 weeks continuous service (inclusive of periods of rest and recreation) the employee will be entitled to 2 days paid rest and recreation leave and an additional paid day of rest and recreational leave for each subsequent 12 weeks of continuous service.

(iii) Payment for leave and travel expenses will be made at the completion of the first pay period commencing after date of return to the job.

(iv) The provisions of clause 24.7(f)(i) do not continue to apply where the work the employee is engaged upon will terminate in the ordinary course within a further 28 days after the last period of rest and recreation leave.

(v) Service will be deemed to be continuous notwithstanding an employee's absence from work as prescribed in this clause.

(vi) Variable return home

In special circumstances, and by agreement with the employer, the return to the usual place of residence entitlements may be granted earlier or taken later than the prescribed date of accrual without alteration to the employee's accrual entitlement.

(vii) No payment instead

Payment of travel expenses and leave with pay as provided for in this clause will not be made unless utilised by the employee.

(viii) Alternative paid day off procedure

If the employer and the employee so agree, any accrued rostered days off (RDO) as prescribed in clause 33 – Ordinary hours of work, may be taken, and paid for, in conjunction with and additional to rest and recreation leave.

(ix) Termination of employment

An employee will be entitled to notice of termination of employment in sufficient time to arrange suitable transport at termination or must be paid as if employed up to the end of the ordinary working day before transport is available."

[87] The key elements of the CFMMEU claim are as follows:

- a new requirement in clause 24.2(a) that an employer must not unreasonably refuse any request by an employee to change their address for the purpose of the employee's entitlement to the living away from home allowance;

  the addition of a new clause 24.2(c) to the Building Award prohibiting employers from putting undue pressure on employees to provide a false address for the purpose of avoiding any requirement for payment of the living away from home allowance;

- a significant increase to the living away from home allowance in clause 24.3(a)(i);

- the insertion of a new paragraph (iii) into clause 24.3(a) which would provide the employer with the option of providing the employee with accommodation and paying for meals by way of separate meal allowances for breakfast, lunch and dinner;

- the addition of new requirements about the minimum accommodation standards in clause 24.3(b) including a single room for all employees with (among other things) air conditioning and an ensuite bathroom, and the provision of email and internet access and mobile phone coverage;

- inserting a new paragraph (c) into clause 24.3 to require employers to provide employees who are required to live in a construction camp at a remote location with their own specific room for the duration of their employment on the project;

- increasing the weekly and daily camping allowance where free messing is not provided under clause 24.5, and clarifying the operation of the provision;

- amending clause 24.7(a) to clarify that the transport is to be from the employee's usual place of residence, to remove the reference to "*second class rail*"; and to insert "*taxi*" as a form of transportation that may be used;

- varying clause 24.7(f) to change the employee entitlement to rest and recreation to a period of 7 days unpaid rest and recreation leave, exclusive of any days of travel, after each continuous 3 week period of work where the duration of work on the job is scheduled for more than 8 weeks, and to provide for paid rest and recreation leave after each 12 weeks of continuous service.

[88] The CCF sought, like the CFMMEU, to include a new clause 24.3(a)(iii) to provide the employer with the option to provide an employee living away from home with accommodation only and to pay separately specified meal allowances for breakfast, lunch and dinner.

[89] The MBA sought the variation of clause 24.3(a)(ii) of the Building Award and clause 24.5(a) of the current Joinery Award, to read "*provide the worker with reasonable lodging in a well kept establishment and with reasonable board of three adequate meals each day*" in order to clarify that this option included the provision of meals, and that there was no separate entitlement to meal allowances.

Evidence

CFMMEU

[90] The CFMMEU called evidence from the following witnesses in support of its claim: Frank O'Grady; Dean Reilly; Josh Burling; Roland Cummins; Danny Callaghan; David Kelly; Graham Pallot; Paul Ferreira; Kris Woodward; and David Kirner.

[91] Frank O'Grady, was Assistant National Secretary for the Construction and General Division of the CFMMEU, with employment experience in the construction industry for the past 40 years. He gave evidence[52] concerning the issue referred to as "*gate starts*", meaning circumstances where an employer wanted employees to give false local addresses to get a start on a project. Mr O'Grady asserted that this was used by employers to avoid paying the living away from home allowance or providing accommodation. He said that "*gate starts*" were particularly an issue in the civil construction sector, and employees were reluctant to complain or give evidence about this as they were concerned they would lose their jobs.

[92] Mr O'Grady also gave evidence concerning differing roster arrangements to accommodate periods of time working on the job and periods of rest and recreation at home. Mr O'Grady explained that it was difficult for the union to reach agreement with a company to provide rest and recreation conditions which were similar to project enterprise agreements due to the lesser standard in the award and the need to compete with other companies that relied on the award standard.

[93] Mr O'Grady gave evidence about employers' common methods of compensating employees for meals and accommodation when they were engaged in distant work, and said that it was common for employers to meet the costs of accommodation and meals, particularly where employees lived in camp on remote projects. He stated that in recent years there had been a change in the industry to providing accommodation but paying an allowance for meals,

[52] Exhibit 11, Witness Statement of Frank O'Grady dated 2 December 2016; Transcript 4 April 2017 PN1164-PN1239

and this option was common in refractory agreements that he had negotiated. He said at many of the sites he had visited, employees were covered by project agreements and enterprise agreements; however some did not specify the period of time for rest and recreation and he was not aware of any enterprise agreement containing the rest and recreation clauses and living away from home allowance amount sought by the CFMMEU.

[94] Dean Reilly, an Organiser for the CFMMEU with previous employment experience as a carpenter in the building and construction industry, gave evidence[53] that he had worked on projects and jobs that required him to live away from home. Mr Reilly had performed work under both enterprise agreements and for a company that applied the award. He described the impact living away from home had on employees and their families based on personal experience and interactions with other employees. Mr Reilly opined that employees engaged in distant work experienced more stress as "*life still goes on at home whilst you are away*", and that a lack of internet and phone reception, particularly in camp sites in remote areas, contributed to stress: "*Not being able to hold a conversation or get onto skype to video call the kids is a huge problem as the kids want to see you and want to know when you are home next and they cannot see you for a month*". He said that employees working away from home were "*far more likely to have mental issues… like anxiety, depression and aggressive behaviour*" which could also lead to high divorce rates, fighting amongst employees, and alcohol and drug abuse. He likened distant work to being institutionalised, similar to people who have been jailed, and described employees having been physically restricted from leaving their worksite accommodation or needing permission to leave the premises. Mr Reilly also described the additional stress employees experienced when pressured to share rooms or to participate in "*motelling*" and stated that if cleaning was not maintained then hygiene was also an issue.

[95] He said that he experienced reduced time at home due to having to travel to and from the work site during rest and recreation periods, with a late flight out of the site and an early flight into the site, and this placed further pressure on employees and their families. During cross-examination Mr Reilly conceded that flight delays and flight paths were not within the control of employers; however Mr Reilly asserted that the flights chosen by the employer were the result of mismanagement from the project. Mr Reilly provided an example of a project in which he was required to provide a local address so that he was not paid the living away from home allowance.

[96] Josh Burling, an Organiser for the CFMMEU with over 20 years' employment experience in the building and construction industry, gave evidence[54] about the impact of working "four weeks on, one week off" roster as a local employee who was able to go home at nights. He said that the first two days of a seven-day period of rest and recreation leave at home involved sleep and overcoming the shift just completed. He stated that the four weeks on had an impact on his family relationships, as he did not spend much time with his children because they were often either just finishing their dinner or having a shower before going to bed when he returned from work, and whilst he had most Sundays off work he spent the mornings sleeping in and found it difficult to achieve more than a few household chores whilst preparing for another week at work. Mr Burling also gave evidence about the impact of

[53] Exhibit 12, Witness Statement of Dean Reilly dated 2 December 2016, Transcript 4 April 2017 PN1257-PN1378

[54] Exhibit 13, Witness Statement of Josh Burling dated 6 December 2016, Transcript 4 April 2017 PN1381-PN1404

the four weeks on, one week off roster on fly-in fly-out employees. He stated that fly-in fly-out employees "*suffer a lot more*" after spending four weeks away from their families and loved ones and then only being home for five days once travel to and from the sites is taken into account. Mr Burling had witnessed fly-in fly-out employees experience marriage breakdowns and depression and require extra time off to repair their marriages and relationships and to spend time with their children. Mr Burling described the roster as "*unhealthy*" and "*in some cases deadly*" and gave evidence of there being seven suicides on the Inpex project. During cross-examination, Mr Burling confirmed that both he and the employees engaged as fly-in fly-out workers he based his evidence on were engaged on the Inpex project and were covered by an enterprise agreement.

[97] Roland Cummins was an Organiser for the CFMMEU in far North Queensland and the Northern Territory with employment experience in construction for 12 years. Mr Cummins gave evidence[55] that he worked as a local employee when he performed construction work, however he had worked with employees who were engaged on a fly-in fly-out or a drive-in drive-out basis. He stated that many employees engaged in distant work experienced stress and depression which could be triggered by *"[t]rying to deal with private issues away from home, not being able to speak to loved ones on a regular basis, missing special events (kids birthdays, Christmas, Easter, Weddings etc.). Even though you may work with a number of work mates it can become a very lonely time when you are away from your loved ones*". In addition to stress and depression, Mr Cummins gave evidence that distant work employees experienced greater risk to their safety due to the fatigue caused by their rosters, and he had seen injuries to distant work employees due to falling asleep whilst operating plant. He had knowledge of seven suicides at one project over a four-year period. Despite the negative impact of distant work, Mr Cummins explained that *"[m]ost workers work away because of the financial benefit*". His view was that even rosters (not going over three week periods, with at least seven full days off for rest and recreation) should be put in place, and that travel time to and from work should not be included in the rest and recreation period. He also said that employers should provide accommodation that is clean and comfortable and not engage in "*motelling*" as *"[h]aving to share rooms or be moved around during your swing only creates unnecessary frustration to workers working away*". During cross-examination, Mr Cummins said that employees on the projects about which he gave evidence were covered by enterprise agreements.

[98] Mr Danny Callaghan was a crane operator with employment experience in the building and construction industry for over 25 years. He gave evidence[56] that he had worked on distant projects and spent long periods of time away from family, which had been difficult for him and his family. Mr Callaghan stated that spending long periods away from home placed additional pressure and responsibility on his wife to take care of their children and handle household maintenance problems. He described having missed family events such as birthdays, christenings, weddings and Christmas due to working away. Difficulties using mobile phones and the internet at distant work sites exacerbated the strain on relationships with family and friends, and also affected "*doing regular business such as banking and paying bills*". During cross-examination, Mr Callaghan said in relation to the Barrow Island project that he believed it was Chevron's responsibility (as the main contractor) to provide

[55] Exhibit 14, Witness Statement of Roland Cummins dated 6 December 2016; Transcript 4 April 2017 PN1410-PN1439

[56] Exhibit 31, Witness Statement of Danny Callaghan dated 1 December 2016; Transcript 4 April 2017, PN1671-PN1712

adequate mobile phone coverage, but they would not pay the money to get the extra coverage. He explained that whilst there was some coverage employees were not allowed to use their phones at work, and accordingly everyone would be using them at the same time once they got back to the accommodation facilities. In relation to whether any landlines were available, he stated that he had never used one and had not seen any.

[99] Mr Callaghan described the pressures distant work employees experienced with accommodation, particularly "*motelling*" and "*hotbedding*". Mr Callaghan explained "*motelling*" as packing up personal items for the end of a swing and having them stored so that another employee could use the room. When employees engaged in "*motelling*" it "*means that you a keep a bare minimum of personal effects with you because of the hassle of packing it up each time and also the fear of items being lost or stolen*". Mr Callaghan stated that he had not personally experienced "*hotbedding*", which involved sleeping in a bed that another employee had just got out of. He did not consider this or the practice of "*bunking*" and sharing rooms to be acceptable, stating *"[w]orkers are entitled to privacy and their own personal space. We are not in the army*".

[100] David Kelly, an Organiser for the CFMMEU Construction and General Division NSW Branch, has been a union official for 25 years and has also worked as a labourer in both the building and construction industry and in civil construction. Mr Kelly gave evidence[57] that he had gained a good understanding of the difficulties employees face in accessing the living away from home allowance and the adequacy of the allowance as compensation for performing distant work. Mr Kelly gave evidence about "*gate starts*" where employers encouraged employees to provide a local address, "*even when the employer knows that they maintain a residence at a place too far for them to travel home to*". During cross-examination, Mr Kelly was asked whether employers asking employees for a false address amounted to fraud and what steps he had taken to draw the practice to the attention of the authorities such as the police. Mr Kelly said he believed it was fraud, but "*in terms of taking matters to police, I don't really think that's my role. In those cases I take it up with the boss and seek to recover the amounts owed*". Mr Kelly said that he had been able to recover amounts owed on a number of occasions, but it was often difficult to take matters to the Fair Work Commission or the Chief Industrial Magistrate because employees were "*dependent on these regional jobs*". Related to the practice of "gate starts", Mr Kelly also gave evidence that it was increasingly common for employers to direct employees "*to contact regionally based labour hire companies in order to obtain work on regional jobs… [and] begin as new starters with local addresses*". Mr Kelly stated that if employees sought the living away from home allowance, they would not be hired for work on the site. This meant that employees had inconsistent access to the living away from home allowance, regardless of whether employees were "*working for the same company and with the same domestic situation*". Mr Kelly gave evidence that some employees negotiated a "*caravan allowance*" as it was paid at a lower rate, and other employees lived in a "*doss house*" where a discretionary allowance was provided to cover groceries; some employees had illegal deductions taken as "*rent*" for a house that the employer provided, and that migrant visa holders were "*housed in inadequate accommodation and/or shipping containers*". He had used different methods such as negotiation with the companies, clients or the government, and through media attention to resolve such situations. Mr Kelly said the CFMMEU had negotiated agreements with the sorts

[57] Exhibit 30, Witness Statement of David Kelly dated 1 December 2016; Transcript 4 April 2017 PN1601-PN1661

of companies that engaged in the above conduct, and that he would normally endeavour to have the agreements underpinned by the award.

[101] Mr Kelly described having been involved in many disputes and negotiations over the adequacy of the meal allowance entitlement on overtime. He also gave evidence about issues raised by refractory employees, such as the quality of accommodation, pressure to share rooms despite working 12-hour rotating shifts, the practice of "*motelling*", and the time spent travelling to and from distant work as employees found their rest and recreation leave was reduced due to long periods in transit. Mr Kelly also gave evidence about the impact of distant work on employees and their families. He said that employees expressed difficulties coping with the lifestyle and the pressure it also placed on their families, and many employees were divorced and estranged from children due to the long absences. He also considered that family breakdown was a contributor to drug and alcohol abuse amongst employees. Attached to Mr Kelly's witness statement were two statements, one made by a construction employee performing work at remote locations and the other by the wife of a construction employee. These statements described the personal and family impacts of performing distant work.

[102] Graham Pallot was the Assistant Secretary of the CFMMEU Construction and General Division Western Australia Branch, and had worked as a labourer in the building and construction industry for over 12 years prior to working for the CFMMEU. He gave evidence[58] that most of the branch's members outside of the Perth metropolitan area were employed on fly in, fly out arrangements. He said that in some circumstances, employees were "*required, or strongly encouraged*" to falsify their usual place of residence to obtain a job, requiring them to pay their own airfares and travel in their own time. When questioned in cross-examination about what action he had taken to resolve this, Mr Pallot confirmed that he had not brought a prosecution for breach of an instrument and had not contacted the Fair Work Ombudsman because employees were afraid of the consequences of taking action (such as not obtaining work on future major projects). He said that he discussed the issue with employers during the bargaining process for agreements, and employees had asked the CFMMEU to make improvements within the award system to make their rights clearer.

[103] Mr Pallot also gave evidence relating to employees' concerns with roster lengths and the amount of time spent away from families. Mr Pallot said that employees were fatigued by the length in rosters, and this was particularly a concern for the day employees flew out of the site to begin their rest and recreation leave. The additional money spent on travel, and the winding down of major projects, placed further pressure on employees' wives and partners to work and support household expenses. Because head contractors of construction employers on projects dictated accommodation arrangements and flights, employees were not able to raise their concerns through the dispute resolution procedure with their employers in the normal way.

[104] Mr Pallot added that employees' difficulty in coping with the amount of time spent away from families was intensified by not having access to mobile phones at work and the "*generally very poor communications in the camps*". He said employees experienced difficulties with mobile phones. They were not allowed to have mobile phones at work, and when they got back to the camp so many employees tried to use their phones at the same time

[58] Exhibit 35, Witness Statement of Graham Pallot dated 7 December 2016; Transcript 5 April 2017 PN2137-PN2250

that the communication facilities at the camp were unable to cope. In relation to accommodation camps at remote projects, he said that the "*camps are run like prison camps and they don't have a lot of freedom at all*". He also gave evidence on the issues of "*motelling*" and "*bunking*". Mr Pallot stated that "*motelling*" undermined employees' "*security and sense of feeling safe, as there is always someone you find to be obnoxious or you feel unsafe to make contact with*", whilst the practice of "*bunking*" impacted upon employees' privacy and was difficult for employees performing opposite shifts. He said it was also becoming common for employees, particularly shutdown employees or those doing short periods away, to be required to supply their own accommodation and meals. Mr Pallot stated that employees had recently been contacting him to advise that "*the cost of getting the job has actual (sic) been more than the money they have earnt*".

[105] Mr Paul Ferreira was the North West Organiser for the CFMMEU Construction and General Division Western Australia Branch, and had previous employment experience as a safety representative and scaffolder in the building and construction industry. Mr Ferreira gave evidence[59] that most members in the North West area were employed on a fly-in fly-out arrangement. He said that the four weeks on and one week off roster was an issue for employees due to the long absence from their families, and the roster led to fatigue, particularly on fly-out days. Fly-out days were long days for employees as employees were often booked on the latest flight out to maximise the day's production. Mr Ferreira added that "*[i]t's only a matter of time before a worker will be killed falling asleep behind the wheel of a car after being up for over 24 hours*". The roster also led to other health impacts, and there was little mental health support for employees who experienced difficulties in coping with being away from their families. Mr Ferreira described the concerns employees had raised in relation to accommodation arrangements. He gave evidence that "*motelling*" affected employees' mental health and hygiene, and that "*bunking*" affected employees working opposite shifts and privacy when making personal phone calls. Mr Ferreira also gave evidence regarding the expenses associated with camp accommodation for shutdown employees and employees performing short stints. Mr Ferreira stated that "*[d]epending on which camp they stay at accommodation and meals range from $160.00 per night to $260.00 per night. Occasional meals are charge[d] at $24 to $27 per meal*". In addition to concerns with the expenses associated with camp accommodation, the "*downward pressure on wages"* meant that employees *"are increasingly depending on their wife's and partners to also work and help support household expenses thus putting further pressure on their relationships*". There had been a downturn in work relating to the big projects in the north-west, and employers were using "*baseline agreements*" in which wages and conditions were just above the award and "*vastly inferior*" to the Wheatstone project.

[106] Kris Woodward was employed as an advanced rigger, and had worked as a fly-in fly-out employee for more than 10 of the 15 years he had spent in the building and construction industry. Mr Woodward gave evidence[60] of the difficulties experienced by employees working on the Barrow Island project, particularly in relation to the negotiation of a new enterprise agreement. Mr Woodward stated that employees experienced a "*big shock discovering how hard it was to put a case forward for change*", and in the build-up to the previous agreement's expiry date several employees had committed suicide. Mr Woodward

[59] Exhibit 36, Witness Statement of Paul Ferreira dated 2 December 2016; Transcript 5 April 2017 PN2258-PN2318

[60] Exhibit 37, Witness Statement of Kris Woodward dated 2 December 2016; Transcript 5 April 2017 PN2332-PN2390

gave evidence in relation to the survey that Barrow Island employees had participated in as part of the negotiations for the new enterprise agreement. The survey had asked employees to choose the kind of roster system they would like to work. In discussing the survey results, Mr Woodward revealed that a shorter roster which included more time at home seemed to be the most important outcome to employees. This meant that there was "*[m]ore time out of isolation and at home with our families, time spent re-setting and re-connecting with loved ones*". Mr Woodward gave evidence of the impact of distant work on employees, and said that poor internet and phone reception could create stress for employees, and that the main contractor could have improved the communication facilities. During cross-examination he clarified that employees at the Barrow Island project site asked their employer several times to fix the connection issues, however it was Chevron (the main contractor) that controlled and was responsible for the facilities and that had refused to fix the issues. Mr Woodward was aware that the Kellogg's joint venture telecommunications supervisor had directly asked Chevron to fix the issues.

[107] Evidence was also given by Mr David Kirner, a District Secretary for the CFMMEU, who has worked for the CFMMEU since 1987.[61] Mr Kirner gave evidence regarding the accommodation facilities that were provided for employees under the Joinery Award who were required to live away from home, particularly those employed as glaziers, cabinetmakers and joiners. Mr Kirner said that employees on a project who travelled from South Australia to New South Wales had their accommodation paid for and sometimes their meals paid for such as breakfast. Mr Kirner said that on a project involving employees who travelled from South Australia to Queensland, employees were generally provided apartments with cooking facilities. Mr Kirner was not required for cross-examination.

AWU

[108] The AWU called evidence from Jeffery Sharp, an Organiser for the AWU who had previously worked in the construction industry for 41 years.[62] He gave evidence that "*gate starts*", where employees provided a false local address so that the employer did not have to pay the living away from home allowance, was a big issue in the industry and that "*only a small number of employees who are working on a distant or remote job will actually be paid living away from home allowances and expenses, while a large percentage of workers will do gate starts*". Mr Sharp said that recently he had been approached by about 20 workers who had given a local address at the request of their employer, and who now wished to claim a living away from home allowance. During cross-examination, Mr Sharp said that he could not remember bringing any disputes or claims on behalf of those employees.

[109] Mr Sharp also gave evidence that in his experience, workers were opposed to "*motelling*" or "*hot bedding*", where workers are required to pack up their belongings and vacate their room when they are on leave or rest and recreation. In discussing motelling, Mr Sharp said that "*[w]orkers on construction jobs are performing hard manual labour, often in hot conditions, and will come back to their rooms, and lie on their beds, covered in sweat. Workers do not want to use a mattress that other workers have sweated all over*". Mr Sharp

[61] Exhibit 16, Witness Statement of David Kirner dated 1 December 2016.

[62] Exhibit 10, Witness Statement of Jeffrey Sharp dated 9 December 2016; Transcript 4 April 2017 PN1091-PN1153

also said of motelling is that it is "*a big inconvenience to have to pack your gear away, and set it back up somewhere else*".

[110] Mr Sharp described arrangements whereby employers provided accommodation only and provided a meal allowance. In that circumstance employees usually received a meal allowance of between $50 and $80 per day which "*will not always cover the costs of meals*" depending on the region and remoteness of the location. Mr Sharp also gave evidence about the impact distant work and long periods away from their families had on employees. He said that the time spent on travel to and from distant work caused concern for employees because it reduced their time spent at home. Mr Sharp stated that being away from families for long periods could lead to serious problems such as "*marriages breaking down, children developing behavioural problems, and workers experiencing depression, anxiety and even attempting or committing suicide… [and] can also find it difficult to adjust back to life at home*". Mr Sharp also gave evidence that employees became fatigued when they worked long rosters and by the end of the roster "*they are drained and short-tempered*" which may lead to accidents or fights. During cross-examination, Mr Sharp confirmed that the types of employees who had experienced issues such as marriage breakdowns were/are fly-in fly out and drive-in drive-out employees who had worked those types of arrangements for a long period. He also gave evidence that when workers were on longer rosters requiring them to be away from home for longer they suffered from boredom, which made abuse of alcohol or other drugs more likely.

MBA

[111] Mr Peter Glover, the Director of Construction of Master Builders Association of NSW (MBA NSW) gave evidence in support of the MBA's claim.[63] Mr Glover said that there was confusion over the meaning of "*board and lodging*" in clause 24 and whether a meal allowance was payable in addition. He said that he advises members that employees are not entitled to the meal allowance if they were provided board and lodging, which included three meals per day.

Submissions

CFMMEU

[112] The CFMMEU submitted that the last major change to the living away from home provisions of the Building Award, or its predecessor awards, were made nearly 40 years ago, and accordingly it was appropriate to modernise the clause and update it to reflect current practices and the cost of accommodation and meals. The CFMMEU submitted that the living away from home provisions of the Building Award, Joinery Award and Mobile Crane Award should be varied to make entitlements clearer; to ensure allowances payable reflect the current costs of accommodation and meals; to better reflect modern means of transport; and to provide for improved rest and recreation entitlements.

[113] In relation to clause 24.1 of the Building Award, the CFMMEU submitted that while the provision disqualified an employee from the entitlements if they give a false address, there

[63] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

was no corresponding provision in clause 24 that dealt with employees being pressured by employers to give a false address. Its proposed clause 24.2(c) would address the problem of workers facing undue pressure to give a false address in order to secure work on distant projects.

[114] In relation to the current monetary allowances provided in clause 24.3(a)(i) of the Building Award, the CFMMEU submitted they were woefully inadequate and needed to be significantly increased. The payment of the allowance had changed over time, and was now intended to cover the costs incurred by employees rather than the difference between the costs incurred and the money saved for not living at home. Its calculations of the appropriate amount were based on the cost of reasonable board and lodgings consisting of furnished accommodation inclusive of a separate bathroom of at least a three star level, and the cost of three adequate meals per day, and were based on the use of surveys and publications of meal costs and accommodation charge rates. Based on its calculations, the current allowance should be increased to $130.55 per day or $913.88 per week.

[115] In relation to its claim to insert a new clause 24.3(a)(iii) to cater for situations where employers provide accommodation and want to pay an allowance for meals to the employee, the CFMMEU submitted that the appropriate amounts were a $15 breakfast allowance, $15 lunch allowance and $30 dinner allowance. It noted that the CCF's proposed clause 24.3(a) did not suggest any values for their proposed meal allowances.

[116] In relation to clause 24.3(b), the CFMMEU submitted that its proposed clause would specify the standard of accommodation to be provided, and also the means of communication to be provided in a manner which reflected the modern technology now available. These minimum requirements would meet the standards recommended by the International Labour Organisation and considered in various disputes before the Commission. Its proposed new paragraph (c) in clause 24.3 would require employers to provide employees who are required to live in a construction camp at a remote location with their own specific room for the duration of the time spent living away from home. The traditional practice on remote projects had been for employees to have their own rooms in a construction camp for the duration of their employment on the project, but recently employers had introduced a practice whereby an employee's belongings, which were usually kept in their accommodation, were packed into boxes when an employee left for a period of rest and recreation so that the room could be given to another worker. On the employee's return the employee would be allocated a room, which might be a different room in another location in the camp which the employee would then have to refurbish with his or her belongings. The CFMMEU submitted that this practice was strongly opposed by construction workers and was inconsistent with the ILO recommendations in that it represents an undue disturbance by external factors on the privacy of workers.

[117] The CFMMEU sought that clause 24.5 be varied to increase the weekly and daily camping allowance where free messing was not provided, and to clarify the operation of this clause. It submitted that the camping allowance was intended to compensate employees living in a camping site or caravan park for being accommodated in a lesser standard than hotel accommodation, for not being provided with a cook, and for providing their own food including the preparation of the food and cleaning up afterwards. It submitted that rather than trying to set monetary rates for each of the above disadvantages, the simple option was that

the amount should not be less than the amounts determined for employees who are provided with accommodation in a hotel or motel but who are required to purchase their own meals.

[118] In relation to clause 24.7(a)(i) of the Building Award, the CFMMEU contends that it should cover transport from the employee's usual place of residence, and for it to be updated to refer to modern travel arrangements. The reference to "*second class rail*" was outdated and should be deleted. Taxis should be added as a form of public transportation that may be used. In most cases, it was submitted, an employee would utilise a combination of the travel methods identified in the clause. In relation to clause 24.7(f), the CFMMEU submitted that the rest and recreation provisions were outdated and no longer appropriate, and that the evidence had identified compelling reasons for employees to return home on rest and recreation after shorter periods working on distant jobs, and that the rest and recreation period be calculated exclusive of the time it took to return home at the beginning of the period and to return to work at the end of the period.

AWU

[119] The AWU supported the CFMMEU's submissions.

MBA

[120] The MBA submitted that its proposed variation to the term "*board and lodging*" in clause 24.3(a) of the Building Award and clause 24.5(a) of the Joinery Award was a technical clarification that would alleviate confusion arising from the existing wording and ensure that the awards remained clear to users. The confusion arose where employees believed that the award provision provided an entitlement to board and lodging as well as payment for meals or an allowance/reimbursement for meals that they consumed whilst living in those circumstances. The MBA sought to remove the ambiguity by clarifying that lodging is reasonable in a well-kept establishment and that reasonable board includes three adequate meals per day. In relation to its claim concerning the daily fares and travel allowance, it was submitted that it was illogical that the fares and travel allowance should be payable when an employee is required to reside adjacent to their place of work simply because they are not provided transport. The MBA sought to replace the word "*and*" with "*or*" in clause 24.7(d), so that employees are excluded from receiving the allowance if they reside on-site or adjacent to the site *or* where supplied with transport.

[121] The MBA opposed the CFMMEU's living away from home claim, and submitted that the claim would create an array of additional obligations on employers who engaged workers in circumstances involving distant work. It opposed the proposed new clause 24.2(c) on the basis that it was not necessary to meet the modern awards objective. The Act already contained provisions which provide relief against undue influence and coercion, and there was no need to include an express provision requiring those covered by the awards to not engage in illegal conduct. In relation to the claim to increase the living away from home allowance in clause 24.3(a)(i), it was submitted that the CFMMEU did not substantiate the proposed increase, nor provide the formula or rationale for its calculation. There was also no evidence that the current method used to determine allowances is deficient, and the proposed amounts would be an unreasonable and unjustified increase to the safety net by almost doubling the existing allowances.

[122] The MBA opposed each of the CFMMEU proposals that would require an employer to provide additional facilities to employees engaged in distant work. It submitted that these provisions would mandate the provision of facilities that would impose significant increase to operational costs, require those facilities to be provided to all employees engaged in distant work regardless of the circumstances, mandate obligations on employers to provide for matters above and beyond a fair and relevant minimum safety net, and deal with matters that are already conventionally dealt with by enterprise agreements and project specific arrangements.

[123] The proposal that taxis be added as a form of transportation in clause 24.7(a) was opposed, the MBA contending that it was unnecessary given the suite of travel options currently available to employees. Where an employee was required to travel to a distant job, taxis were likely to be the least practical and cost-efficient form of transport. The MBA opposed the CFMMEU's claims in relation to clause 24.7(f) on the basis that they constituted a significant increase in existing rest and recreation entitlements under the Building Award, did not reflect what could be considered a fair and relevant minimum safety net, and would impose an unreasonable financial burden on business if they were to be applied.

HIA

[124] The HIA noted that those operating in the residential construction industry were largely unaffected by the living away from home provisions, but supported the submissions made by the other employer groups. It submitted that the CFMMEU's proposed new clause 24.2(c), which would prohibit employers exerting undue influence on employees to provide a false address, would introduce a significant degree of uncertainty and afford employees an unsubstantiated level of discretion in relation to entitlements. The proposed increases to the living away from home allowance would have a significant effect on businesses, yet the materials relied on by the CFMMEU were insufficient in light of the significant nature of the change sought. The proposed variation to clause 24.3(b) of the Building Award would introduce a significant number of additional requirements in relation to what would be considered accommodation of a reasonable standard, some of which are impractical and went beyond what would be an appropriate part of the minimum modern award safety net. The HIA submitted that the CFMMEU had provided no evidence to justify the claimed significant increase in camp allowances.

CCF

[125] The CCF submitted that a new clause specifying the value of the meals included in the living away from home allowance would clarify the entitlements of employees who are provided accommodation only by the employer. The current lack of clarity in the Building Award in this respect caused considerable tension between employees and employers, in circumstances where many employers preferred the reduced administrative burden of paying for an employee's accommodation directly to an establishment and paying all meal allowances directly to the employee.

Ai Group

[126] The Ai Group submitted that the CFMMEU had failed to provide sufficient evidence to demonstrate that its claims were necessary to ensure that the awards achieved the modern awards objective, including by providing a fair and relevant minimum safety net of terms and conditions.

ABI and NSWBC

[127] ABI and NSWBC submitted that evidence given by CFMMEU officials alleging that some employers may pressure employees to provide false addresses, could not be relied upon to support a claim that the proposed "*undue influence*" provision in clause 24 was necessary. Moreover the proposed provision was unnecessary because the issue of undue influence is dealt with in section 344 of the Act. They also submitted that the evidence filed by the CFMMEU did not substantiate that there was an issue in the industry whereby employees were only paid the minimum allowance or that employers were refusing to pay employees higher allowances where employees had advised they had had to outlay an amount greater than the award amount.

Provisional conclusion and further submissions

[128] In the August 2017 Statement[64] we expressed the provisional view in relation to the claims regarding the living away from home/distant work entitlements that clauses 24.1-24.3 should be varied to provide as follows:

> **24.1 Qualification**
>
> The entitlements under this clause apply when an employee is employed on construction work at such a distance from the employee's usual place of residence or any separately maintained residence that the employee cannot reasonably return to that place each night, provided that:
>
> **(a)** the employee is not in receipt of relocation benefits;
>
> **(b)** the employee is maintaining a separate place of residence to which it is not reasonable to expect the employee to return each night; and
>
> **(c)** the employee has provided the correct details of their usual place of residence, or any separately maintained address, to the employer.
>
> **24.2 Employee's address**
>
> **(a)** On engagement, an employee must provide the employer with their address at the time of application and the address of any separately maintained residence. An employee must not knowingly make a false statement regarding the details required in clause 24.1(c).

[64] [2017] FWCFB 4239

(b) The employer must take reasonable steps to verify the address details provided by the employee. Reasonable steps may include requesting documentary proof of the address, such as by the provision of a driver's licence, but do not include investigating the veracity of the documentary proof that is provided by the employee.

(c) Despite clause 24.1(c), the employer will be liable to pay or provide the entitlements under this clause to an employee who satisfies clause 24.1(a) and (b) if the employee has failed to provide the correct address details and the employer has failed to take reasonable steps to verify the address details in accordance with paragraph (b). However the employer will not be liable to pay or provide the entitlements under this clause if the employer has requested documentary proof of the employee's address details and the employee has provided fraudulent documents in response to that request.

24.3 Entitlement

(a) Where an employee qualifies under clause 24.1 the employer will:

(i) pay the employee the greater of $68.45 per day or an amount which fully reimburses the employee for all reasonable accommodation and meal expenses incurred;

(ii) provide the worker with accommodation and three adequate meals each day;

(iii) provide the worker with accommodation and reimburse the employee for all reasonable meal expenses; or

(iv) where employees are required to live in camp, provide all board and accommodation free of charge.

(b) Any accommodation provided under paragraph (a) must be of reasonable quality and must include reasonable ablution, laundry, recreational, kitchen, external lighting, communications and fire protection facilities in accordance swith contemporary community living standards having regard to the location in which the work is performed.

[129] In response to this provisional view, the CFMMEU submitted that:

- the proposed changes to clause 24.2 went some way to address the CFMMEU's concerns about "*gate starts*", but did not deal with the issue of undue pressure placed on the employee by the employer;

- the proposed clause 24.3(a) did not change the amount of the allowance, but it did remove the discretion of the employer not to reimburse any higher expense that might be incurred; and

- the proposed clause 24.3(b) did not add anything to the current provision and did not address the issues raised by the CFMMEU concerning single room accommodation, "*motelling*" and internet and mobile access.

[130] The AWU submitted that it continued to support the variations proposed by the CFMMEU. Specifically in relation to clause 24.3(b), the AWU submitted that "*community living standards having regard to the location on which the work is performed*" was not an appropriate reference point for accommodation requirements, since distant work was often performed in quite remote locations where communities may endure relatively low living standards, and proposed that clause 24.3(b) instead provide as follows:

> "Any accommodation provided under paragraph (a) must be in accordance with contemporary living standards taking account of limitations arising from the location in which work is performed and must include reasonable washing, laundry, recreational, kitchen, external lighting, communications and fire protection facilities."

[131] MBA submitted that the proposed clause 24.2(b) placed the onus on the employer to take reasonable steps to verify the employee's address was true and correct, but this capacity was limited, and expressly prohibited questioning the veracity of any document provided by the employee as proof of address. This meant that the employer was not able to avoid paying the entitlement in clause 24.1 by establishing that the employee's proof of address was fraudulent. The MBA also opposed the deletion of the existing clause 24.2, so that employees would not "game" the provision by altering an address to trigger the entitlement in circumstances where they had earlier provided a false address in order to secure employment. It also submitted that the proposed clause 24.2(c) should be amended to impose a positive obligation upon employees to provide evidence of their address to the employer in order for them to receive living away from home entitlements.

[132] In relation to proposed clause 24.3, MBA advanced a re-drafted provision which requires any reimbursement of expenses to be at the request of the employee, removes the requirement for "*full*" reimbursement, and makes it clear that the modes of provision of the living away from home entitlements were alternatives available at the election of the employer.

[133] The HIA opposed the proposed changes to clause 24.2 insofar as it imposed on the employer additional requirements to take reasonable steps to verify an employee's address, required the employer to pay the allowance if the employee failed to provide the correct address but the employer failed to take reasonable steps to verify the address, and entitled an employee to subsequently change their address and access the allowance. The HIA did not oppose the proposed new clause 24.3.

[134] The CCF also opposed the proposed deletion of clause 24.1(b) and the proposed amended clause 24.2 on the basis that it reversed the current award obligation, required payment of the entitlement unless the employee provided fraudulent documents, and did not require the consent of the employer in respect of a change of address. In relation to the proposed clause 24.3(a), the CCF opposed there being an entitlement to a higher reimbursement-based payment and, in respect of paragraph (iii), pressed its proposal for

separate specified amounts for breakfast, lunch and dinner allowances. The CCF supported the proposed clause 24.3(b).

Consideration

The false address issue

[135] We are satisfied, based on the evidence adduced by the CFMMEU, that some employers operating on distant construction projects are avoiding the payment of living away from home allowance entitlements by conditioning offers of employment at such projects upon the provision of a local address by the prospective employee, even where the employer knows this not to be the employee's true address. The evidence is not such as to permit us to state any precise conclusion about the incidence of such avoidance activity, but it is sufficient to enable us to conclude that it constitutes a significant problem for some employees working at remote locations. The practical result is that there are some employees living away from home at distant work locations who are not receiving their living away from home entitlements under the award. Clauses 24.1(b) and 24.2 protect against employees accessing the living away from home allowance entitlement by providing a false address. However the provisions offer no protection to employees who may be encouraged or "required" by an employer to provide a false address so as to *disentitle* such employees to the allowance. A provision which is capable of ready avoidance in this way is incapable of forming part of a fair and relevant safety net, having regard in particular to s 134(1)(g), and therefore does not meet the modern awards objective.

[136] However, we are not satisfied that the CFMMEU's proposal of an award prohibition against "undue influence" on the part of the employer constitutes a satisfactory solution to the difficulty, for two related reasons. First, the concept of "undue influence" is difficult to define, and requires an assessment as to whether a person's free will has been substantially subordinated to that of the other party.[65] Modern Award terms should provide clear and certain standards for compliance. Secondly, it seems to us to be a provision more directed at award enforcement proceedings in a Court, where an employee has been denied living away from home entitlements, rather than a workable provision designed to ensure that employees receive living away from home entitlements. The CFMMEU's own evidence suggests that employees were reluctant to seek enforcement of living away from home entitlements. The resolution proposed by the CFMMEU, would likely not be effective.

[137] We consider that a better approach would be to ensure that living away from home entitlements are not determined by reference to assertions about an employee's residential address which are not the subject of basic verification steps. The current clauses 24.1 and 24.2 provide adequate procedures for the employer to verify the addresses of an employee in order to avoid having to pay living away from home entitlements to an employee on the basis of a false address provided by the employee. However they do not provide adequate steps to ensure that employer and employee collusion about an address is avoided. Accordingly we consider that clause 24.2 of the Building Award (and the equivalent provisions in the Joinery Award and the Mobile Crane Award) should be modified in accordance with the draft provisions contained in the August 2017 Statement. Those provisions would:

[65] *Thorne v Kennedy* [2017] HCA 49 at [30]-[32]

- make it a condition of the provision of living away from home entitlements that the employee has provided correct residential address details;

- prohibit the employee from knowingly making a false statement regarding address details;

- require the employer to take reasonable steps to verify the address details provided by the employee, which may include requesting documentary proof of the address such as the provision of a driver's license;

- require the employer to pay living away from home entitlements where the employer has failed to take reasonable steps to verify the address details provided by the employee, even if the address details are not correct, in order to ensure that the employer does not encourage, influence or collude in the provision of a false address that would deny the employee access to the entitlements; and

- ensure that the employer is not liable to pay living away from home entitlements where the employer has requested documentary proof of the employee's address and the employee has provided fraudulent documents in response.

[138] The submission advanced by MBA that the proposed clause 24.2(b) in the August 2017 Statement would prohibit employers from questioning the veracity of documents provided by employees as proof of address is based on a misreading of the provision and is incorrect. The provision would *require* the employer to take reasonable steps to verify the employee's address details, but that requirement does not include investigating the veracity of documents supplied by the employee, so the steps *required* to be taken by the employer are limited in that respect. However there is nothing in the clause which is intended to *prohibit, limit or prevent* the employer from taking the further step of investigating the veracity of any documents provided by the employee. Clause 24.2(c) makes clear that if the documents are established to be fraudulent there is no liability on the part of the employer to pay living away from home entitlements.

[139] MBA opposed the deletion of the current clause 24.1(b), which it submitted had the rationale of preventing an employee from supplying a false address which would disentitle the employee to living away from home entitlements, so as to gain employment at the outset, and then subsequently changing residential addresses in order to gain access to the entitlements. To that extent, the provision has become unnecessary given the additional procedures we propose to add to prevent employees gaining employment by providing a false address. However we accept that an employer who has engaged an employee on the basis that the employee genuinely resides locally, and is not entitled to living away from home entitlements, should not subsequently be required to pay such entitlements on the basis that the employee has chosen to relocate to a distant location absent the employer's consent. Consequently the existing clause 24.2(b) will be retained, and added as clause 24.2(d) to the new provisions set out in the August 2017 Statement.

Living away from home allowance entitlement

[140] We accept the case of the CFMMEU that, in respect of the employer's option to pay the living away from home entitlement as a monetary amount to cover both accommodation and meals, the current allowance of $70.81 per day (or $494.94 per week) is self-evidently inadequate in most circumstances. The amount would barely be adequate to cover the expense of three meals per day let alone accommodation. The currently prescribed allowance cannot be characterised as either fair or relevant and does not achieve the modern awards objective. However we are not persuaded that the allowance should be increased to $130.55 (or $913.88 per week) as proposed by the CFMMEU. The material advanced by the CFMMEU in support of this amount was insubstantial. There is no evidence identifying the actual costs typically incurred by employees in obtaining accommodation and meals at distant work locations when the allowance in clause 24.3(a)(i) of the Building Award was paid. In any event we do not consider it appropriate to increase the safety net allowance to such an extent in circumstances where the actual cost of the meals and accommodation it is intended to cover are likely to vary significantly depending upon the locality of the work. We consider a more effective and fairer approach is to retain the minimum amount but to allow employees to be reimbursed reasonable accommodation and meal costs incurred where these exceed to the minimum Award amount. As previously noted, the MBA submitted that there should not be "*full*" reimbursement, and the additional amount should only be payable on employee request. We reject these submissions. We do not consider there is any rationale for an employee who has been required to perform distant work being required to make a request to be paid an amount that covers these costs. Clause 24.3(a) of the Building Award will therefore be varied as proposed in the August 2017 Statement.

[141] We accept the submissions advanced by various parties that the employer should have the option under clause 24.3, as part of a fair and relevant safety net, of providing accommodation and paying an allowance to cover meals. However the CFMMEU's proposal earlier discussed was not supported by any probative material. The CCF did not propose any amounts for the allowances. We consider that a better approach is to provide for reimbursement for all reasonable expenses for meals. Clause 24.3(a)(ii) will therefore be added to the Building Award as proposed in the August 2017 Statement.

[142] Contrary to MBA's submissions, we consider that the proposed clause 24.3(a) in the August 2017 Statement makes it clear that the employer has four alternative ways of dealing with the living away from home allowance. We also do not accept MBA's submission that there is any ambiguity in the existing clause 24.3(b)(ii), or in clause 24.3(b)(ii) proposed in the August 2017 Statement. In both cases it is clear that where the employer provides both accommodation and meals of the requisite standard, there is no additional obligation to pay the allowance in clause 24.3(a)(i).

[143] The Building Award will therefore be varied in terms of the proposed clause 24.3(a) contained in the August 2017 Statement, and equivalent variations will be made to the Joinery Award and the Mobile Crane Award.

Standard of accommodation

[144] In respect of the current prescription of the standard of accommodation to be provided (clause 24.3(b) of the Building Award), we accept that it is in some respects outdated, is not suited to form part of a relevant safety net, and therefore does not meet the modern awards objective. However we do not consider that the detailed prescription of the accommodation facilities proposed by the CFMMEU is appropriate for a fair and relevant modern award safety net, for the following reasons. First, although the standards proposed by the CFMMEU involving particular separate bedrooms and bathrooms for each employee and the provision of internet, email and mobile phone coverage may be reasonable and appropriate for very large projects of the type carried out as part of mining construction from time to time, it cannot be said that they are reasonable or appropriate for *all* projects requiring employees to live away from home. An employer engaged on a project which is small in scale or at a particularly remote location, will likely encounter difficulty and not insignificant expenditure in providing all of these facilities. Secondly, at many projects, the head contractor will have responsibility for and control over the facilities to be provided to employees living away from home on or near to the site. That head contractor may employ few, or no, employees engaged at the site. Modern award obligations of the type proposed by the CFMMEU would bind sub-contractors employing persons on the project who are unlikely to be in any position to control or influence the standard of accommodation provided for the project, and thus make compliance an impracticable proposition. Thirdly, many employers engaged on larger scale projects enter into greenfields agreements which usually displace the operation of the Building Award. Such agreements are a more suitable vehicle for the establishment of detailed prescriptions for the standard of accommodation to be provided, since they can be adjusted to meet the circumstances of the particular project.

[145] A more general prescription concerning the standard of accommodation at distant projects, updated to meet contemporary standards, is we consider an approach which would better suit the establishment of a fair and relevant safety net as required by the modern awards objective. The proposed clause 24.3(b) in the August 2017 Statement was intended to propose a prescription of that nature. However we accept the criticism of the drafting of the proposed provision advanced by the AWU to which we have earlier referred. We propose broadly to accept the alternative formulation proposed by the AWU. Accordingly clause 24.3(b) will be varied to read as follows:

> "Any accommodation provided under clause 24.3(a) must be in accordance with contemporary living standards taking into account the particular circumstances of the location in which the work is performed and must include reasonable washing, laundry, recreational, kitchen, external lighting, communications and fire protection facilities."

[146] Corresponding variations will be made to the Joinery Award and the Mobile Crane Award.

Camping allowance

[147] We accept the CFMMEU's submissions that there is a lack of clarity associated with the camping allowance provision in clause 24.5 of the Building Award, although this lack of

clarity extends to other parts of clause 24 as well. The current clause 24.3(a)(iii) establishes the starting principle that when employees are required to live in camp, the employer is to provide food and accommodation free of charge. Clause 24.4(a) by implication concerns camps, since that is what clauses 24.4(b), (c) and (d) are expressly concerned with. It provides that where there are 10 or more employees engaged, the employer is to provide a cook (presumably for the purpose of the provision of meals free of charge, consistent with clause 24.3(a)(iii)). Where there are less than 10 employees, the employer is to reimburse the costs of food purchased for the employee's own use or meals purchased in the nearest recognised centre. In this situation, clause 24.4(a) recognises that the provision of food free of charge may occur by way of the reimbursement of the cost of food.

[148] However clause 24.5 then provides that where free messing is not provided, the employee must receive a "*camping allowance*" of $201.48 per week or $28.76 per day. This is apparently inconsistent with the requirement in clause 24.4(a) that a cook must be provided where there are 10 or more employees. Additionally, if the CFMMEU is correct in considering that the camping allowance is to compensate for the *cost* of food, as well as the disability concerned in an employee having to prepare or purchase his or her own meals, it is inconsistent with the notion of reimbursement of meal expenses in clause 24.4(a) which applies where no cook is provided and is plainly inadequate in quantum. Further, clause 24.6, which facilitates charging for meals in a construction camp, is inconsistent with the principle established in clause 24.3(a)(iii) that meals in camp are provided free of charge.

[149] It may be the case, as the CFMMEU submitted, that clauses 24.4 and 24.5 have their origins in predecessor provisions concerned with a different type of camp (camping sites and caravans) than clause 24.4(a)(iii) (a modern construction site). It may also be the case that clause 24.6 was intended to be concerned with meals in addition to the three basic meals per day. But none of these things are apparent in the text of the current provisions.

[150] We consider that these provisions should be clarified and simplified to be consistent with the following propositions:

- the employer should bear the cost of reasonable meals for employees required to stay in a camp of whatever sort;

- where it is not practicable for the employer to directly provide the meals, the employer should be required to reimburse the employee for the reasonable expense of meals;

- it is not possible to fix an allowance to cover the cost of meals, since the cost will be greatly variable depending on where the camp is located;

- detailed prescriptions about the circumstances in which the employer is to employ a cook or a camp attendant have no place in a modern safety net award, and the employer should be at liberty as to how it provides meals of a reasonable standard and maintains a camp in a clean and hygienic condition (such as, for example, by the use of contractors);

- the camping allowance should remain, on the basis that it compensates for the disability of the employee having to purchase and/or prepare his or her own food; and

- there is no need in a modern safety net award for a provision to facilitate charging for extra meals; this can be dealt with at the workplace level.

[151] Consistent with these principles, we have formed the provisional view that clauses 24.4, 24.5 and 24.6 should be replaced with the following new provisions:

"**24.4 Reimbursement of meal expenses for living in camp**

Where it is not possible for the employer to provide meals free of charge directly to employees required to live in camp, the employer shall:

(a) reimburse employees for food reasonably purchased by the them for their own use or for the reasonable cost of meals consumed in the nearest recognised centre; and

(b) pay an allowance of $201.48 for every complete week the employee is available for work, or in the case of broken weeks $28.76 per day including any Saturday or Sunday if the employee is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance will not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance will not be payable for the Saturday and Sunday.

24.5 Camp conditions

(a) The employer must ensure that a camp is maintained in a clean and hygienic condition.

(b) Where an employer has established a camp site and provides facilities for employees living in their own caravan, the employer must provide reasonable space for the caravans."

[152] We will provide interested parties an opportunity to file any further submissions they wish to make in respect of the above proposed new provisions within 28 days of the date of this decision.

Travelling expenses – modes of travel

[153] We accept that the modes of travel referred to in brackets in the first item point in clause 24.7(a) of the Building Award are partially outdated and are therefore no longer relevant for the purpose of the modern award safety net. However we do not accept the

CFMMEU's proposal to correct this by simply by adding to and modifying the listed modes of travel. They are merely examples of modes of transport which may or may not be appropriate in particular circumstances. Even if the list is updated as proposed by the CFMMEU, it remains non-exhaustive and non-prescriptive and is likely to become outdated again with the passage of time. We consider that the words in brackets do not serve any useful purpose and that the better course is to delete them altogether. Clause 24.7(a) of the Building Award will be varied accordingly, and an equivalent variation will be made to the Joinery Award.

Rest and recreation

[154] We are not satisfied that the limited evidence before us supports the major change to the rest and recreation provision proposed by the CFMMEU. The proposal would involve the universal introduction of a" three weeks on, one week off" roster. Such a roster has generally not been adopted in greenfields agreements applying to major construction projects, where (with the agreement of the CFMMEU and/or the AWU), a "four weeks on, one week off" roster is the usual standard.[66] The evidence adduced by the CFMMEU referred to the personal and family difficulties encountered in the performance of building and construction work at remote construction projects. However that evidence, which was often expressed in emotive and sometimes in exaggerated terms, was not persuasive that the change proposed by the CFMMEU ought to be adopted. There was no expert evidence adduced dealing with any health and safety detriments contended by the CFMMEU, including the incidence of suicide, drug and alcohol use, much less that this was associated with a particular form of roster or that the risks would be mitigated if a "three weeks on, one week off" roster were to be adopted. Nor is there any evidence directed to the potential impact of such a roster on cost and the efficiency of major construction projects, or of any consequential effects on employment. The CFMMEU's submissions also fail to take into account that for, many employees, remote work represents an opportunity to maximise their earnings in a comparatively short period of time, and does not represent a long-term lifestyle choice.

[155] However we are persuaded that one aspect of the CFMMEU's claim concerning rest and recreation does raise an issue of merit. The CFMMEU's claim was that the time spent on travel to the employee's home for the purpose of a period of rest and recreation and the return travel to the work site should not be included in the seven-day rest and recreation period. We consider that the evidence adduced by the CFMMEU establishes that some employers seek to save expenses on air travel by booking the most inexpensive flights rather than flights which result in the least travel time to and from the employee's home. In some cases, as a consequence, travel time for the employee is unnecessarily prolonged and the time spent at home by the employee is reduced. To the extent that clause 24.7(f)(i) does not place a reasonable restriction on this practice, we consider that it does not constitute part of a fair and relevant safety net and does not achieve the modern awards objective. We consider a reasonable limitation to be that at least five full days of the prescribed period of rest and recreation should be exclusive of travel time. That limitation should be adopted within the context of a minimum "four week on, one week off" roster in accordance with the industry practice. We also propose to remove the distinction between modes of travel with necessary consequential variations to clause 24.7(f).

[66] See *Thiess Pty Ltd Wheatstone Project Agreement 2012* [2012] FWAA 7466

[156] Accordingly clause 24.7(f) will be varied to provide as follows:

"**(f) Rest and recreation**

Where an employee is engaged on a job which qualifies the employee for the provisions of this clause and the duration of work on the job is scheduled for more than 8 weeks the employee will be entitled to rest and recreation in accordance with the following:

(i) After each continuous 4 week period of work away from home the employee will be entitled to a minimum period of 7 days unpaid rest and recreation leave at the employee's usual place of residence, of which 5 days shall be exclusive of travel from the job to the employee's usual place of residence and return to the job. On each occasion that the employee returns to their usual place of residence they will be paid for travel expenses in accordance with clause 24.7(a), (b) and (c) above.

(ii) After 12 weeks continuous service (inclusive of periods of rest and recreation) the employee will be entitled to 2 days' paid rest and recreation leave and an additional paid day of rest and recreational leave for each subsequent 12 weeks of continuous service.

(iii) Payment for leave and travel expenses will be made at the completion of the first pay period commencing after date of return to the job.

(iv) The provisions of clause 24.7(f)(i) do not continue to apply where the work the employee is engaged upon will terminate in the ordinary course within a further 28 days after the last period of rest and recreation leave.

(v) Service will be deemed to be continuous notwithstanding an employee's absence from work as prescribed in this clause.

(vi) Variable return home

In special circumstances, and by agreement with the employer, the return to the usual place of residence entitlements may be granted earlier or taken later than the prescribed date of accrual without alteration to the employee's accrual entitlement.

(vii) No payment instead

Payment of travel expenses and leave with pay as provided for in this clause will not be made unless utilised by the employee.

(viii) Alternative paid day off procedure

If the employer and the employee so agree, any accrued rostered days off (RDO) as prescribed in clause 33–Ordinary hours of work, may be taken, and paid for, in conjunction with and additional to rest and recreation leave.

(ix) Termination of employment

An employee will be entitled to notice of termination of employment in sufficient time to arrange suitable transport at termination or must be paid as if employed up to the end of the ordinary working day before transport is available."

5. FARES AND TRAVEL PATTERNS ALLOWANCE

Current provisions

[157] Clause 25, *Fares and travel patterns allowance* of the Building Award currently provides as follows:

25.1 Employees will start and cease work on the job at the usual commencing and finishing times within which ordinary hours may be worked, and will transfer from site to site as directed by the employer. Other than in the case of an employee directed by the employer to pick up and/or return other employees to their homes, time spent by an employee travelling from the employee's home to the job and return outside ordinary hours will not be regarded as time worked. No travelling time payment is required except as provided for in clauses 21.1, 24.7, 25.5, 25.7 and 36.3. The fares and travel patterns allowance recognises travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work.

25.2Metropolitan radial areas

An employee, other than an employee in the metal and engineering construction sector who is required to commence or cease work at the employer's workshop, yard or depot other than on a construction site, must be paid an allowance of $17.43 per day for each day worked when employed on construction work, at a construction site located:

(a) within a radius of 50 kilometres of the GPO in a capital city of a State or Territory; or

(b) within a radius of 50 kilometres of the principal post office in a regional city or town in a State or Territory.

25.3Distant work

The allowance prescribed in clause 25.2 must be paid to employees employed on distant work (as defined in clause 24.1), when the work is carried out within a radius of 50 kilometres from the place where, with the employer's approval, the employee is accommodated.

25.4 Country radial areas

(a) An employer with a business or branch or section thereof (for the purpose of engagement) that is established in any place (other than on a construction site) outside the areas mentioned in clause 25.2, must pay their employees the allowances prescribed in clause 25.2 for work located within a radius of 50 kilometres from the post office nearest the employer's establishment.

(b) Where the employer has an establishment in more than one such place the establishment nearest the employee's nominated address will be used for purposes of this clause and employees are entitled to the provisions of clause 25.5 when travelling to a job outside such radial area.

25.5 Travelling outside radial areas

Where an employer requires an employee to travel daily from inside one radial area mentioned in clauses 25.2, 25.3 and 25.4, to work on a construction site outside that area, the employee will be entitled to:

(a) the allowance prescribed in clause 25.2 for each day worked; and

(b) in respect of travel from the designated boundary to the job and return to that boundary:

(i) the time outside ordinary working hours reasonably spent in such travel, which will be paid at the ordinary time hourly rate, and calculated to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be $0.47 per kilometre where the employee uses their own vehicle.

25.6 Residing outside radial areas

An employee whose residence is outside the radial areas prescribed in clauses 25.2, 25.3 and 25.4 and who crosses a radial boundary to travel to a construction site, will be entitled to the allowance prescribed in clause 25.2 for

each day worked but not payment for the time reasonably spent in travelling from the designated radial boundary to the job and return to the radial boundary.

25.7 Travelling between radial areas

The provisions of clause 25.5 will apply to an employee who is required by the employer to travel daily from one of those areas mentioned in clauses 25.2, 25.3 and 25.4 to an area, or to another area, mentioned in clauses 25.2, 25.3 and 25.4.

25.8 Provision of transport

(a) No allowances, other than those prescribed in clauses 25.5 and 25.7 and in the circumstances described in clause 25.8(b), will be payable on any day on which the employer provides or offers to provide transport free of charge from the employee's home to the place of work and return.

(b) The allowance prescribed in this clause will be payable on any day for which the employer provides a vehicle free of charge to the employee for a purpose related to their contract of employment, and the employee is required by the employer to drive this vehicle from the employee's home to their place of work and return.

25.9 Transfer during working hours

(a) An employee transferred from one site to another during working hours will be paid for the time occupied in travelling and, unless transported by the employer, must be paid reasonable cost of fares by the most convenient public transport between such sites.

(b) Provided that where an employee agrees to their employer's request to use the employee's own car for such a transfer, the employee must be paid an allowance at the rate of $0.78 per kilometre.

25.10 Daily entitlement

(a) The travelling allowances prescribed in this clause will be payable for:

(i) any day upon which the employee performs or reports for duty, or allocation of work; and

(ii) any rostered day off taken as prescribed in clauses 33—Ordinary hours of work, and 34—Shiftwork.

(b) The allowances prescribed in this subclause will be taken into account when calculating the annual leave loading.

(c) The allowances prescribed by this subclause will not be taken into account for calculating overtime, penalty rates, annual or personal/carer's leave entitlements.

25.11 Work in fabricating yard

When an employee is required to perform prefabricated work in an open yard and is then required to erect or fix on-site, the provisions of this clause will apply.

25.12 Apprentices

(a) Apprentices will be entitled to a proportion of the allowances prescribed in clauses 25.2, 25.3 and 25.4 in accordance with the following scale:

(i) on the first year rate—75% of amount prescribed;

(ii) on second year rate—85% of amount prescribed;

(iii) on third year rate—90% of amount prescribed;

(iv) on fourth year rate—95% of amount prescribed.

(b)

(i) Apprentices will only receive the allowances prescribed in clause 25.12(a) for days when they attend work and any rostered day off.

(ii) Apprentices will not be paid the allowance in clause 25.12(a) for days they attend an RTO for training and assessment in accordance with the contract of training.

(iii) When a school-based apprentice attends off-the-job training or assessment not at the school at which they are enrolled they will receive 25% of the allowance prescribed in clause 25.12(a).

25.13 Adjustment of living away from home—distant work and fares and travel patterns allowance

The monetary allowances prescribed in clauses 24—Living away from home—distant work, and 25—Fares and travel patterns allowance, will be adjusted in accordance with clause 20.4.

The claims

[158] The HIA sought to replace clause 25 of the Building Award with the following provision:

"**25 Fares and travel patterns allowance**

25.1 Daily Fares Allowance

(a) In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work, an employee is to be paid an allowance of $17.43 per day for each day worked when the employee starts and finishes work on a construction site.

(b) This clause will apply when an employee is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.

(c) An employee will not be entitled to the allowance prescribed in subclause (a) when the employee:

(i) Is absent from work.

(ii) Is not required to attend a construction site due to:

(A) An RDO.

(B) The employee being required to start and finish work at the employer's workshop, yard or depot.

(iii) Is provided by the employer, or is offered to be provided by the employer, accommodation that is located at the construction site.

(iv) Is provided a company vehicle.

(v) Is provided, or offers to be provided, transport free of charge from the employee's home to the place of work and return by the employer.

(vi) Is an apprentice attending an RTO for training and assessment in accordance with the contract of training.

(d) The allowances prescribed by this subclause will not be taken into account for calculating overtime, penalty rates, annual leave, annual leave loading or personal/carer's leave entitlements.

25.2 Time spent in travel

(a) Travelling between construction sites

(i) An employee, transferred from one site to another during working hours, will be paid for the time spent in travelling.

(ii) If the employer does not provide transport:

(A) An employee is entitled to the reasonable cost of fares for public transport between construction sites; or

(B) Where an employee uses their own vehicle the employee must be paid an allowance at the rate of $0.78 per kilometre.

(b) Outside ordinary hours

Time spent traveling from an employee's home to their job and return outside ordinary hours will be unpaid unless the employer directs the employee to pick up and return other employees to their homes.

25.3 Distant Work

(a) If an employee is required to travel to a construction site more than 50km from the employee's usual place of residence, the employee will be entitled to:

(i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, and calculated to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be $0.47 per kilometre where the employee uses their own vehicle.

(b) This provision does not apply when, at the commencement of employment, the employee's usual place of residence was more than 50km from the construction site on which the employee was initially engaged.

25.4 Apprentices

(a) An apprentice will be entitled to a proportion of the allowances prescribed in clauses 25.1(a) and 25.3 in accordance with the following scale:

(i) on the first year rate—75% of amount prescribed;

(ii) on second year rate—85% of amount prescribed;

(iii) on third year rate—90% of amount prescribed;

(iv) on fourth year rate—95% of amount prescribed.

(b) Apprentices will only receive the allowances prescribed in clause 25.4(a) for days when they attend work.

(c) When a school-based apprentice attends off-the-job training or assessment not at the school at which they are enrolled they will receive 25% of the allowance prescribed in clause 25.4(a). 25.5 Adjustment of living away from home—distant work and fares and travel patterns allowance The monetary allowances prescribed in clauses 24—Living away from home—distant work, and 25—Fares and travel patterns allowance, will be adjusted in accordance with clause 20.4.".

[159] The HIA's claim sought to address three issues which it identified as being a source of "*continued frustration*" for its members:

(1) The notion of "*radial areas*" was outdated as the basis for the payment of the daily fares allowance. The allowance should be payable when the employee started and finished at the construction site, and travel time should be payable when the employee had to travel to a construction site more than 50 kms from the employee's usual place of residence.

(2) The allowance should only be payable when the employee started and finished work at a construction site, and used their own vehicle or public transport for travel to and from that site.

(3) The allowance should not be payable when the employee was:

- absent from work;
- not required to attend a construction site due to an RDO;
- required to start and finish at the employer's workshop, yard or depot;
- provided or offered accommodation at the construction site;
- provided with a company vehicle;
- provided or offered transport free of charge from home to the site and return; or
- was an apprentice attending an RTO for training and assessment in accordance with a contract of training.

[160] MBA sought the variation of clause 25.2 of the Building Award to provide the following:

"**25.2 Metropolitan radial areas**

25.2.1 An employee must be paid an allowance of $XX.xx per day for each day worked when employed in construction work at a construction site located away from the employers' establishment and:

(a) within a radius of 75 kilometres of the GPO in a capital city of a State or Territory; or

(b) within a radius of 75 kilometres of the principal post office in a regional city or town in a State or Territory.

25.2.2 Clause 25.2.1 does not apply to employees in the metal and engineering sector who begin and cease work at the employer's workshop, yard or depot."

[161] The effect of this proposed variation would be to extend the metropolitan radial zone from a radius of 50 kms to 75 kms to reflect what the MBA contends are improvements in transport infrastructure and technology which have reduced travel times.

[162] The MBA also sought that clause 25.8(b) be varied to provide:

"(b) The allowance prescribed in this clause will be payable on any day for which the employer provides a vehicle free of charge to the employee for a purpose related to their contract of employment, and the employee is required by the employer to drive this vehicle from the employee's home to their place of work and return and for no other private use."

[163] This variation was intended, the MBA submitted, to place a limitation on the employee's use of a vehicle supplied by the employer in the circumstances described by clause 25.8(b) by adding the words "*and for no other private use*".

[164] The MBA also sought a variation of clause 24.7(d) of the Building Award to clarify that the provision excludes the normal operation of clause 25, *Fares and travel patterns allowance*, in circumstances where distant work is undertaken and employees are residing on site or adjacent to the site *or* are provided with transport.

[165] The CCF sought to delete clause 25.8(b) of the Building Award to exclude employees who are provided with a funded motor vehicle from also receiving the fares and travel patterns allowance. The CCF also sought to insert a new clause 25.10(a)(iii) into the Building Award to exclude employees not working on a building site as part of their normal duties from receiving a travel allowance. The proposed new clause 25.10(a)(iii) would read as follows:

"(iii) the travel allowances prescribed in this clause will not be payable to employees not required to work on a building site as part of their normal duties."

Evidence

HIA

[166] HIA relied on the evidence of Kristie Burt, a Workplace Advisor with the HIA ACT/Southern Region.[67] Her role involved providing advice and assistance to members in relation to building and construction matters, industrial relations and workplace relations matters, including obligations under the modern awards. She gave evidence that she had provided advice on the fares and travel patterns allowance in clause 25 of the Building Award - in particular, the daily fares allowance in clause 25.2 – to approximately 50 HIA members in her region. Ms Burt said that she generally received negative feedback about the allowance from small businesses, and that HIA members were confused about the operation of the allowance. Such members often thought they were complying with the provision by supplying a vehicle to employees or by providing a fuel card and contributing to maintenance and repairs for the employee's vehicle. At a 2015 HIA conference, where she presented an information session on the allowance, members provided feedback that they thought the operation of the allowance was unfair. Specifically, they did not think it was fair that the allowance was payable to employees who lived one street away or could walk to work. Nor did they think it was fair that it was payable to employees when a work vehicle was supplied or when fuel costs and maintenance were provided to the employee.

[167] The HIA also relied on the evidence of Kirsten Lewis, HIA's Economic Coordinator, about a survey of the HIA's members in relation to the Building Award (HIA Survey).[68] The results of the HIA Survey were appended to Ms Lewis' witness statement. Ms Lewis gave evidence that the HIA Survey was sent to 26,102 separate email addresses of which, on her analysis, 23,810 members received. Of the recipient members, 290 responded to the HIA survey. Relevantly, the survey results showed that 33 of the respondents provided employees with a company car.

MBA

[168] MBA called evidence from Peter Glover, the Director of Construction, Master Builders Association of NSW (MBA NSW).[69] Mr Glover gave evidence that clause 25 of the Building Award dealing with calculating fares for metropolitan radial areas was out of date. The 50 kilometre radius in the current clause came from the *National Building and Construction Industry Award 2000* and similar clauses had existed in earlier versions of the *Building and Construction Employees and Builders Labourers Award* as well as the *National Building and Trades Construction Award 1975*. He said the majority of those awards set the radius at 50 kilometres, although he conceded in cross-examination that in previous awards the radial areas had been 30 kilometres in South Australia and the ACT and 33 kilometres in the Northern Territory, and that for Sydney the radial area had been the County of Cumberland. Mr Glover said that he had dealt with calls from members about the restrictions in place when an employer provided a vehicle free of charge for employees to drive to and

[67] Exhibit 28, Witness Statement of Kristie Burt dated 30 November 2016

[68] Exhibit 25, Witness Statement of Kirsten Lewis dated 29 November 2016.

[69] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

from work, and expressed the view that there needed to be greater clarity as to what workers could or could not do if they were provided with a vehicle by their employer.

[169] Mr Glover gave evidence that there had been significant upgrades to many metropolitan and country roads since the metropolitan radial areas were set at 50 kilometres. In cross-examination however Mr Glover was taken to an Austroads research report entitled "*Congestion Reliability Review Summary*",[70] and conceded that the report showed that the time spent travelling to and from work had not changed since the start of the twentieth century. He also conceded that he did not have evidence that the time taken to drive to particular sites had reduced. He said that based on his own experience, travel times may have reduced in larger regional areas such as around Wagga Wagga, Dubbo, Armidale or Tamworth.

CFMMEU

[170] Brendan Holl, an organiser with the CFMMEU Construction and General Division NSW Branch, gave evidence[71] that in his experience the travel times in and around Sydney were increasing. He said that a trip from Bateau Bay on the Central Coast of NSW to Roseville in northern Sydney often took in excess of one hour and 30 minutes in the morning and longer in the afternoon, that if there was an accident on the M1 motorway the journey could take just short of two hours, and that if he left home after 6.00 am the M1 was "*like a carpark*". He also gave evidence that the M2 Motorway in Sydney had many 80 kilometre an hour zones and could often be in gridlock, and that the M2 and M7 motorways only had two lanes open for much of their length. Mr Holl said that in his experience the motorways to the west and south-west of Sydney had not reduced travel time.

Submissions

HIA

[171] HIA submitted it was necessary to replace clause 25 of the Building Award to clearly outline the obligations of employers and the entitlements of employees in relation to travel arrangements and the payment of daily fares. It submitted that the operation of the concept of radial areas was confusing and not understood by many HIA members, and that this should be replaced by a simpler concept based on the distance of travel from the employee's residence. It was also necessary to clarify that employees were not entitled to the allowance when they were not required to attend site due to a rostered day off, where the employer provided or offered to provide accommodation at the construction site or where the employee was provided with a company vehicle. The HIA submitted that the current clause was at odds with the promotion of flexible modern work practices and acted as a disincentive for employers to provide employees with company vehicles.

[70] Exhibit 39

[71] Exhibit 18, Statement of Brendan Holl (undated)

MBA

[172] The MBA submitted that its variation to clause 25.2 of the Building Award involved a technical wording change to clarify confusion about the type of employee to whom the clause applied and to settle ambiguity. In respect of its claim to increase the radial area, the MBA submitted that improvements have been made to infrastructure and transport technology such that the time taken to travel within or between radial areas has changed from that which was relevant when the provisions were first applied. In relation to clause 25.8(b), it submitted that the current provision did not place any limitation on situations or circumstances where the company provided vehicle could be used other than for driving to and from work, which left it open to employees to utilise the company vehicle for purposes other than those related to their contract of employment and to transport themselves to and from a workplace, and still be paid the allowance. The addition of the words "*and for no other private use*" should be inserted at the end of clause 25.8(b) to provide an express limitation on the circumstances in which the use of a company vehicle by an employee would attract payment of the allowance.

CCF

[173] The CCF submitted that an employee to whom a vehicle is provided free of charge by an employer does not incur travel costs or suffer the circumstances described in clause 25.1 of the Building Award. In respect of its proposed clause 25.10(a)(iii), the CCF submitted that an employee who is not required to work on a building site should not be entitled to the daily travel allowance and was never intended to receive the allowance in predecessors to the Building Award. It further submitted that such employees are already compensated for travel expenses by clause 21.1 of the Building Award. This included employees in civil construction who performed maintenance, repairs and other work on earthmoving and equipment at the employer's sheds and workshops. These employees rarely, if ever, work on building sites, yet were currently entitled to the fares and travel patterns allowance.

ABI and NSWBC

[174] ABI and NSWBC supported HIA's proposed variation, submitting that HIA had advanced a meritorious case and demonstrated that the variation meets the modern awards objective.

CFMMEU

[175] The CFMMEU submitted that employer groups' claims to vary clause 25 should be rejected. The HIA had failed to provide a sufficient merit-based argument to upset the principle recognised that the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made, and similar claims to those currently made by the HIA and MBA were rejected during the Modern Awards Review 2012 (2012 Award Review). The fares and travel pattern allowance provisions in the Building Award are historically based on the concept that the industry required mobile employees, the requirement of which was an advantage to employers. The extensive use of private cars by employees added to this advantage and warranted additional compensation to cover the time and cost associated with travelling between an employee's residence and construction site. Employees could not be expected to

move their place of residence whenever they accept employment on a new construction site and had the right, within reason, to seek work wherever they chose and to be compensated for travelling expenses. It submitted that the fares and travel allowance provisions in the Building Award were neither complex nor difficult to understand. In essence the complaint of employers was that they did not like paying the allowance and were looking for any avenue not to pay it.

[176] The CFMMEU referred to the Federal Court decision in *Master Builders' Association Of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (1981),*[72] which it submitted confirmed that if an employee was provided with a vehicle and was required to drive to and from home to the construction site then the time spent so driving was work time. As a result, if an employee was not compensated by the payment of the fares and travel patterns allowance, then the employee was entitled to payment as part of working hours, presumably at overtime rates. In relation to the HIA's contention that the allowance should not be payable when an employee was on a rostered day off, the CFMMEU submitted that the entitlement to payment on RDOs had been a feature of the construction awards since the introduction of the 38 hour week in 1982, and the HIA had provided no evidence to support a change to this provision. In respect of the HIA's claim to remove radial areas, the CFMMEU submitted that the proposed change would lead to great confusion in the industry. It would remove a direct distance calculation based on the city GPO or the employer's establishment and replace it with the term "*distant work*" for any construction site beyond 50 kms from an employee's home. This would conflict with the well understood definition of "*distant work*" currently used in clause 24 of the Building Award. The HIA's proposed clause would further discriminate between employees by only paying additional time and allowances for "*distant work*" to those employees who commenced employment beyond 50 kms of the employee's home.

[177] The CFMMEU further submitted that the wording of the current clause 25.2 was determined by the Commission in order to remove an ambiguity or error based on submissions made by both the CFMMEU and MBA. The CFMMEU submitted that this previous variation resolved the issue and no further variation was warranted.

[178] In relation to the MBA's claim, the CFMMEU submitted that the grounds relied upon by the MBA to increase radial areas were preposterous, and that research conducted by the NRMA demonstrated that travel times have increased over the past 10 years. This was supported by information from the Bureau of Infrastructure, Transport and Regional Economics and numerous newspaper articles. The current radial areas already, in respect of a number of metropolitan areas, represented an expansion from previous smaller areas.

[179] In relation to the CCF's claim, the CFMMEU contended that no evidence had been provided to support the variation proposed by the CCF to delete clause 25.8(b). In relation to the CCF's proposed clause 25.10(a)(iii), the CFMMEU submitted that the CCF had provided no evidence to support the problem about which they complained. As to fitters, mechanics and welders who perform maintenance and repair work on earthmoving plant, trucks and other equipment off-site at the employer's premises, these categories of employees were not covered by the Building Award.

[72] 54 FLR 358

AWU

[180] The AWU submitted that the Commission could not be satisfied that the variations to clause 25 sought by the employer groups was necessary to ensure that the Building Award met the modern awards objective. The HIA's concerns about the operation of clause 25 were difficult to understand given that its operation was entirely contingent on what the employer agreed to in a contract of employment and then on what directions were issued to the relevant employee.

Consideration

[181] We broadly accept the CFMMEU's characterisation of the purpose of the fares and travel patterns allowance. An essential feature of the work of employees covered by the Building Award who normally perform work on construction sites is that they must, over time, travel to different sites at different locations, and incur variable travel costs and associated inconveniences in doing so. This mobility will usually mean that an employee will use a private motor vehicle for travel purposes. Additionally there will be construction sites at locations where public transport will most likely be necessary (such as capital city CBD sites). The allowance compensates employees, on an averaging basis, for the cost and inconvenience associated with variable travel to and from work. Accordingly we do not consider there is a proper basis for any substantial alteration to the entitlement established by the clause 25 of the Building Award where it serves the purpose we have identified.

[182] However to the extent that clause 25 extends payment of the fares and travel pattern allowance to circumstances where the identified rationale is not evident, we consider that it does not achieve the modern awards objective. That is, the payment of a daily travel allowance to an employee who on a given day is not engaged in the travel for which the allowance is intended, or is provided with a mode of transport free of charge by the employer, could not be said to be a feature of a fair and relevant safety net. We accept the HIA's case in this respect. We cannot identify any legitimate rationale for the payment of the allowance in circumstances where the employee is:

- absent from work for any reason including leave and RDOs;
- provided with or offered free transport by the employer to and from the construction site;
- provided with a fully maintained vehicle by the employer to travel to and from the construction site (regardless of any other use that may be made of the vehicle); or
- not required to start and finish work at the construction site but rather at another fixed location (so that actual travel to and from the construction site occurs in paid working time).

[183] Apart from reliance on the arbitral history underlying clause 25 of the Building Award, the CFMMEU was unable to identify any persuasive rationale for the payment of the fares and travel patterns allowance in the circumstances we describe above. As to RDOs and

other absences of work, on one view clause 25 already excludes payment of the allowance during such absences since the allowance is only payable "*for each day worked*". The position adopted by the CFMMEU suggests there is some contest about this. In any event we consider that achievement of the modern awards objective requires the variation of clause 25 to clearly exclude an entitlement to the payment of the allowance in the circumstances identified above.

[184] We also consider there is substance to the proposition advanced by the HIA that clause 25 is unnecessarily complex and confusing. We have had some regard to the evidence adduced by the HIA concerning member confusion about the obligations under clause 25, but primarily we have taken into account the way in which the clause is drafted. In particular, the provisions concerning distant work (clause 25.3), travel outside radial areas (clause 25.5), into radial areas from a residence outside any radial area (clause 25.6) and between radial areas (clause 25.7) are complex both in expression and their relationship to each other and to the primary criterion for payment in clause 25.2. We consider that clause 25 should be varied, so that the fares and travel pattern allowance and other travelling time entitlements are simplified as follows:

25.1 Fares and travel pattern allowance

(a) In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work, an employee is to be paid an allowance of $17.43 per day for each day worked when the employee starts and finishes work on a construction site, or is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.

(b) An employee will not be entitled to the allowance in paragraph (a) on any day where the employer:

(i) provides or offers to provide transport free of charge from the employee's home to the place of work and return; or

(ii) provides a fully maintained vehicle free of charge to the employee.

25.2 Travelling between construction sites

An employee transferred from one site to another during working hours will be paid:

(a) for the time spent in travelling; and

(b) if the employer does not provide transport:

(i) the reasonable cost of fares for public transport between construction sites; or

(ii) where the employee uses their own vehicle the employee must be paid an allowance at the rate of $0.78 per kilometre.

25.3 Travelling outside ordinary hours

Time spent travelling from an employee's home to their job and return outside ordinary hours will be unpaid unless the employer directs the employee to pick up and return other employees to their homes.

25.4 Distant work payment

(a) If an employee is required to travel to a construction site that is:

(i) not located in a metropolitan radial zone in which the employee's usual place of residence is located; and

(ii) more than 50 kms by road from the employee's usual place of residence;

the employee will be entitled to the distant work payment in paragraph (b) in addition to the allowance in clause 25.1.

(b) The distant work payment is:

(i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be $0.47 per kilometre where the employee uses their own vehicle.

(c) Despite paragraph (a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.

(d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:

(i) the GPO of a capital city of a State or Territory; or

(ii) the principal post office in a regional city or town in a State or Territory.

25.5 Apprentices

(a) An apprentice will be entitled to a proportion of the allowances prescribed in clauses 25.1 and 25.4 in accordance with the following scale:

(i) on the first year rate - 75% of the amount prescribed;

(ii) on the second year rate - 85% of the amount prescribed;

(iii) on the third year rate - 90% of the amount prescribed;

(iv) on the fourth year rate - 95% of the amount prescribed.

(b) When a school-based apprentice attends off-the-job training or assessment not at the school at which they are enrolled they will receive 25% of the allowance prescribed in clause 25.1

25.6 Adjustment of allowances

The monetary allowances prescribed in clause 24, clause 25.1, clause 25.2(b)(ii) and clause 25.4(b)(ii) will be adjusted in accordance with clause 20.4.

[185] In respect of the MBA's claim to extend the metropolitan radial areas to 75 kilometres, we do not consider that the MBA has established that there has been any broad-based reduction in travel times for building and construction workers over any relevant period which would support a variation. The proposed variation to clause 25 set out above disposes of the claims advanced by the MBA and the CCF concerning the fares and travel pattern allowance when an employer provides a vehicle to travel to and from construction sites. Similarly, the CCF's further claim for a new clause 25.10(a)(iii) providing that the allowance be payable only when an employee starts and finishes work on a construction site, is addressed by those variations.

6. OVERTIME – TIME OFF INSTEAD OF PAYMENT FOR OVERTIME

Current position

[186] The Building Award and the Joinery Award do not currently provide for time off in lieu of payment for overtime (TOIL). In its July 2015 decision,[73] the Award Flexibility Full Bench considered, amongst other things, claims to insert or vary TOIL provisions in modern awards. The Full Bench proposed, on a provisional basis, a model TOIL term, and expressed a provisional view that 113 identified modern awards with overtime provisions should be varied to insert the model term. However the Building Award and Joinery Award were not included in the list of modern awards subject to this provisional view. The Full Bench determined that "given the unusual arbitral history and the particular features of the industry

[73] [2015] FWCFB 4466

covered by the two construction awards (including the operation of daily hire)"[74] any application to insert a TOIL provision in the Building Award and Joinery Award would be dealt with during the Award stage of the Review.[75] After receiving further submissions, the Full Bench subsequently finalised the terms of the model TOIL term in its July 2016 decision.[76] A slightly modified term of the model provision was developed for awards which provided for time off in lieu of overtime to be afforded at overtime rates.[77]

[187] The model TOIL term set out in Attachment C of the Full Bench's July 2016 decision is as follows:

A.1 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause A.1.

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked;

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. An agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

[74] [2015] FWCFB 4466 at [307]

[75] See [2015] FWCFB 4466 at [307]

[76] [2016] FWCFB 4258

[77] [2016] FWCFB 7737

EXAMPLE: By making an agreement under clause A.1 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause A.1 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause A.1 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.

The claims

[188] The HIA and MBA both sought to vary the Building Award and the Joinery Award to insert the model TOIL term into the awards' overtime clauses (clause 36.17 and clause 30.9 respectively).

Evidence

HIA

[189] The HIA relied on the evidence of Kirsten Lewis (earlier discussed) and the HIA Survey attached to her witness statement. The HIA Survey results indicated that overtime was worked on a frequent basis, with 49 per cent of survey respondents indicating their employees work overtime one to two times per week and 23 per cent indicating overtime three to four times per week. HIA also relied on the HIA Survey as evidence that 44 per cent of respondents have had requests from employees to take leave instead of an overtime payment.

MBA

[190] The MBA called Cameron Spence, the Director of Industrial Relations at the Master Builders' Association of the ACT to give evidence in support of the inclusion of the model TOIL term in the Building Award and the Joinery Award.[78] Mr Spence gave evidence that there had been a number of instances (eight or nine) where members had expressed a desire for the option of TOIL under the award. He indicated that the inquiries about this had come from all manner of businesses in the construction industry including head contractors, subcontractors, painters and plumbers. Mr Spence also gave evidence that employees of some members would like the option of TOIL, and that he had become aware of this as a result of his involvement in enterprise agreement bargaining negotiations. He further stated that whilst the vast proportion of workers in the construction industry were men, it was a misconception that only women were interested in taking TOIL. He referred to the Award Flexibility Full Bench's July 2015 decision not to include the Building Award and the Joinery Award in the list of awards to be varied to include the TOIL model term on the basis of their "unique arbitral history", and stated that he was not aware of anything in that history preventing the provision being inserted into either of the awards.

Submissions

HIA

[191] The HIA submitted that the responses to the HIA Survey indicate that TOIL arrangements would provide greater flexibility to small, non-unionised, award-reliant businesses and enable businesses to better adapt to the ebbs and flows of the residential construction industry.

[78] Exhibit 33, Witness Statement of Cameron Spence dated 9 December 2016; Transcript 5 April 2017 PN1858-PN2124

MBA

[192] MBA submitted that there were no features of the construction industry that would prevent the inclusion of the model TOIL provision and no reason why the building and construction workforce should be denied the opportunity to access an option for greater flexibility in the workforce.

ABI and NSWBC

[193] ABI and NSWBC supported the claims, submitting that HIA had advanced a meritorious case and demonstrated that the variation meets the modern award objectives.

CFMMEU

[194] The CFMMEU opposed the insertion of the model TOIL term. It submitted that the project nature of work in the industry, short term contracts and daily hire employment all militated against the inclusion of the model TOIL term. The absence of a TOIL provision did not deny employees covered by the construction awards the opportunity to access an option for greater flexibility in the workplace, as employers and employees could agree to include a TOIL provision in an enterprise agreement provided it passed the better off overall test. It submitted that insufficient evidence had been advanced in support of the claims, and in particular it took issue with the utility of the HIA Survey, noting that only 1.2% of HIA's members responded to the survey, that 36 of the 290 respondents were covered by awards other than the Building Award and Joinery Award, that 37 other respondents indicated that more than one award applied or no award was identified, and that the questions asked were based on incorrect premises and/or were insufficiently detailed. Less than 49% (142) of the respondents to the survey actually worked overtime, of which only 62 had received a request from an employee for TOIL, and 43 of the 142 respondents whose employees worked overtime made negative comments about TOIL.

[195] The CFMMEU further submitted that by inserting the model TOIL term, overtime that attracted penalty payments of time and a half or double time would be replaced by time that would be paid at single time. This was not an equal swap, as the value to the employer in having production targets met was of far greater value than releasing an employee from the requirement to work when times were slack. Whilst the insertion of the TOIL term would obviously reduce one aspect of employment costs (i.e. labour costs), there is no evidence that it would increase productivity, and it would increase the regulatory burden. There was no evidence to show that the inclusion of a TOIL provision would ensure that the awards in question provide a fair and relevant safety net and thus was necessary to achieve the modern awards objective as required by s.138 of the Act.

AWU

[196] The AWU submitted that MBA and HIA had not demonstrated it was necessary to insert TOIL conditions into the Building Award. The AWU submitted in the alternative that if a TOIL term was to be inserted, an employee should be entitled to accrue time off at the

relevant overtime rates, which would reduce the risk of employees being pressured to take TOIL instead of being paid at overtime rates.

CEPU

[197] The CEPU opposed the insertion of the model TOIL term and submitted that the MBA and HIA had failed to bring evidence in support of this insertion. The CEPU also submitted in the alternative that, if a variation was granted in relation to TOIL, it should be calculated at the overtime rate.

Consideration

[198] In its July 2015 decision, the Award Flexibility Full Bench, in deciding to develop a model TOIL term, dealt with the broad issues of jurisdiction, principle and merit concerning the concept of time off in lieu of overtime, including:

- the benefits to employees in providing employees with the capacity to take time off in lieu of overtime by agreement with their employer;

- the taking of time off in lieu of overtime on the basis of an hour off in ordinary time for each hour worked, consistent with the *Family Leave Test Case* standard, except where the award already provides for time off in lieu of overtime to be taken at the overtime penalty rate; and

- the safeguards necessary to ensure employees are not pressured into taking time off in lieu of overtime when they do not genuinely wish to do so.

[199] The question before us is whether the general conclusions reached by the Full Bench as to these matters, which are embodied in the model term which we have earlier set out, are rendered inapplicable to the Building Award or the Joinery Award by reason of the "unusual arbitral history and the particular features of the industry covered by the two construction awards".[79] The relevant arbitral history is set out in the Full Bench's July 2015 decision,[80] and it is not necessary to repeat it here. It is sufficient to say that the history shows that test case decisions have not always been applied automatically to the building and construction industry, and that previous attempts to insert TOIL provisions in awards applicable to the industry have not been successful. However no identified arbitral decision has given specific consideration to the application of TOIL to the industry or exposed any reason why the general conclusions reached in the Full Bench's July 2015 decision would not be applicable to the industry. We do not consider that there is anything in the arbitral history of the two awards which would militate against the inclusion of the model TOIL term in the two awards.

[200] That brings us to whether there are any particular features of the building and construction industry which would cause us to reach different conclusions than the general conclusions stated in the July 2015 decision of the Award Flexibility Full Bench. We do not consider that the project nature of the industry by itself precludes an award TOIL provision.

[79] [2015] FWCFB 4466 at [307]

[80] [2015] FWCFB 4466 at [298]-[307]

Many construction projects involve the employment of employees under the Building Award or the Joinery Award for considerable periods and at all levels of projects (including residential homebuilding). Some employees are engaged on a full-time ongoing basis from one project to the next. This means that it is feasible for time off in lieu of overtime arrangements to work effectively for at least a proportion of employees.

[201] However the modes of employment permitted by the awards, particularly the Building Award, are a relevant point of distinction. Clause 12 of the Building Award provides for daily hire employment, which is a type of non-casual employment, but which may be terminated on one day's notice, or by the provision of notice given at the usual starting time of any ordinary day and expiring at the completion of the day's work. The contingent and insecure nature of daily hire employment makes it difficult to envisage how TOIL would operate as a practical proposition, since a daily hire employee who elected to take TOIL could be terminated at short notice prior to being able to take the time off. The primary benefit of daily hire employment from an employer's perspective is that employees under this mode of employment may be engaged in accordance with the work schedule of a particular project, which will often build in a significant level of overtime (a 50 hour week, including Saturday work, on major construction projects is common). Taking of TOIL may be difficult to reconcile with the scheduling and work flow needs of such projects. Neither the MBA nor the HIA advanced any evidence, or made any submissions, as to how TOIL would practically operate in these circumstances. Nor was it demonstrated that there was any desire on the part of employers or employees for TOIL provisions in the context of daily hire employment. The HIA survey results concerning TOIL were, we presume, wholly or primarily referable to its membership base of residential home builders and not relevant to the operation of daily hire employment in major building construction projects. In respect of casual employment (for which provision is made in clause 14 of the Building Award and clause 12 of the Joinery Award), there is no evidence before us that casual employees are used in the building and construction industry other than on short-term and intermittent basis, and so for similar reasons we have difficulty envisaging how a TOIL provision in the Building Award or the Joinery Award would be feasible in practical terms.

[202] However, we consider that, in respect of full-time weekly and part-time employees under the Building Award, and full-time and part-time employees under the Joinery Award, the incorporation of the model TOIL term is necessary to ensure achievement of the modern awards objective, for the same reasons as stated in the Award Flexibility Full Bench's July 2015 decision. We do not consider, for the reasons stated, that the model TOIL term would be part of a minimum safety net that was relevant to daily hire employees and casual employees under the Building Award, and casual employees under the Joinery Award. Accordingly the model TOIL term will be inserted into both awards, but will not apply to daily hire or casual employees.

7. COVERAGE AND CLASSIFICATION ISSUES

Current coverage provisions

[203] The coverage of the Building Award is set out in clause 4, which relevantly provides:

4.1 This industry award covers employers throughout Australia in the on-site building, engineering and civil construction industry and their employees in the classifications within Schedule B– Classification Definitions to the exclusion of any other modern award.

4.2 Without limiting the generality of the exclusion, this award does not cover employers covered by:

(a) the *Manufacturing and Associated Industries and Occupations Award 2010*;

(b) the *Joinery and Building Trades Award 2010*;

(c) the *Electrical, Electronic and Communications Contracting Award 2010*;

(d) the *Plumbing and Fire Sprinklers Award 2010*;

(e) the *Black Coal Mining Industry Award 2010*;

(f) the *Mining Industry Award 2010*; or

(g) the *Quarrying Award 2010*; or

(h) the *Pre-Mixed Concrete Award 2010*.

…

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

4.9 For the purpose of clause 4.1, **on-site building, engineering and civil construction industry** means the industry of general building and construction, civil construction and metal and engineering construction, in all cases undertaken on-site.

4.10 For the purposes of clause 4.1:

(a) …

(b) civil construction means:

(i)the construction, repair, maintenance or demolition of:

- civil and/or mechanical engineering projects;
- power transmission, light, television, radio, communication, radar, navigation, observation towers or structures;
- power houses, chemical plants, hydrocarbons and/or oil treatment plants or refineries;
- silos; and/or
- sports and/or entertainment complexes;

(ii) road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt;

...

(v) the testing of soil, concrete and aggregate when it is carried out at a construction site in or in connection with work under clause 4.10(b)(i);

...

[204] Clause 4.1 of the Joinery Award provides that it covers "…*employers throughout Australia of employees in the joinery and building trades industries and occupations who are covered by the classifications in this award and those employees*". Clause 4.8 defines the expression "*joinery and building trades industries and occupations*" to mean the industries listed in clause 4.8(a) and the occupations listed in clause 4.8(b). One of the industries listed, in clause 4.8(a)(i), is "*joinery work*". "*Joinery work*" is given the following definition in clause 3.1 of the Joinery Award:

> **joinery work** means work performed by the classifications contained in this award in a joinery shop, provided such establishment is not located on an 'on-site' construction project, and includes the preparation, decoration and assembling of joinery or building components principally in timber or similar material.

The claims

[205] The CFMMEU sought to vary clause 4.2 of the Building Award to remove the priority to be given to the excluded awards. The variation it sought was to the chapeau to clause 4.2 to read as follows:

> "**4.2** Without limiting the generality of the exclusion in clause 4.1 and except for employers of employees engaged on-site performing work in the classifications contained in this award, this award does not cover employees covered by:…"

[206] The CCF sought to delete clause 4.10(b)(ii) of the Building Award so as to give the *Asphalt Industry Award 2010* (the Asphalt Award) exclusive coverage of the asphalt industry. Clause 4.1 of the Asphalt Award provides that it covers "…employers throughout Australia in the asphalt industry and their employees…", and clause 4.1(a) defines "*asphalt industry*" as follows:

"**(a) Definition of asphalt industry**

For the purpose of this clause, asphalt industry means roadmaking and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt."

[207] The AWU sought to vary the classification structure in Schedule B of the Building Award to "*clarify*" that employees who are engaged to perform testing work on soil, concrete and aggregate are classified at the CW/ECW2 level. The variation sought by the AWU was to add "*Tester – soil, concrete or aggregate*" to the list in clause B.2.2(d) of broadbanded award classifications incorporated into the classification of "*Construction worker level 2/Engineering construction worker level 2 (CW/ECW 2)*".

[208] Mr Thomas Walsh sought to vary Schedule B of the Building Award to include a specific classification for a "*Utility Locator*".

[209] The MBA sought to vary clause 3 of the Joinery Award to replace the definition of "*joinery work*", and to add a new definition of "*joinery shop*", as follows:

"**joinery work** means work performed by the classifications contained in this award in a joinery shop, and includes the preparation, decoration and assembling of joinery or building components principally in timber or similar material, and the on-site installation of joinery or building components prepared, decorated or assembled off-site by classifications contained in this Award.

joinery shop means the employers principal or main establishment that is not located on an 'on-site' construction project."

Evidence

AWU

[210] The AWU called evidence from three witnesses in support of its claim. The witnesses described the type of testing work performed on constructions sites by employees of Coffey Information Pty Ltd (Coffey), a company specialising in construction materials testing.

[211] Jeff Buhler, an AWU organiser, gave evidence[81] that he understood that construction companies generally outsource testing work to companies such as Coffey because of their independence. Mr Buhler gave evidence, based on his contact with AWU members employed by Coffey, that the majority of such members spent most of their time on construction sites and generally only attend base laboratories to deliver samples, hand in paperwork or attend meetings. The employees received in-house training from Coffey but did not require external qualifications. The testing work was critical to the completion of building and construction projects as whole projects might be undermined if construction materials were faulty. Mr

[81] Exhibit 43, Witness Statement of Jeff Buhler dated 30 November 2016; Transcript 5 April 2017 PN2700-PN2725

Buhler said that he was familiar with labouring work in the construction industry, and testing work was significantly more complex and involved a higher degree of responsibility than work performed by labourers.

[212] Anthony Callinan, the Assistant Branch Secretary of the NSW Branch of the AWU, gave evidence[82] that he had assisted many members who worked for Coffey in the Newcastle region. Mr Callinan gave evidence that he first encountered Coffey at the Coopernook project on the Pacific Highway, during which Coffey's employees operated out of a temporary laboratory adjacent to the Thiess Pty Ltd workshop at Johns River. Mr Callinan said that in 2011 he visited Coffey employees working on the Hunter Expressway Alliance Project, and nearly all of the Coffey employees working on the project had only ever worked on site. He had not spoken to any Coffey employees who undertook work for industries other than civil construction. In August 2011 he became aware that the *ECLA/AWU Soil, Concrete Testing and Analysis Award 2000*, a pre-reform award, was terminated, following which Coffey negotiated an enterprise agreement which was approved by employees. The AWU opposed the approval of the agreement on the basis that it did not meet the Better Off Overall Test (BOOT) in terms of an assessment against the Building Award; however Coffey successfully argued before the Commission that the relevant instrument for an assessment of the BOOT was the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award).

[213] Mr Callinan gave evidence that many employees in the civil construction industry performed duties that were essential to the industry, but which were not traditional construction jobs, such as concrete slump testing and soil compaction testing. Most of Coffey's employees did not hold any formal qualifications related to testing, and the only training required was certification to use the nuclear density gauge in soil testing. Employees learnt to perform their testing duties primarily through observing other employees.

[214] Geoff Muller, a full-time concrete technician working for Coffey, gave evidence[83]that the testers he worked with did most of their work on construction sites and would only spend one or two hours per week in the base laboratory. He did not hold any formal qualifications that were directly relevant to his work with Coffey, and he was not aware of any workmates holding a Certificate III in Laboratory Skills or similar testing qualifications. Mr Muller said that Coffey separated its construction testing work into a concrete section and a soil section although there was some overlap between the work of the two sections. He would normally receive a phone call or text the night before or the day before telling him where to start from the next day and what type of work he and his team were required to perform, which was generally either pick-ups or testing work. He would be sent from site to site throughout the working day and was in constant contact with management for work instructions. Mr Muller stated that he would attend anywhere from one to fifteen construction sites per day and spent approximately ninety-eight per cent of his time at work on construction sites. He only attended the laboratory to drop off tests. Employees in the concrete section spend at least ninety-five per cent of their time on construction sites, which included major civil construction projects, roads, footpaths and residential houses. He said he and his team

[82] Exhibit 42, Witness Statement of Anthony Callinan dated 30 November 2016; Transcript 5 April 2017 PN2636-PN2697

[83] Exhibit 41, Witness Statement of Geoff Muller, dated 1 December 2016; Transcript 5 April 2017 PN2563-PN2624

experienced the same working conditions on construction sites as other workers in the construction industry.

MBA

[215] MBA relied on evidence Peter Glover in support of its claim.[84] Mr Glover gave evidence that the current definition of "*joinery work*" in the Joinery Award had created confusion amongst award reliant employers, in that it was not clear to what extent on-site work was capable of being covered by the Joinery Award. He said that it was not uncommon that joinery shops engaged part of their workforce in the workshop and another part of their workforce to undertake fixing and installing on–site. An expansion of the definition to include on-site installation would resolve any confusion and simplify the way joiners are employed. The pre-modern joinery award had covered the requirement from time to time to go on-site to fit or fix products but this had been lost with the making of the modern award. During cross-examination, Mr Glover accepted that, under clause 21.2.1 of the *National Joinery and Building Trades Products Award 2002*, when an employee performed work on-site the employee was entitled to be paid the rates and allowances of the *National Building and Construction Industry Award 2000*.

Submissions

CFMMEU

[216] The CFMMEU submitted that its proposed amendment to clause 4.2 would allow the normal process of resolving overlapping award coverage in clause 4.8, whereby the most appropriate award would apply, in respect of work performed on building and construction. This approach better reflected the general intent of the Commission and its predecessors in the award modernisation process.

[217] In relation to the CCF claim, the CFMMEU opposed the removal of clause 4.10(b)(ii) from the Building Award. The CFMMEU submitted that the CCF had misrepresented the position in relation to the coverage of predecessor awards taken into consideration when the modern award was made. Other than attempting to compare conditions between awards, the CCF had provided no probative evidence to justify the change in the coverage of the Building Award with respect to the asphalt industry.

[218] The CFMMEU also opposed MBA's proposed variation to the definition of joinery work under the Joinery Award, and submitted that MBA has provided no empirical or probative evidence to justify this variation.

CCF

[219] The CCF submitted that deleting clause 4.10(b)(ii) of the Building Award would give the Asphalt Award primacy for the asphalt industry, address the current award overlap and provide clear rules to identify which award applies to asphalt work in accordance with the aims expressed during award modernisation.

[84] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

AWU

[220] The AWU submitted that it had encountered problems with the application of the coverage provisions of the Building Award because the classification structure in Schedule B.2 did not refer to the testing of soil, concrete and aggregate when it was carried out at a construction site.

[221] The AWU submitted that the CCF has provided no evidence in support of its claim to delete clause 4.10(b)(ii) of the Building Award. The CCF had provided an inaccurate summary of the pre-modern awards in their submissions, and its submission that the Building Award introduced asphalt and bitumen work to building and construction award coverage for the first time was incorrect.

MBA

[222] MBA submitted that its proposed new definition of "*joinery work*" should be added to the Joinery Award to ensure that it would continue to apply to those employees who did off-site joinery work but sometimes performed work on construction sites to install the materials they had prepared off-site. This change would reduce complexity and address confusion that had arisen as to the applicable award when workers attended construction sites to install materials they had made off-site. It was the most appropriate solution to address the issue of conflict of coverage between the construction awards.

[223] MBA opposed the CFMMEU claim to amend clause 4.2. It submitted that the issue of coverage had previously been considered in *Australian Workers' Union v Coffey Information Pty Limited*,[85] and the CFMMEU's proposed variations were likely to cause greater uncertainty and were inconsistent with the decision in *Coffey.* The CFMMEU's proposal would remove flexibilities enjoyed by workplaces arising from current coverage exceptions, increase the regulatory and compliance burden on workplaces by requiring the application of multiple instruments, and increase complexity and reduce the extent to which the current coverage situation was simple and understandable.

[224] MBA also opposed the AWU's proposal to include testers of soil, concrete or aggregate under the CW/ECW2 classification of the Building Award and submitted that, if granted, it would create greater uncertainty for employers and employees and give rise to potential for conflict in award coverage and increased disputation. This proposal, it submitted, would go against the decision of the Full Bench in *Coffey*, in which it was determined that conducting tests in a laboratory was inherently work of a scientific nature and covered by the Manufacturing Award.

Mr Thomas Walsh

[225] Mr Walsh submitted that there was a shortage of experienced people performing the function of Utility Locator available for employment, and there needed to be more training offered for young people to learn the trade. Mr Walsh submitted that utility locators use

[85] [2013] FWCFB 2894

sophisticated electronic equipment and "*Dial Before You Dig*" plans to detect underground infrastructure or assets before any excavation takes place.

Ai Group

[226] Ai Group opposed the CFMMEU's claim and submitted that it was a re-agitation of a previous claim which was properly determined by the Award Modernisation Full Bench, and that the CFMMEU had not provided any evidence to demonstrate that there are any changed circumstances that required the Commission to revisit this matter.

CEPU

[227] The CEPU opposed the CCF's claim to amend the definition of civil construction under the Building Award. It submitted that this matter had previously been considered by the Commission, and the distinction between the Asphalt Award and Building Award was clear. No cogent reasons had been advanced for the variation and the application should be rejected.

HIA

[228] The HIA opposed the CFMMEU's proposed variation to clause 4.2 of the Building Award and submitted that the CFMMEU had provided no evidence to support the proposition that the variation was necessary to meet the modern awards objective or that there was any real issue with the current provision, and that rather than improving the interpretation and understanding of award coverage the variation would disturb settled arrangements, cause significant upheaval in the industry and unjustifiably expand the coverage of the Building Award.

[229] The HIA also opposed the AWU's proposed variation to the CW/ECW2 classification, and submitted that it would not only expand the coverage of the Building Award but also sought to ascribe a rate of pay to those engaged in that type of work without any evidence in support of the proposed change.

AMWU

[230] The AMWU supported the proposal of the AWU in principle, but submitted that the work of testers of soil, concrete and aggregate was part of the "*Technical Field*" of work which is defined in the Building Award at clause B.1.13. The AMWU proposed a variation to the AWU's proposal to ensure that the Building Award clearly covered the work type under the Technical Field of work which would extend the Technical Field of work to CW/ECW2.

ABI and NSWBC

[231] ABI and NSWBC opposed the AWU's proposed variation to the CW/ECW2 classification in Schedule B, and submitted that the AWU had provided insufficient evidence to support the variation or to demonstrate that it was necessary to meet the modern awards objective.

Consideration

CFMMEU claim

[232] We are not satisfied that the variation sought by the CFMMEU is necessary to meet the modern awards objective. There was no evidence before us that there is any practical problem concerning conflicting coverage as between the Building Award and the awards listed in clause 4.2. Even if such a problem existed, we consider that the CFMMEU's proposed variation would add to rather than eliminate confusion and complexity. Currently, there is at least a clear position that where any of the awards listed in clause 4.2 covers an employee, the Building Award does not cover the employee. That means that there cannot be overlapping coverage. The CFMMEU's proposed variation would alter that clear position and *permit* overlapping coverage in relation to employees working on building and construction sites. Clause 4.2 of the Building Award as currently framed provides a clear exclusion by reference to coverage of employers by identified awards. This is consistent with the s.134(1)(g) consideration in the modern awards objective. The CFMMEU's proposal would have the result that primary resort would be had to the mechanism in clause 4.8 whereby instances of overlapping coverage are to be resolved by reference to which award classification "*is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work*". That mechanism should be a secondary mechanism where it is not otherwise possible to delineate clear boundaries between the coverage of particular awards. The secondary mechanism involves an evaluative judgment to determine the "*most appropriate*" award classification as between overlapping awards. It does not allow an employer to clearly determine, in advance, which set of award obligations applies to a particular employee where there is overlapping award coverage. It might also expose an employer to liability for civil penalties and backpay if the employer is wrong in its assessment. The CFMMEU's claim is therefore rejected.

CCF claim

[233] It may be accepted that there is a degree of overlapping coverage concerning asphalt work as between the Building Award and the Asphalt Award. Clause 4.1 of the Building Award, which we have earlier set out, provides that the award covers employers "*in the on-site building, engineering and civil construction industry*" and their employees in the award's classifications. On-site building, engineering and civil construction industry is defined in clause 4.9 as "*the industry of general building and construction, civil construction and metal and engineering construction, in all cases undertaken on-site*". The expression "*civil construction*" is defined in clause 4.10(b) to include a number of activities, including asphalt work in clause 4.10(b)(ii). Accordingly the Building Award covers asphalt work only to the extent that it is engaged in by an employer operating in the on-site building, engineering and civil construction industry and is performed by relevant employees on-site. Clause 4.1 provides that the Building Award applies to the exclusion of any other modern award, so the Asphalt Award could not cover asphalt work performed by employees on-site.

[234] Clause 4.1 of the Asphalt Award provides that it covers employers in the "*asphalt industry*" and their employees in the award's classifications, to the exclusion of any other modern award. Clause 4.1(a) defines "*asphalt industry*" in the same terms as clause 4.10(b)(ii) of the Building Award. There is no exclusion in respect of asphalt work performed

on building and construction sites. The Asphalt Award's coverage extends to building and construction sites, and in respect of employers which could be characterised as operating in both the on-site building, engineering and civil construction industry and the asphalt industry. There is a potential for overlap with the coverage of the Building Award. The overlapping coverage would need to be resolved by reference to the standard mechanism in clause 4.8 of the Building Award and clause 4.7 of the Asphalt Award, namely an assessment as to which classification in which award is the most appropriate to the work and the environment in which it is performed.

[235] The CCF's proposed solution is to remove any coverage of asphalt work by the Building Award on building and construction sites, by the deletion of clause 4.10(b)(ii). This is not the first time that a claim of this nature has been made. In the 2012 Award Review, ABI applied for the effective removal of any coverage of asphalt work by the Building Award, by the alternative expedient of adding the Asphalt Awards to the list of awards in clause 4.2 in relation to which the coverage of the Building Award was excluded. This application was rejected by FWA (Watson SDP) in a decision issued on 15 July 2013.[86] The Senior Deputy President said (footnotes omitted):

> "[121] ABI submitted that its proposed variation, to add the Premixed Concrete Award and the Asphalt Award to the list of exclusions in clause 4.2 of the Building On-site Award is directed towards removing confusion created by the overlapping coverage of the Building On-site Award.
>
> [122] It submitted that uncertainty arises in the case of the Asphalt Award from overlap in the definition of "civil construction" in the Building On-site Award and the definition of the "asphalt industry" in the Asphalt Award, both of which include *"*road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt".
>
> [123] ABI relied on the evidence of Mr N Perumal, Commercial Manager for CTEC Pty Ltd (CTEC), that there was uncertainty as to whether certain work was covered by the Building On-site Award or the Asphalt Award, which made it difficult for CTEC to ensure that contractors applied industrial arrangements compliant with the National Code of Practice for the construction industry and the associated implementation guidelines. He also gave evidence that "[i]t would be beneficial if the coverage of each award was clarified as proposed by the amendments made by ABI to remove ambiguity and confusion as to each award's coverage".
>
> [124] ABI submitted that the Premixed Concrete Award excludes employees covered by the Building On-site Award but the Building On-site Award does not contain a reciprocal provision. It submitted that the lack of a reciprocal provision can create an overlap for employers, confusion and uncertainty as to the correct award coverage for employees.

[86] [2013] FWC 4576

[125] ABI submitted that the modern awards objective includes the need to ensure a simple easy to understand award that avoids unnecessary overlap and that providing an express exclusion of the Premixed Concrete and the Asphalt Awards would aid in clarification for employers when determining award coverage.

[126] The Ai Group supported the ABI applications.

[127] The CFMMEU opposed the variations proposed by ABI to extend the exclusions in clause 4.2. The AWU opposed the variation, submitting that rather than reduce potential confusion, the ABI proposal would alter the status quo in terms of relationship between each of those two modern awards.

[128] In relation to the Asphalt Award, the CFMMEU and the AWU noted that the Award Modernisation Full Bench had specifically considered the relationship between the Asphalt Award and the Building On-site Award when making the Building On-site Award and in making the Asphalt Award in Stage 3. In the Stage 3 decision, the Award Modernisation Full Bench said:

> "We have retained roadmaking within the coverage clause of the award. Roadmaking, in this context, is intended to comprehend those elements of roadmaking associated with the asphalt industry and undertaken by employers within the industry as defined. Other roadmaking activity, undertaken by employers within the civil construction sector of the building, engineering and civil construction industry, will fall within the coverage of the Building, Engineering and Civil Construction Industry General On-site Award."

[129] Clause 4.2 of the Building On-site Award was formulated by the Award Modernisation Full Bench, following specific consideration of coverage as between the Building On-site Award and the Asphalt Award. The distinction between the two modern awards in respect of roadmaking is clear from the decision of the Award Modernisation Full Bench.

[130] The only evidence of any practical issues arising in relation to that coverage was the evidence of Mr Perumal. It is insufficient to warrant a variation on the basis of the considerations arising out of Item 6 of Part 2 of Schedule 5 of the Transitional Provisions Act. No cogent reason has been established for departing from the current considered provision determined by the Award Modernisation Full Bench. In any case, it is not apparent on the evidence how the addition of the Asphalt Award to the exclusions in clause 4.2 of the Building On-site Award would assist CTEC in applying the distinction between the work reflected in the observations of the Award Modernisation Full Bench in its Stage 3 decision."

[236] As the above passage makes clear, it was intended by the Award Modernisation Full Bench that the Building Award would cover asphalt work, specifically roadmaking, undertaken by employers within the civil construction sector of the building, engineering and civil construction industry. Other roadmaking carried out by employers in the asphalt industry was to be covered by the Asphalt Award.

[237] The CCF has not advanced a merits case for any alteration to this position. There is no evidence or other material before us to permit us to be satisfied that it is necessary for asphalt work performed by employers in the on-site building, engineering and civil construction industry on building and construction sites to be removed from the Building Award and placed in the Asphalt Award in order to achieve the modern awards objective.

[238] As earlier stated, there is some potential for overlapping coverage in respect of employers who may be characterised as falling within both the on-site building, engineering and civil construction industry and the asphalt industry. There is no evidence before us to suggest however that this potential problem has manifested itself in any actual practical difficulty requiring any reconsideration of the coverage boundary between the Building Award and the Asphalt Award.

AWU claim

[239] The AWU claim concerned the inclusion in the CW/ECW2 classification in the Building Award of a reference to the work function of "*Tester – soil, concrete or aggregate*" as a matter of clarification that employees performing that function were covered by that classification. However an examination of the recent industrial history of this work makes it clear that the claim is one that has substantial implications for the issue of award coverage.

[240] The AWU's evidence in support of its claim was concerned with the work performed by employees of Coffey, a business which specialised in construction materials testing. Coffey was the subject of litigation when in 2012 it applied for approval of an enterprise agreement which it had made with its workforce, the *Coffey Materials Testing Services Agreement 2012-2016* (Coffey Agreement). An issue arose concerning the relevant award to be used as a reference point for the assessment of the BOOT in s 193 of the FW Act. Coffey contended that the modern award which covered the work was the Manufacturing Award, but the AWU, which opposed approval of the Coffey Agreement, contended that the Building Award covered the work. At first instance, FWA (Cargill C) determined that the Manufacturing Award covered the work and the Building Award did not, that the Coffey Agreement passed the BOOT when assessed against the Manufacturing Award, and that the agreement should be approved.[87] It may be noted that in the proceedings before the Commissioner, Mr Callinan and Mr Muller gave broadly the same evidence about the nature of the work performed by Coffey's employees, including that it was primarily done on-site and that most employees did not hold formal qualifications relating to their work, as they gave before us.

[241] An appeal against the approval decision was dismissed by a Full Bench of the Commission.[88] The Full Bench however took a somewhat different approach to the issue of coverage than did the Commissioner at first instance. While it accepted, as did the Commissioner, that the Manufacturing Award covered the work performed by Coffey's employees, the Full Bench proceeded on the assumption that the Building Award (referred to in the Full Bench's decision as the "On-site Award") also *prima facie* covered the work when

[87] [2012] FWAA 10317

[88] [2013] FWCFB 2894

performed on-site without finally determining that issue.[89] It then resolved the potential overlapping coverage of the two awards by reference to the "interaction rules" in the awards. In this respect the Full Bench said:

> "[22] The awards contain interaction rules to govern the situation when more than one award may apply. Clause 4.2(a) of the On-Site Award, set out above, excludes the application of the On-site Award if the employees are covered by the Manufacturing Award. Clause 4.2(a) of the Manufacturing Award excludes the operation of that award if the coverage is based only on the occupational coverage of the award and the employer is covered by another award containing a classification which is more appropriate to the work performed by the employee.
>
> [23] These provisions require a consideration of whether there is a more appropriate classification in the On-site Award, on the assumption that it otherwise applies. In our view the provisions establish a priority in favour of the Manufacturing Award where there is not a more appropriate classification in another applicable award.
>
> [24] We are unable to conclude that the classifications in the On-site Award are more appropriate to the classifications in the Manufacturing Award. The Manufacturing Award contains classifications which specifically cover laboratory work and the work of technical workers. The Manufacturing Award covers such employees on a very wide occupational basis. Less qualified employees are nevertheless covered by general semi-skilled classifications.
>
> [25] The On-site Award applies very widely to employers in the construction industry. The classifications are of a very general nature. They contain no specific mention of laboratory or testing work although the definition of the civil construction industry does. The technicians work on such projects as the company may be contracted to provide its specialist services from time to time. Long term employees will usually perform their work in a base lab or at multiple locations. Most of the work is performed at base labs. In our view a classification structure designed for workers in the construction industry cannot be considered more appropriate than the technical stream in the Manufacturing Award.
>
> [26] It follows that the Manufacturing Award covers the technicians and by virtue of clause 4.2(a) of the On-site Award, the On-site Award does not cover them."

[242] It can be seen that a critical aspect of the Full Bench's reasoning in support of the conclusion that the classifications in the Manufacturing Award were more appropriate than those in the Building Award was that the latter award did not contain any classification that specifically mentioned laboratory or testing work. The AWU's claim before us would clearly remedy that deficiency. If granted, it would provide a basis to re-litigate the question of whether Coffey's employees, at least when performing materials testing work on-site, were covered by the Manufacturing Award or the Building Award. In that sense, the grant of the claim may affect current award coverage. Whilst it is open for the AWU or any party to make an application varying current modern award coverage of a particular area of employment,

[89] [2013] FWCFB 2894 at [27]-[28]

any such application must demonstrate that the existing award coverage of that employment does not meet the modern awards objective so that it is necessary to alter the coverage in order for the modern awards objective to be achieved.[90] The AWU's case before us did not attempt to demonstrate this in respect of Coffey's materials testing employees, and cannot be granted on that basis.

[243] Still, clause 4.10(b)(v) of the Building Award includes in its coverage, as part of the definition of "*civil construction*", the "*testing of soil, concrete and aggregate when it is carried out at a construction site in or in connection with work under clause 4.10(b)(i)*". The Building Award contemplates coverage of construction materials testing in some circumstances, otherwise this provision would seem to have no work to do. However, there is no classification in the Building Award which establishes a classification and a rate of pay for the performance of such work. The submissions of the employer organisations did not address this issue. No party submitted that clause 4.10(b)(v) should be removed altogether.

[244] In the circumstances we have determined that we should invite further submissions as to whether, without disturbing the coverage of either the Building Award or the Manufacturing Award, a variation should be made to the classification structure in the former award to provide a minimum rate of pay for those employees covered under clause 10.4(b)(v) or, alternatively, whether clause 10.4(b)(v) should be removed on the basis that it serves no utility.

Mr Walsh's claim

[245] Mr Walsh has proposed that the Building Award be varied to include a classification of "*Utility Locator*" to cover persons who perform the function of detecting underground infrastructure and assets such as pipes, electricity cables and fibre optic cables, using "*sophisticated electronic equipment*". This work is both safety-critical and necessary to avoid costly damage to critical infrastructure. The material in Mr Walsh's submission satisfies us that utility location is a field of work of significance to the building and construction industry, and that there are a number of businesses which specialise in this work. *Prima facie* there should be an award classification applying to this work.

[246] Unfortunately the submissions of the other parties did not engage with Mr Walsh's submission to any real degree, with the result that we have insufficient information to determine his claim. We propose to invite further submissions in order to further progress this issue, addressing the following matters:

- whether any existing award classification covers utility locators (whether under the Building Award or any other award);

- the training, qualifications and accreditation (if any) required to perform utility location work;

- the rates of pay currently paid in the market for this work;

[90] *Alpine Resorts Award 2010* [2018] FWCFB 4984 at [53]; cf. *Horticulture Award 2010* [2017] FWCFB 6037

- if there is no current award classification, which award and which classification should apply; and

- any other relevant matter.

MBA claim

[247] MBA's claim concerning the Joinery Award was founded on the proposition that there was currently overlapping award coverage as between the Joinery Award and the Building Award in relation to employees who primarily performed joinery work off-site but who were required from time to time to install materials on-site as an incident of their duties. That premise requires examination.

[248] The coverage of the Joinery Award, as the definition of "*joinery work*" in clause 3.1 makes clear, is confined to work performed in off-site joinery shops. The coverage of the Building Award, as earlier discussed, is confined to joinery work undertaken on-site. Clause 4.1(d) of the Joinery Awards excludes from its coverage employers and employees covered by the Building Award, and clause 4.2(b) of the Building Award excludes from its coverage employees covered by the Joinery Award. There is no overlap.

[249] At best, the MBA's submissions raise the theoretical possibility that an employee may perform joinery work at an off-site workshop and then be required to perform work installing joinery materials on a construction site, with the unsatisfactory result that the employee will be covered by the Joinery Award in respect of the former work and the Building Award in respect of the latter work in the course of a single employment. However there is no evidence of any real-life manifestation of this possibility which would justify an award variation to resolve it. Further and in any event we do not consider that MBA's proposed variation would constitute an appropriate resolution to the theoretical problem it has identified. Its variation would mean that on-site joinery installation work would always fall within the coverage of the Joinery Award, even where this constituted the major or even sole work duty of the employee, because this would be deemed to be work performed in an off-site joinery shop. This would amount to a significant change in coverage to the Building Award and the Joinery Award, and would potentially lead to the Joinery Award having significant application on-site in circumstances where it was only ever intended to apply off-site. MBA has not demonstrated why a change of coverage of this significance is necessary to achieve the modern awards objective. We are not satisfied that a change of this nature would constitute part of a fair and minimum safety net, particularly as the conditions of the Joinery Award are not adapted to the circumstances and environment of work on a building and construction site. Accordingly MBA's application is rejected.

8. JUNIOR RATES AND OTHER WAGE RATE ISSUES

Current provisions

[250] Clause 19 of the Building Award provides for the minimum wages of employees covered by the award. Minimum wages for the classification scale provided for in clause 18 and defined in detail in Schedule B to the award are set out in clause 19.1. Importantly, clause 19.1(a) provides (emphasis added)

19.1 General

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

. . .

[251] The expression "*adult employee*" is not defined in the Building Award. Clause 3 defines "*adult apprentice*" (who are provided for in clause 15, *Apprentices* and for whom rates are provided in clause 19.8) as "*a person of 21 years of age or over at the time of entering into a contract of training in a specified trade*". The confinement of clause 19.1 to adult employees means that no rate of pay is set for employees who are not adults, apart from those who have entered into an apprenticeship (for whom minimum rates of pay are comprehensively dealt with in clause 19.7).

[252] Clause 19.3(a) provides for the calculation of hourly rates of pay for daily hire employees. Clause 19.3(a)(ii) relevantly provides:

(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.

. . .

[253] In respect of weekly hire employees, clause 19.3(b) provides for the calculation of their hourly rate as follows:

(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.

[254] Clause 19.5 provides, in respect of mobile crane operators:

19.5 Mobile cranes capacity adjustment formula

For each additional 40 tonnes over a maximum lifting capacity of 100 tonnes, an amount of 2.4% of the weekly standard rate must be added to the base rate for Level 5 (CW/EW5) and above.

[255] Clause 19.6 is a facilitative provision in respect of employees being paid by piece rates. It provides:

19.6 Piece rates

(a) An employer and an employee may agree to remunerate the employee in whole or in part by piece rates, instead of (in whole or in part) the rates and allowances provided for in this award.

(b) The agreement must be made without coercion or duress.

(c) The employer must record a piece rate agreement made under this clause in writing and provide a copy to the employee and must keep the agreement as a time and wages record.

(d) The piece rate agreement must set out the following information:

(i) the parties to the agreement;

(ii) the date the agreement commences to operate; and

(iii) the basis on which the piece rate payment is made and how piecework will be measured.

(e) An employee working under a piece rate agreement must:

(i) be paid no less than the amount which the employee would have been entitled to receive under the rates and allowances prescribed by this award if the piece rate agreement had not been made; and

(ii) not disadvantage the employee in relation to their terms and conditions of employment.

(f) For the purpose of the NES, the base rate of pay for a pieceworker is the base rate of pay as defined in the NES.

(g) For the purpose of the NES, the full rate of pay for a pieceworker is the full rate of pay as defined in the NES.

(h) An agreement made under this clause may be terminated by written agreement between the employer and the employee or by either party giving four weeks' notice in writing to the other party and the agreement will cease to operate at the end of the notice period.

The claims

Junior employees – MBA and CCF claims

[256] There were two employer claims for the addition of a scale of junior rates to clause 19 of the Building Award. MBA sought the addition of the following new provision to apply to junior employees who were not otherwise undertaking training:

"19.1A Junior employees

Where the law permits junior employees to perform work in the construction industry, the junior employee (other than an apprentice or trainee) will be entitled to the percentage of the applicable adult weekly wage (in the case of part-time or casual employees the hourly rate) for their classification as set out in the table below:

Age	**% of adult rate**
Under 16 years	36.8
At 16 years	47.3
At 17 years	57.8
At 18 years	68.3
At 19 years	82.5
At 20 years	97.7

…"

[257] The CCF also sought the addition of a new scale of wages for non-apprenticed junior employee as follows:

"19.7(c) The minimum ordinary rate of pay to be paid to junior workers shall be in accordance with the percentages as set out below:

The minimum wages for an unapprenticed or non –trainee junior are:	**% of CW3 level**

	42%
Between 16 and 17 years of age	
Between 17 and 18 years of age	55%
Between 18 and 19 years of age	75%
Between 19 and 20 years of age	88%
Over 20 years	100% of appropriate classification

(d) Industry allowance

Where a junior worker works in circumstances which would entitle a tradesperson to the industry allowance prescribed in 24.1 of this award the following extra rates, expressed as a percentage of that industry allowance, shall be paid:

	Percentage
Between 16 and 17 years of age	40
Between 17 and 18 years of age	72
Between 18 and 19 years of age	95
19 years of age and over	100

…"

Other MBA claims

[258] MBA sought to modify the mobile cranes capacity adjustment formula in clause 19.5 by the addition of a new clause 19.5.2 as follows:

> "**19.5.2** The weekly rate, inclusive of the mobile cranes capacity adjustment formula, is calculated as an hourly rate in accordance with clause 13.2."

[259] In respect of piece rates, MBA sought the deletion of clause 19.6(b), which as earlier set out requires that any agreement between an employer and an employee to enter into a piece work arrangement be made without coercion or duress.

CFMMEU

[260] The CFMMEU sought to vary clauses 19.3(a) and 19.3(b) of the Building Award to include all of the relevant allowances in the hourly rate calculations, to reflect the fact that all tradespersons and labourers can be engaged on a daily hire or weekly hire basis.

Evidence

MBA

[261] In support of its junior rates claim MBA called evidence from Robert Wilson, the National Director of Workforce Development and Training of MBA.[91] Mr Wilson gave evidence, based on a report that he appended to his witness statement entitled "*Towards 2020*", that MBA predicted that 300,000 people would be required by the year 2024 in the

[91] Exhibit 32, Witness Statement of Robert Wilson dated 9 December 2016; Transcript 5 April 2017 PN1793-PN1842

building and construction industry to replace the approximately 30,000 people that leave the industry each year. He gave evidence that the major pathway into the industry was through the apprenticeship system, and MBA had identified that there were 44,225 construction trade apprentices in a workforce of one million, down from 56,447 in 2010. Also appended to Mr Wilson's witness statement was an extract of data from the National Centre for Vocational Education Research containing information about projected apprentice completion rates and the latest commencement rates. Mr Wilson gave evidence that there was a trend decrease in the number of completions and an increase in the number of commencements. He noted that the increase in commencements "*bucks the trend involving a general decrease in the number of new commencements*" of apprenticeships in the sector.

[262] Mr Wilson said that it had often been reported to him by member associations that there was an inability for young people to experience the building and construction industry unless they were employed as an apprentice and also that students undertaking training were reaching second stage apprentice wages without having the skills expected by employers. This meant that employers were not employing young people that had started apprenticeships through those programs. Mr Wilson's view was that it would be appropriate for young people to have the option of being employed on a construction site to experience what working in the industry might be like, but if an employer were to do that under the current provisions of the award the young person would have to be paid at adult rates which created a disincentive for employers. Creating junior rates would encourage more young people to experience the industry and, similar to other industries, would be an alternative pathway for young people into the industry. However in cross-examination Mr Wilson accepted that the building and construction industry had the highest full-time employment of 15 to 24 year olds of any industry.

[263] Mr Glover also gave evidence concerning junior rates.[92] He said that a number of members have asked over the years why it was not possible to employ staff who are not apprentices under junior rates, and stated that he knew no reason why there was no provision in the Building Award. He considered it likely that it would provide employers a huge incentive to employ staff they might not have otherwise considered, and identified a flow-on benefit to new employees of being exposed to a new industry and who might consider moving into a full apprenticeship.

CCF

[264] CCF called three witnesses in support of its claim to introduce junior wages to clause 17 of the Building Award. David Castledine, CEO of the NSW branch of CCF, gave evidence[93] that members of CCF have communicated directly to him a number of issues in the industry that relate to a lack of junior rates within the award. These included an aging workforce; skills shortages and a lack of incentive for employers to engage or target school leavers because there are no junior rates; the cost of employing and trialling junior employees, which was expensive when compared to older people; and the need for junior rates to be included in the award to encourage employment of younger people. He said the 2016 CCF

[92] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

[93] Exhibit 23, Affidavit of David Castledine affirmed 7 December 2016

NSW branch survey of employers in the civil construction and maintenance industry, which he conducted, supported these anecdotal observations.

[265] David O'Connor, the Executive General Manager of Diona Pty Ltd (Diona), a civil engineering company based in New South Wales, gave evidence[94] that the lack of junior rates in the Building Award had impacted upon his decisions to engage and train staff. Mr O'Connor said there was no incentive for Diona to engage a school leaver or an entry level employee under the age of 20 because all employees commenced on the same rate of pay. Mr O'Connor said that employing a junior attracted additional business responsibilities, including increased mentoring and supervision, which were not offset by the current pay scale. In analysing payroll data prepared by his payroll manager Mr O'Connor said Diona employed two people under the age of 20 in its workforce of 180. Mr O'Connor said there was a skills shortage in the industry, and that the lack of junior rates had contributed to this because there was a reduction in the number of trainees and apprentices on a national level. This would be addressed by the insertion of junior rates of pay into the award, which would incentivise employers to engage employees under the age of 20 and develop a skilled workforce from a junior level.

[266] John Hovey, Managing Director of the Hovey Group of Companies, gave evidence[95] that the lack of junior rates of pay under the Building Award was a disincentive for employers to engage young people in the industry. Mr Hovey said that the Hovey Group employed approximately 100 people, none of whom are under 18 years of age. Mr Hovey said that there were 250 students who graduated from high school in Australind (near Bunbury) each year, and that none of these students entered the civil construction industry in a labouring capacity. The cost of paying a 16 or 17 year old school leaver was not financially viable because of the prohibitive pay rate under the award, and that this cost increased because an experienced worker was required to accompany a junior worker. Mr Hovey said that young people entering the workforce did not have basic life skills that would allow them to be a valued contributor to the workforce, and therefore required an employer to provide a culture of learning and support. Mr Hovey said that there was a gap in the workforce, a shortage of young labour in the civil construction industry and an ageing workforce in the industry.

CFMMEU

[267] The CFMMEU called evidence from two witnesses in opposition to the claims by MBA and CCF for junior rates. Liam O'Hearn, an Organiser/Apprenticeship Officer with the Victorian/Tasmanian Branch of the Construction and General Division of the CFMMEU, gave evidence[96] that it was rare to non-existent for the industry to employ 15 and 16 year olds because junior employees were not old enough to hold a driver's licence or earn a forklift driving licence, which was often a minimum requirement of the job. He said that the concept of unskilled labourers was outdated because labourers were often required to hold tickets qualifying them as competent in driving a forklift ticket, traffic management, dogging, rigging, hoisting or scaffolding. For a 16 year old who is too young to gain tickets, it was critical they were signed up as an apprentice to receive training.

---

[94] Exhibit 20, Affidavit of David O'Connor affirmed 7 December 2016

[95] Exhibit 22, Affidavit of John Hovey affirmed 7 December 2016

[96] Exhibit 15, Witness Statement of Liam O'Hearn (undated); Transcript 4 April 2017 PN1445-PN1531

[268] Mr O'Hearn said that, in his work with the CFMMEU, he had handled cases of underpayment of young employees who were incorrectly paid as apprentices when they were in fact not signed up as apprentices. He provided an example of one young worker who was paid as an apprentice for two and half years when he was not an apprentice. He stated that there were "*systemic problems with a failure to train and have proper assessment and certification carried out across the industry*", and he was concerned that employers might seek to not hire apprentices in favour of junior wage employees. He also held serious concerns that a junior wage entry for young workers without a connection to training and development would pose serious safety concerns. Mr O'Hearn noted there were entrant rates for labourers under the award, whereby a labourer's rate of pay will increase over time commensurate with experience.

[269] Robert Cameron, an Apprentice Training Coordinator for the CFMMEU Construction and General Division Queensland-Northern Territory Branch, gave evidence[97] that the introduction of junior rates to the Building Award would result in a reduction in the number of apprentices within the industry as employers could and would employ young people as cheap labour until they reached adult wages, when they would be dismissed and replaced with new junior employees. He said he had observed that employers in the industry preferred not to employ workers until they had received all their formal training elsewhere. Formal training in the civil construction industry had begun in the early 2000s, and the sector was only just starting to accept its value. He was concerned that the introduction of junior wages would erode advancements in the area in terms of formal training of employees, and lead to informal, minimal on-the-job enterprise-specific training.

Submissions

MBA

[270] MBA submitted, in relation to its junior rates claim, that the Building Award currently represented a disincentive to employers from hiring junior employees who are not undertaking training by requiring they be paid adult rates. It simultaneously acted as a disincentive to young employees by requiring them to be engaged under a formal training arrangement. MBA submitted that its proposed new junior wage table, which contained a series of percentages of the minimum adult rate aligned to age categories, would overcome these disincentives.

[271] MBA submitted that clause 19.5 of the Building award should be varied to clarify the way in which the mobile crane capacity formula was calculated and applied. This was a technical change to improve the understanding of this formula and would not cause a material change to its operation.

[272] MBA submitted that the wording "*be made without coercion or duress*" in 19.6(b) of the Building Award was superfluous and unnecessary as no other provision allowing for various arrangements to be agreed was accompanied by such a requirement, even though they too must also be made without coercion or duress.

[97] Exhibit 17, Statement of Robert Cameron (undated)

[273] MBA opposed any variation to 19.3(a) and (b) and submitted that the CFMMEU's proposal to include all of the relevant allowances in the hourly rate calculations was unnecessary, would cause confusion amongst industry award users and represents an unsubstantiated increase to the safety net for which there is no basis or justification.

CCF

[274] The CCF submitted that the lack of junior rates of pay was counter to the modern awards objective, was anti-employment and was considerably limiting businesses' incentive and scope to "*grow*" the next generation of construction workers. Junior rates were universally utilised in the civil construction industry prior to the making of modern awards. Due to the cyclical nature of the construction industry there was always a demand for "*boom labour*", and it was necessary to ensure there was enough labour supply entering the market to ensure availability of replacement employees and to accommodate the increased work required. An ageing workforce and rapid increases in technology utilised in the industry drove the need for young people. The CCF submitted that junior employees required more supervision and mentoring than adult employees, and as the Building Award required them to be paid the same, then employers would hire an adult employee wherever possible.

CFMMEU

[275] In relation to the junior rates claims of MBA and the CCF, the CFMMEU submitted that the claims lacked merit and did not meet the modern awards objective. The CCF's claim that junior rates were universally utilised in the civil construction industry prior to the making of modern awards was misleading and factually inaccurate, since the junior wage rates in the *National Building and Construction Industry Award 1990* to which the CCF referred were confined to unapprenticed juniors in South Australia and juniors engaged in roof tile fixing in Western Australia. Prior to the modern award there were no junior rates in federal awards covering civil construction, no junior rates for builder's labourers, and limited junior rates for some building trade work in South Australia and Western Australia. The CCF's survey of members was not probative because of the low return rate and because it was based on false propositions, and there was no reliable evidence that the lack of junior wage rates had contributed to skill shortages or the very low number of apprenticeship and traineeships undertaken in the civil construction industry. According to the ABS, the construction industry had the highest number of 15-19 year olds employed on a full-time basis and the highest number of 20-24 year olds employed on a full time basis, and there were more apprentices and trainees in the construction industry than any other industry, which demonstrated that the absence of junior rates was having no impact on the employment of young people, nor the take-up of apprentices and trainees in the construction industry. There were already avenues that allowed young people to experience the building and construction industry before commencing a full time apprenticeship or traineeship, such as VET, school based apprenticeships and traineeships and pre-apprenticeship programs. The introduction of junior wage rates with no link to training would undermine apprenticeships and traineeships and lead to the displacement of older, semi-skilled workers with younger labour paid at wage rates that would exploit their youth without paying them the proper value of the work that they perform. Neither the CCF nor the MBA had provided any evidence on work value reasons to justify the wage rates they proposed.

[276] In relation to MBA's proposed modification to the mobile crane formula, the CFMMEU submitted that no empirical or probative evidence to justify a variation to the award had been advanced. In relation to the proposed change to the wording of clause 19.6(b), the current provision was consistent with piece work clauses contained in other modern awards and with the model award flexibility clause and should not be altered.

[277] In relation to its claim for the hourly rate calculations to be altered, the CFMMEU submitted that the variations would remove any ambiguity as to whether the allowances are payable for all purposes and are to be included in the ordinary hourly rate.

AWU

[278] The AWU submitted that the claims by the MBA and the CCF for junior rates involved varying modern award minimum wages as defined in s.284(4) of the Act, and that such variation can only be made if it is justified by work value reasons. The cases presented by the MBA and the CCF were stated only in very general terms and were essentially based on the fact that junior rates appeared in other awards, which was not sufficient for a work value case.

[279] The AWU submitted that the words "*be made without coercion or duress*" should not be deleted from clause 19.6(b), since this was a standard protection in other awards which provided for piece rates. No justification had been provided for a different approach in the Building award. The current clause, it submitted, should pose no concerns to an employer unless they intended to engage in coercion or duress, and was entirely appropriate that an employer who engaged in this behaviour be potentially prosecuted for acting in breach of the award.

CEPU

[280] The CEPU opposed the junior rates claims for similar reasons as the CFMMEU and the AWU.

AMWU

[281] In relation to the proposed alteration to clause 19.6(b), the AMWU submitted that individual flexibility arrangements were also required to be made without coercion or duress, particularly where a party is likely to be in a vulnerable position. For piece work arrangements, where there is a risk that employees may be forced to enter into arrangements as prospective employees, it should be made clear that the arrangements cannot be entered into prior to the commencement of employment.

HIA

[282] HIA submitted that identifying the allowances that were payable for all-purposes of the award within the minimum wage clause of the award would make the award simpler and easier to understand, but care had to be taken to ensure that any such change was reflective of the purpose and intent of the allowances in question. The CFMMEU had provided no

evidence or material in support of its proposed variation to the calculation of hourly rates, and the suggestion that the variation would not result in a cost increase to employers was devoid of any proper analysis.

Ai Group

[283] Ai Group opposed the CFMMEU claim to vary clauses 19.3(a) and 19.3(b) and submit that it is not supported by any valid reasons or evidence that it was necessary to achieve the modern award objective.

ABI and NSWBC

[284] ABI and the NSWBC opposed varying clauses 19.3(a) and 19.3(b), submitting that the CFMMEU did not address how the current clauses were ambiguous or have been interpreted such that they do not provide a fair and relevant safety net.

Consideration

Junior rates

[285] We are not satisfied that the addition of a scale of junior rates to clause 19, either as proposed by MBA or the CCF, is necessary to achieve the modern awards objective of a fair and relevant safety net. Junior rates have generally not been a feature of federal awards regulating the building and construction industry except in the relatively minor respects referred to in the CFMMEU's submission, and the assertion advanced by the CCF that junior rates were universally utilised in the civil construction industry prior to the making of modern awards is simply incorrect. It is likely that for this reason, junior rates were not included by the Award Modernisation Full Bench, despite the inclusion of such rates in the modern award having been sought by MBA and the HIA.

[286] No case has been advanced before us to justify us now reaching a different conclusion. There are four matters in particular which we consider to be of significance in this respect. First, MBA and the CCF as proponents of the inclusion of junior rates were unable to articulate the nature of the duties which they proposed that employees on junior rates would perform such as to justify the rates proposed. As pointed out by the CFMMEU, many non-trades tasks required to be performed on building and construction sites required accreditations or "tickets" which are not available to junior employees. Insofar as junior employees might be engaged to perform unskilled labouring duties under general supervision, the Building Award already provides for entry-level rates which are non-discriminatory in terms of age. The CW/ECW 1 classification (as explicated in Schedule B) provides for four sub-levels as follows:

CW/ECW 1 (level a) (new entrant)	Upon commencement in the industry
CW/ECW 1 (level b)	After three months in the industry

CW/ECW 1 (level c)	After twelve months in the industry
CW/ECW 1 (level d)	Upon fulfilling the substantive requirements of Construction Worker 1/Engineering Construction Worker 1 as detailed above

[287] Clause 19.1(a) provides that the rates of pay for these sub-levels are as follows:

Level 1 (CW/ECW 1):		
CW/ECW 1 (level d)	770.10	20.27
CW/ECW 1 (level c)	755.90	19.89
CW/ECW 1 (level b)	745.40	19.62
CW/ECW1 (level a)	730.30	19.22

[288] These pay rates are based on the relative assessment of the work value of employees entering the industry for the first time without training, skills or experience and requiring general supervision, and no party submitted otherwise. There was no probative evidence before us that demonstrated that a junior employee entering the industry on this basis would necessarily have a lesser work value than an adult employee.

[289] Secondly, MBA and the CCF did not propose that the introduction of junior rates be accompanied by any required program of training on the part of the employer. This omission is a major deficiency in the case presented, particularly when we are dealing with an industry in which the acquisition of skills is critical to safety and the productive performance of work in a team environment. In this respect the building and construction industry is simply not comparable to industries such as retail and hospitality which utilise junior rates to employ large numbers of young people and in which relatively informal on-the-job training is practical. The need for structured training in entry-level positions is currently articulated in clause B.2.1(a) of Schedule B of the Building Award in respect of entry-level employees as follows:

> **(a)** A CW/ECW 1 works under general supervision in one or more skill streams contained within this award. An employee at CW/ECW 1 (level d) will have:
>
> > **(i)** successfully completed, in accordance with RPL principles, a construction skills test equivalent to the required competency standards; or
> >
> > **(ii)** successfully completed a relevant structured training program equivalent to the required competency standards; or
> >
> > **(iii)** successfully completed an Engineering Construction Industry Skills Certificate Level 1 consisting of 16 appropriate modules; or formally recognised equivalent accredited training so as to enable the employee to perform work within the scope of this level; or

> **(iv)** obtained skills equivalent to the above gained through work experience subject to competency testing to the prescribed standards.

[290] The unqualified introduction of junior rates detached from any training requirement would entirely undermine the above training prescriptions for entry-level employees, with real potential for negative safety outcomes.

[291] Thirdly, the evidence does not support the proposition that there is a deficit of young people entering the industry. Notwithstanding the evidence of Mr O'Connor and Mr Hovey, ABS statistics show that the construction industry is, in absolute terms, the highest employer of 15-19 year olds and 20-24 year olds in full-time positions of any industry sector by a very large margin.[98] Other industry sectors which use junior employees to a significant extent do so primarily on a part-time basis, but the evidence before us does not demonstrate that part-time employment is an employment norm in the construction industry. Even so, on an overall basis, the construction industry is the third highest employer of persons in both age groups of all industry sectors. Thus it is far from apparent that the lack of junior rates acts as any disincentive to the employment of young people.

[292] Fourthly, despite a decline in apprenticeship and traineeship numbers across the economy as a whole, the construction industry is by a large margin the highest user of apprenticeships and trainees of all industry sectors, and the number of apprentices and trainees in the industry has increased significantly in recent years.[99] This again does not support the proposition that the industry has difficulty in offering employment to or attracting young people. The introduction of junior wage rates without any training requirement has the potential to undermine the extensive use of apprenticeships and traineeships in the industry, since it would provide an incentive for some employers to employ unskilled young persons in entry level positions without having to bear the expense of training them.

[293] Accordingly the MBA and CCF claims for junior rates are rejected.

[294] However we consider that the current position with respect to the pay rates for non-adult employees who are not in apprenticeships or traineeships needs to be clarified. As earlier stated, clause 19.1(a) only refers to pay rates for "*adult*" employees. We do not consider that the use of the word "*adult*" serves any purpose and is conducive of confusion. Its presence casts in doubt whether the minimum rates in the Building Award provide a safety net for non-adult employees not in apprenticeships or traineeships, and accordingly it is not consistent with the modern awards objective. It will be deleted from clause 19.1(a).

Mobile cranes capacity adjustment formula

[295] We do not consider that the variation proposed by MBA is necessary. The pay increment established by clause 19.5 may be converted to an hourly rate for daily hire and weekly hire employees by the mechanisms in clause 19.3(a) and 19.3(b) respectively.

---

[98] ABS Cat.6291.0.55.003 – EQ12 – Employed persons by Age and Industry division of main job (ANZSIC)

[99] ABS Cat.6227.0.30.001-201705 – Education and Work, Australia, May 2017

Piece rates

[296] We are not satisfied that MBA has demonstrated any basis for the deletion from clause 19.6(b) of the requirement for piece rates agreements to be made without coercion or duress. This requirement was accepted by the Award Modernisation Full Bench as a necessary safeguard in respect of piece work agreements under the *Horticulture Award 2010*.[100] The current position in the Building Award reflects that approach. There is no evidence of any practical difficulty in the application of clause 19.6(b). MBA's claim is rejected.

Hourly rate calculation

[297] We do not consider that the allowances currently provided by clauses 20, 21 and 22 of the Building Award may indiscriminately be included as part of the hourly rate of pay payable for all purposes, as proposed by the CFMMEU. A full analysis of the basis of payment for each existing allowance would be necessary before any further allowances were added to the hourly rate calculation. In any event, the existing position in respect of the relationship between the allowances in clauses 20, 21 and 22 and the hourly rate calculation methodology in clause 19.3 has been overtaken by the new approach we propose to take in relation to allowances, which is discussed later in this decision. Clauses 19.3(a) and (b) will need to be revisited in light of that approach.

9. ALLOWANCES

Current provisions

[298] Clause 20, *Expense related allowance* of the Building Award provides for the following allowances:

- clause 20.1 – tool and employee protection allowance;
- clause 20.2 – meal allowance; and
- clause 20.3 – compensation for clothes and tools.

[299] It is necessary to set out clause 20.1 in full, for reasons explained below:

> **20.1 Tool and employee protection allowance**
>
> **(a)** A tool allowance must be paid for all purposes of the award in accordance with the following table:

Classification	Tool allowance $ per week
Artificial stoneworker, carpenter and/or joiner, carpenter-diver,	31.10

[100] *Horticulture Award 2010* [2009] AIRCFB 966 at [18]

carver, bridge and wharf carpenter, floor sander, letter cutter, marble and slate worker, stonemason or tilelayer	
Caster, fixer, floorlayer specialist or plasterer	25.71
Refractory bricklayer or bricklayer	22.07
Roof tiler, slate-ridger or roof fixer, tradespersons in the metals and engineering construction sector	16.29
Signwriter, painter or glazier	7.47

(b) The above allowance does not include the provision of the following tools or protective equipment. Where the following tools or protective equipment are provided by the employee then the employee must be reimbursed for the cost of such tools or protective equipment by the employer, or alternatively the employer may elect to provide such tools or protective equipment:

(i) Bricklayers:

- scutch comb;
- hammers (excepting mash and brick hammers);
- rubber mallets; and/or
- T squares.

(ii) Carpenters and joiners:

- dogs and cramps of all descriptions;
- bars of all descriptions;
- augers of all sizes;
- star bits and bits not ordinarily used in a brace;
- hammers, except claw hammers;
- glue pots and glue brushes,
- dowell plates;
- trammels;
- hand and thumb screws;
- spanners; and/or
- soldering irons.

(iii) Stonemasons:

- all cutting tools, except mash hammers, squares, pitching tools and straight edges up to four feet (1.2 metres) in length. On completion of engagement the cost of having all cutting tools sharpened; and/or
- jet sprays or some other suitable device for keeping the stone wet when using pneumatic surfacing machines and lathes.

(iv) Plasterers:

- all floating rules, trammels, centres, buckets and sieves. Stands for plasterers' mortar boards not less than 76 centimetres from the ground or where practicable and safe from a scaffold level; and/or
- overalls and the approved brush and roller to perform the work when required to brush on to walls and ceilings, bondcrete, plasterweld or similar substances.

(v) Tradespersons in the metals and engineering construction sector:

- power tools, special purpose tools, and precision measuring instruments for the use of tradespersons and for sheetmetal workers, snips used in the cutting of stainless steel, monel metal and similar hard metals.

A tradesperson will replace or pay for any tools supplied by their employer if lost through their negligence.

(vi) Civil construction employees:

- waterproof protective clothing required by an employee for particular tasks being performed;
- gloves, overalls, basil aprons and other appropriate protective clothing for employees using toxic substances, bitumen, tar, green timber, second-hand timber or bricks;
- a light coat or jacket with high visibility red markings for employees engaged on road work and/or railway work where traffic is not excluded by the use of continuous barriers or fences; and/or
- adequate detergents and solvents for the removal of excessive dirt, bitumen, emulsions, paint and similar substances from the employee's person.

Mess personnel will be reimbursed for the cost of purchasing at least three sets of appropriate clothing which will be laundered and maintained by the employer. These items will include shorts, shirts, trousers, aprons and caps. The provisions of this subclause do not apply where the items of clothing are provided free of charge by the employer. The items will remain the property of the employer.

(vii) All employees:

- all power tools and steel tapes over six metres;

- gloves and hand protective paste for employees engaged in handling hot bitumen, creosote, oiled formwork, refractory repair work and in washing down brickwork;

- protective clothing for employees required to use muriatic acid;
- suitable material and/or coloured glass for the protection of employees working on oxyacetylene or electric arc welding;
- suitable screens to protect employees from flash where electric arc operators are working;
- gas masks for employees engaged upon work where gas is present; and/or
- hand protective paste for any painter, signwriter, plasterer or glazier who requires its use.

(viii) All employees other than refractory bricklayers

Where employees are required either by the employer or by legislation to wear steel toe capped safety boots the employer will reimburse employees for the cost of purchasing such boots on commencement of work. Subject to fair wear and tear, boots will be replaced each six months if required and sooner if agreed.

(c) An employee required to use toxic substances covered by clause 22.2(i) in surroundings where there is an absence of adequate natural ventilation must be provided with:

(i) an approved type of respirator and/or an approved type of hood with airline attached;
(ii) protective clothing as approved by the relevant safety authority;
(iii) soap and washing materials;
(iv) pneumatic rubber tyred wheelbarrow for loads of bricks and materials;
(v) overalls where necessary, when bricklayers are engaged on work covered by clauses 22.2(m) and 22.2(n).

(d) Special conditions to apply to bricklayers engaged on construction or repairs to refractory brickwork

The following special conditions will apply to bricklayers engaged on construction or repairs to refractory brickwork instead of clause 20.1(b)(viii) dealing with safety boots:

(i) after six weeks employment, and on request from the employee, an allowance of $87.92 must be provided for the purchase of boots. The same allowance must be provided to cover the cost of replacement boots, provided that the allowance need not be paid more than once in any six month period dating from the time the allowance is first provided. The allowance is not payable where the employer provides boots; and/or

(ii) employees provided with the allowance, or the boots, will accrue credit at the rate of $4.40 per week from the date of the request. An employee leaving, or being dismissed, before 20 weeks' employment after the date of the request will repay the difference between the credit accrued and the $87.92; and

(iii) an employer must reimburse an employee for an x-ray once every six months, if requested by an employee engaged in refractory brickwork, or working in a tuberculosis home or hospital. Such x-rays may be taken during working hours and count as time worked. An employee who ceases work in a tuberculosis home or hospital may also request an x-ray on cessation of work.

[300] Clause 20.4 sets out the mechanism for the adjustment of the above allowances.

[301] Clause 21, *Site and general wage related allowances* provides for the following allowances:

- clause 21.1 – special allowance;
- clause 21.2 – industry allowance;
- clause 21.3 – underground allowance;
- clause 21.4 – multistorey allowance;
- clause 21.5 – laser operation allowance;
- clause 21.6 – laser safety officer allowance;
- clause 21.7 – carpenter-diver allowance;
- clause 21.8 – refractory bricklaying allowance;
- clause 21.9 – coffer dam worker;
- clause 21.10 – first aid 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.

[302] Clause 22, *Special rates* provides for additional amounts payable for work performed in specified circumstances. These are described as allowances in clause 22.1(a), and clause 22.1(e) requires them to be paid in addition to the other rates prescribed in the award. Clause 22.2 provides for the following special rates to be "*applicable to all sectors*":

- clause 22.2(a) – insulation;
- clause 22.2(b) – hot work;
- clause 22.2(c) – cold work;
- clause 22.2(d) – confined space;
- clause 22.2(e) – swing scaffold;
- clause 22.2(f) – explosive powered tools;
- clause 22.2(g) – wet work;
- clause 22.2(h) – dirty work;
- clause 22.2(i) – toxic substances;
- clause 22.2(j) – fumes;
- clause 22.2(k) – asbestos;
- clause 22.2(l) – asbestos eradication;

- clause 22.2(m) – furnace work;
- clause 22.2(n) – acid work;
- clause 22.2(o) – heavy blocks – employees laying other than standard bricks;
- clause 22.2(p) – bitumen work;
- clause 22.2(q) – height work;
- clause 22.2(r) – suspended perimeter work platform;
- clause 22.2(s) – employee carrying fuels, oils and greases;
- clause 22.2(t) – pile driving;
- clause 22.2(u) – dual lift allowance; and
- clause 22.2(v) – stonemasons – cutting tools.

[303] Clause 22.3 provides for the following special rates applicable only to the general building and construction sector:

- clause 22.3(a) – towers allowance;
- clause 22.3(b) – cleaning down brickwork;
- clause 22.3(c) – bagging;
- clause 22.3(d) – plaster or composition spray;
- clause 22.3(e) – slushing;
- clause 22.3(f) – dry polishing of tiles;
- clause 22.3(g) – cutting tiles;
- clause 22.3(h) – second-hand timber;
- clause 22.3(i) – roof repairs;
- clause 22.3(j) – computing quantities;
- clause 22.3(k) – grindstone allowance;
- clause 22.3(l) – brewery cylinders – painters;
- clause 22.3(m) – certificate allowance;
- clause 22.3(n) – spray application – painters;
- clause 22.3(o) – pneumatic tool operation;
- clause 22.3(p) – bricklayer operating cutting machine;
- clause 22.3(q) – hydraulic hammer; and
- clause 22.3(r) – waste disposal

[304] Clause 22.4 provides for the following special rates applicable only to the civil construction sector:

- clause 22.4(a) – pipe enamelling;
- clause 22.4(b) – powdered lime dust;
- clause 22.4(c) – sand blasting;
- clause 22.4(d) – live sewer work;
- clause 22.4(e) – timbering;
- clause 22.4(f) – special work;
- clause 22.4(g) – compressed air work; and
- clause 22.4(h) – cutting stone.

[305] Clause 42 separately provides for a lift industry allowance.

The claims

MBA

[306] MBA sought significant variations to the allowances provisions of the Building Award. Its primary position was that allowances or award provisions that dealt with a matter that would otherwise be covered by relevant work health and safety legislation should be deleted. In the alternative, it proposed that those allowances or provisions which would otherwise be covered by relevant work health and safety legislation should be varied to remove any prescriptive requirements and replaced with generic references to work health and safety obligations. It also sought the deletion of allowances or award provisions that were outmoded, irrelevant or no longer applicable.

[307] Contingent on the outcome of the above claims, MBA also sought that those allowances which remained in the award should be rationalised so as to class them into one of three categories: skill, disability or expense related. For those which were classed as disability related allowances, MBA claimed they should be subdivided into those which were composite and those which were cumulative.

HIA

[308] The HIA sought to vary clause 20.1 of the Building Award, which provides for the payment of a tool and employee protection allowance to employees, in order to place a positive obligation on employees to actually provide and maintain the specified tools and protective equipment in order to receive the allowance. The current clause does not in express terms require employees to provide or maintain specified tools.

CCF

[309] CCF sought that clause 22.2(h), which relates to dirty work, be varied to insert a definition of "*unusually dirty work*", with the payment of the allowance being confined to the performance of such work. It sought that the term be defined as follows:

> "Unusually dirty work is defined as a situation where the employee is required to work on a site with dirty or contaminated substances or materials not commonly found on building and construction sites, and these substances or materials not covered by any other disability allowances paid under this award."

[310] In the alternative, CCF submitted that if no suitable definition could be agreed upon, the allowance should be removed in its entirety from the Building Award.

CFMMEU

[311] The CFMMEU sought the insertion of a new clause 20.5 as follows:

"**20.5 Communication Equipment Allowance**

Where an employee is required to use two-way radios, walkie talkies, mobile phones, tablets, or other communication devices, during the hours of work, such equipment will be provided by the employer (including payment for any service or other charges incurred). Where such equipment is provided by the employee and required to be used during working hours, then the employee must be reimbursed the cost of providing the equipment and any service or other charges incurred."

[312] The CFMMEU also sought a variation to clause 22.1 to establish a new consolidated special rates allowance by the addition of the following new provisions:

"(f) Subject to the following conditions an employer and an employee may agree to the employee being paid a consolidated special rates allowance of 7.9% of the weekly standard rate:

(i) The consolidated special rates allowance is in compensation of all special rates except the following:

- Hot work
- Cold work
- Confined space
- Swing scaffold
- Asbestos
- Asbestos eradication
- Suspended perimeter work platform
- Towers allowance
- Compressed air work

(ii) The consolidated special rates allowance will be paid as a flat allowance for each hour worked (including time worked for the accrual of RDO's)

(iii) The agreement for the payment of the consolidated special rates allowance shall be recorded in the time and wages record.

(iv) This consolidated special rates allowance will not apply where an employee is receiving the air-conditioning industry and refrigeration industry allowances contained in clause 21.11."

Evidence

MBA

[313] MBA called evidence from David Solomon, Executive Officer Safety and Risk, who oversaw MBA NSW's Work Health and Safety department and is a JAS-ANZ accredited OHS, Quality and Environment Certified Auditor and a Fellow of the International Safety Quality and Environment Management Association (ISQEM).[101] Mr Solomon gave evidence that his team provided workplace health and safety (WHS) advice and training to approximately 8000 member companies to assist them "*in understanding and meeting their obligations under the NSW Work Health and Safety Act 2011 and associated Regulation*". Mr Solomon gave evidence that the areas in the Building Award that involved work health and safety were also covered by the *Work Health and Safety Act 2011* (NSW), associated regulations, codes of practice and other guidance and information materials. Annexed to his first witness statement was a table which Mr Solomon stated "*shows each clause of the On-Site Award that relates to WHS, and the relevant related provisions of the WHS Act and Regulation*". The annexure dealt with a number of the allowance provisions contained in clauses 20-22. Mr Solomon said that many of the Building Award provisions were out of touch with WHS legislative requirements and did not reflect industry best practice, and some clauses had become obsolete or referred to things or practices that no longer existed. He also said that some obligations under the award and legislation overlapped and occasionally contradicted each other. Mr Solomon gave evidence that whilst work health and safety legislation adopted a risk assessment methodology, the award adopted a more prescriptive approach which was in conflict with the work health and safety legislation. Mr Solomon said that MBA NSW often received enquiries from members about whether guidance on work health and safety matters should be taken from legislation or the Building Award.

[314] Mr Solomon stated that the Building Award "*contained a range of allowances that are expected to be paid to employees when engaged in work that is in my opinion exposes workers* (sic) *to a higher level of risk which does not make them safer in the workplace*". He explained that his essential point was that the award clauses to which he referred did not add to safety and therefore should be reviewed to see if there was a continuing need for them. During cross-examination, Mr Solomon accepted that none of the applicable WHS legislation, associated regulations nor codes of practice provides for allowances to be paid to workers. He also accepted that most of the award provisions set out in the table annexed to his witness statement dealt with allowances to be paid to workers or special rates to be paid to workers. In relation to clause 20.1, Mr Solomon stated that the clause was inconsistent with WHS legislation because the legislation provided that where something is deemed personal protective equipment (PPE) it is the responsibility of the employer to provide it. Mr Solomon agreed that there was nothing in the WHS legislation which *prohibited* an employee providing their own equipment and the employer covering the cost, but stated that "*it just adds two sets of values and two sets of rules and it's unnecessarily complicated*". In relation to the multi-storey allowance, Mr Solomon agreed with the proposition that it did not matter that the legislation and the award have different definitions of a storey, as the Building Award provided for an employer to pay an employee an additional loading on top of the hourly rate

[101] Exhibit 1, Witness Statement of David Solomon, dated 16 December 2016; Exhibit 3, Reply Witness Statement of David Solomon; Transcript 3April 2017 PN288-PN333; PN458-PN803

and did not refer to safety measures that might be taken to meet obligations under the WHS legislation.

[315] Mr Glover also gave evidence concerning the allowance issue.[102] Mr Glover gave specific evidence regarding the special conditions to apply to bricklayers engaged on construction or repairs to refractory brickwork (contained in clause 20.1(d)(iii)). He said this clause was out of date and that references to a "*tuberculosis home or hospital*" were obsolete as these facilities are "*virtually not in existence given the disease's rapid decline since the 1960s*." He also said that the allowance was outdated because there was not a lot of refractory brick work being undertaken across the industry, and the risks were better dealt with by WHS legislation. During cross-examination Mr Glover accepted that WHS legislation did not deal with the payment of allowances, and said "*it deals with the issue of minimisation of risk and I think that that's a better approach than paying…an allowance to someone in order for them to be exposed to the risk*." Mr Glover said he was not aware of any employees requesting reimbursement under the clause, but he was not sure whether any refractory companies were members of MBA.

CFMMEU

[316] The CFMMEU called evidence from Dr Gerard Ayers, Occupational Health and Safety and Environment Manager for the CFMMEU Construction Division Victoria/Tasmanian Branch, who holds a PhD (OHS), a Master of Applied Science (OHS), a Graduate Diploma of Occupational Hazard Management and an Associate Diploma of Applied Science (OHS).[103] Dr Ayers opined that the award provisions and the WHS legislation complemented each other and were not mutually exclusive. In his view the award was primarily concerned with employment conditions, but in some circumstances it did overlap with and enter into the realm of workplace health and safety. An example of this was the hours of work and rest breaks provisions in the award, which he stated have "*long been acknowledged with the hazards and risk of fatigue*". Dr Ayers said the Building Award "*in no way prevents continual improvement, or impinges or restricts, in any way, safer methodologies or innovative/newer equipment or technology to do the job*". He said the annexed table to Mr Solomon's witness statement appeared to misrepresent or misunderstand the Building Award and also the performance based work health and safety legislative framework. He said he could not identify any provision in the Building Award which dealt directly with health and safety as distinct from providing allowances for certain disabilities or providing for payment for the supply of a certain tool or piece of equipment. Dr Ayers agreed that, as a general proposition, allowances do not have a health and safety role and stated that the allowances were normally to acknowledge that there was a disability in working with or having to work with particular materials. He conceded that WHS legislation did not contemplate scenarios where an employee and not the employer might provide protective equipment and that this might, potentially, constitute an inconsistency between the legislation and the award.

[102] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

[103] Exhibit 4, Statement of Dr. Gerard Ayers (undated); Transcript 3 April 2017 PN813-PN956

HIA

[317] The HIA called evidence concerning the allowance issue from Kirsten Lewis.[104] Her evidence referred to a question in the HIA Survey in which employer participants were asked whether they provided their employees "*with all of the tools and protective boots necessary to carry out the work?*" The HIA Survey indicated that 52 per cent of respondents stated that they provide their employees with all necessary tools and protective boots, 26 per cent of respondents stated that they did not, and 12 per cent answered the question with the response "*other*".

Submissions

MBA

[318] MBA submitted that a number of provisions in the Building Award were the result of negotiation and arbitration between parties at a time when there were differing provisions in the various state and territory WHS statutes. This had created a situation where there were a large number of items within the Building Award that deal with matters that were otherwise covered by the relevant WHS laws, regulations, codes of practice, guidance materials, Australian standards and other publications. MBA submitted that this created a number of problems including inconsistencies and overlap between the award and WHS requirements; required employers to do things that might detract from the need to ensure workplaces were safe; involved an approach to WHS that was contrary to the performance based model adopted in contemporary WHS laws; and led to requirements that involved different approaches to ensuring a safe workplace dependent upon the classification of worker at a workplace.

[319] MBA submitted that there had been a number of developments to WHS laws which reinforced the notion that WHS should not be the subject of comprehensive obligations set under the Building Award and was best determined with reference to WHS laws. The *Work Health and Safety Act 2011* (Cth) (Model WHS Act) delivered what was essentially a national WHS system which had been adopted by many jurisdictions. Safe Work Australia as a national policy maker published codes of practice providing WHS guidance on types of work, many of which have been recognised by state based regulators as being a practical guide to achieving the standards of WHS. MBA submitted that the approach to WHS embraced in the WHS laws was performance based, whereas the approach in the Building Award was a prescriptive approach. It submitted that in a jurisdiction which turns on continual improvement in safety technology, design, experience and knowledge, any prescriptive legal provision was prone to becoming quickly outdated, obsolete and therefore confusing to the end user. For these reasons the provisions that deal with matters otherwise covered by WHS laws should be amended to remove references to WHS matters. Alternatively those clauses that cause an inconsistency with WHS laws should be altered to replace specific references with generic references. The remaining allowances should be rationalised dependent upon whether they were skill, disability or expense related.

[104] Exhibit 25, Witness Statement of Kirsten Lewis dated 29 November 2016

[320] MBA opposed the CFMMEU claim for a new clause 20.5–Communication Equipment Allowance. The proposed provision did not provide for an allowance in the conventional sense and would oblige employers to reimburse the full cost of providing the equipment and any service or other charges incurred. It submitted that the claim contemplates circumstances that would rarely, if ever, exist as such equipment was conventionally supplied by the employer as it was in their interest to do so. MBA further submitted that the proposed provision lacked the flexibility for the employer to determine whether they would provide the equipment or require employees to provide their own, leaving this decision to the discretion of the employee. Additionally there was significant uncertainty attached to the proposed provision in relation to what costs it would cover and what future obligations it could place on the parties.

[321] MBA supported the concept of streamlining allowances in the Building Award. However it submitted that the CFMMEU's proposal to insert a new consolidated special rates allowance would not address existing concerns. Rather it would compound the concerns by introducing greater complexity, further administration and an increased regulatory burden on employers.

HIA

[322] The HIA submitted that the tool and employee protection allowance was an expense related allowance and therefore should only be payable where the expense was actually incurred by the employee in order to reimburse them for the cost associated with purchasing and maintaining tools. The HIA submitted that the CFMMEU proposal for a new clause 20.5–Communication Equipment Allowance might also have unintended consequences, including interfering with existing company policies or other contractual arrangements or adversely affecting an employee's own approach to tax deduction. The proposed variation would simply add cost and regulatory burden to businesses and be particularly burdensome for small businesses.

[323] HIA opposed the variation to insert a new consolidated special rates allowance and submitted that whilst it was not mandatory, it was of little practical utility. There was no rationale for the inclusion and exclusion of certain allowances, and no material provided explaining or justifying the use of 7.9% as the amount of the consolidated rate. Alternatively, if the proposed variation were to be adopted, there should be no requirement for the arrangement to be recorded in the time and wages record as this would add unnecessary additional regulatory burden at odds with the modern award objectives.

CCF

[324] In relation to its claim, the CCF submitted that the lack of a clear definition of "*dirty work*" led to unnecessary tension between employees and employers, additional regulatory burdens, unnecessary costs for employers, and a complex dispute resolution process. The CCF submitted that in the alternative, if no suitable definition could be agreed, the allowance should be removed in its entirety from the Building Award.

ABI and NSWBC

[325] ABI and the NSWBC supported HIA's claim for a variation to clause 20.1, submitting that the HIA had advanced a meritorious case and demonstrated that the variation meets the modern award objectives. They submitted that the CFMMEU's claim to insert a new clause 20.5–Communication Equipment Allowance was not supported by any evidence and should be rejected. ABI and the NSWBC supported the submissions made by HIA with respect to the CFMMEU's proposal for a new consolidated special rates allowance, and submitted that the rationalisation of allowances could be achieved by parties entering into an individual flexibility arrangement.

Ai Group

[326] The Ai Group likewise submitted that the claim by the CFMMEU for a new clause 20.5–Communications Equipment allowance was unsupported by any evidence that such a proposal was necessary to achieve the modern award objectives. The Ai Group opposed the CFMMEU's proposal for a new consolidated special rates allowance in clause 22.1, and submitted that it was likely that employers paying such a rate would pay more than that payable when simply applying the allowances as and when they fell due.

CFMMEU

[327] The CFMMEU submitted that the claims by MBA with respect to the interaction of WHS and allowances under the Building Award should be rejected as the MBA is misguided. The relevant provisions were not inserted into the award to deal with WHS matters per se, but were rather to provide for the payment of allowances or rest breaks where certain disabilities were experienced. The provisions that MBA sought to delete or change were accepted by the Full Bench in the 2012 Award Review as matters that may be included in modern awards, predicated on the basis that they dealt with subject matters set out in ss.139 and 142 of the Act. Whilst the adoption of the model WH&S laws had some impact on award conditions, in that any provision in an award that was inconsistent with them had no effect, there was clearly no prohibition on an award dealing with WHS matters. The developments in WHS legislation provided no reason for the wholesale removal of allowances from the Building Award to the detriment of employees covered by the award. The CFMMEU submitted that the replacement of specific references to WHS matters to generic references would lead to disputation, and leaving the specific provisions in the award would ensure that the award met the modern award objectives, particularly in regard to ensuring an easy to understand and stable modern award.

[328] The CFMMEU conceded that MBA's argument that clause 20.1(d)(iii) is obsolete is partially correct, given that designated tuberculosis treatment facilities no longer exist in Australia. It submitted that the provision is mainly concerned with employees being reimbursed for x-rays to check their lungs against any infections or disease, and applied to employees employed on refractory brickwork. The CFMMEU submitted that the clause should be retained and varied to provide as follows:

> "**20.1(d)(iii)** An employer must reimburse an employee engaged in refractory brickwork for an x-ray (if required by an employee) once every six months. Such x-rays may be taken during working hours and count as time worked."

[329] The CFMMEU submitted that it did not necessarily oppose grouping allowances, as proposed by the MBA, but this could be dealt with by conciliation following the determination of the substantive matters.

[330] In response to the claim by HIA regarding clause 20.1, the CFMMEU submitted that the Building Award already provided, at clause 20.1(b), that if the employer provided boots no allowance will be payable. The tool allowance was only payable to tradespeople, and the HIA Survey did not provide evidence as to the extent to which employers in the industry provided tools. The CFMMEU submitted that HIA had failed to provide empirical or probative evidence sufficient to warrant such a significant variation to the award and that the proposed variation should therefore be rejected.

[331] In relation to the CCF claim, the CFMMEU submitted that the CCF had not pointed to any disputes over the interpretation of clause 22.2(h), or changed circumstances to warrant a variation of the definition of dirty work.

[332] In support of its claim for the insertion of a new clause 20.5–Communication Equipment Allowance, the CFMMEU submitted that there had been an increase in the extent to which mobile phones, smart phones and tablets were being used, with normal industry practice being that the employers provided these to employees at no extra cost. The responsibility for the cost of the provision of this equipment to employees was currently a grey area and not covered by the Building Award.

[333] The CFMMEU submitted that its proposed new consolidated special rates allowance was a facilitative provision that would allow employers and employees to agree to rationalise the allowances paid without affecting the rights of those employers who wanted to continue to pay the individual special rates for the specific occasions on which they would be payable.

AWU

[334] In response to the MBA claims, the AWU submitted that there was nothing remarkable about an award prescribing additional compensation for the performance of duties that gave rise to a greater safety risk. Shift work was an example, in that it was recognised that the performance of shift work could increase safety risks because there is a higher likelihood of fatigue, but was not prohibited in Australia. The AWU submitted that instead a compromise position has been reached whereby safety laws imposed strict obligations on employers and occupiers in terms of ensuring workplaces are safe, and employees received additional compensation in recognition of the disabilities associated with shift work. The AWU submitted that it was overly simplistic to propose that any award condition which provided additional compensation to an employee because they were being exposed to a potentially dangerous working environment should be deleted. The AWU submitted that they were not opposed to allowances being categorised as either related to expense, skill or disability.

[335] In response to the HIA claim regarding clause 20.1, the AWU submitted that it was clear that the allowance in clause 20.1(a) was a longstanding part of the minimum wages of the identified classes of tradespeople as opposed to an allowance which was contingent on the existence of any specified circumstances, which is why it was payable on an all-purpose basis.

The AWU submitted that HIA have previously tried to run this claim and that they had not provided any new evidence to establish that this variation is necessary.

[336] In response to the CCF claim for a new clause 22.2(h), the AWU submitted that this claim was not simply a clarification exercise, and would instead significantly reduce the circumstances whereby the dirty work allowance was paid. The AWU submitted that no clarification was needed as no practical problems had been identified by their members and the CCF had not provided any evidence of this. The AWU submitted that if a definition was required, it should be as follows:

> "**Unusually dirty work** means a duty or duties not regularly performed by an employee that results in the employee being exposed to dirtier conditions than they would encounter if performing their regular duties."

CEPU

[337] The CEPU submitted that the MBA's application was misconceived, and that the functions that awards and WHS legislation performed were distinct and separate. The proposed variation to clause 20.1 of the Building Award put forward by HIA had previously been considered, and the Commission should reach the same conclusion and reject the variation. The CCF had not provided any evidence to support its proposed variation to clause 22.2(h) and therefore the claim should be rejected.

AMWU

[338] The AMWU submitted that many of the entitlements which the MBA sought to characterise as duplications of WHS regulations were not in fact duplications. The award provisions were entitlements which benefitted employees directly, which was different to obligations for the employer to provide a safe work environment which might not entail any specific entitlement for employees.

Provisional conclusions and further submissions

[339] In the August 2017 Statement[105] we expressed the provisional view that the existing clause 20.1 should be replaced with the following provision

> **20.1 Tool and employee protection allowance**
>
> **(a)** An allowance in recognition of the maintenance and provision of the standard tools of trade must be paid for all purposes of the award in accordance with the following table:

[105] [2017] FWCFB 4239 at [2]

Classification	Tool allowance $ per week
Artificial stoneworker, carpenter and/or joiner, carpenter-diver, carver, bridge and wharf carpenter, floor sander, letter cutter, marble and slate worker, stonemason or tilelayer	30.45
Caster, fixer, floorlayer specialist or plasterer	25.17
Refractory bricklayer or bricklayer	21.61
Roof tiler, slate-ridger or roof fixer, tradespersons in the metals and engineering construction sector	15.95
Signwriter, painter or glazier	7.31

(b) Where any other tools are required for the performance of work by a tradesperson covered by paragraph (a), or where in the case of any other employee any tools are required for the performance of work, the employer shall:

(i) provide the tools; or

(ii) reimburse the employee for provision of the tools.

(c) Where any protective clothing or equipment, other than safety boots, is required for the safe performance of work, the employer shall:

(i) provide the clothing or equipment; or

(ii) reimburse the employee for provision of the clothing or equipment.

(d) Where employees other than refractory bricklayers are required either by the employer or by legislation to wear steel toe capped safety boots the employer will reimburse employees for the cost of purchasing such boots on commencement of work. Subject to fair wear and tear, boots will be replaced each six months if required and sooner if agreed.

(e) The following special conditions will apply to refractory bricklayers:

(i) After six weeks employment, and on request from the employee, an allowance of $86.09 must be provided for the purchase of boots. The same allowance must be provided to cover the cost of replacement boots, provided that the allowance need not be paid more than once in any six month period dating from the time the allowance is first provided. The allowance is not payable where the employer provides boots.

> **(ii)** Employees provided with the allowance, or the boots, will accrue credit at the rate of $4.30 per week from the date of the request. An employee leaving, or being dismissed, before 20 weeks' employment after the date of the request will repay the difference between the credit accrued and the $86.09.

[340] We also expressed the following provisional views in the August 2017 Statement concerning the allowances in clauses 21 and 22:

> "***Allowances - clauses 21 and 22***
>
> [3] It is provisionally proposed that a number of allowances in clause 21 and 22 of the Award should be abolished and the industry allowance should be increased by a compensatory amount.
>
> [4] Attached is a list of allowances for which provision is made in the Award categorised as expense, disability and skill allowances by reference to the sector of the building construction industry to which the allowances apply. They should be re-ordered in the Award in accordance with these categories. It is proposed to abolish the lift industry allowance. The expense related allowances will be dealt with separately. We propose to retain the skills related allowances.
>
> [5] As to the disability allowances we propose that the industry allowance be increased and replace all other disability related allowances for which provision is made in the Award. We also propose that the quantum of the industry allowance differ as between the various identified sectors of the building construction industry to take into account the fact that existing disability related allowances do not apply uniformly across the various sectors. The sectors we have in mind are the residential construction sector (which encompasses both cottage construction and multi-unit apartment buildings construction), the commercial building and construction sector, the civil construction sector and the metal and engineering construction sector. The following issues arise for consideration in respect of this proposed approach:
>
> > (a) the appropriate definitions for each sector identified above having regard to the coverage definitional provisions in clause 4.10 of the Award;
> >
> > (b) the quantum of the industry allowance that should apply in each sector; and
> >
> > (c) whether any existing disability related allowance should be retained."

[341] The proposed categorisation of the allowances was set out in the Attachment to the August 2017 Statement, which it is not necessary to reproduce here.

[342] In response to the above provisional conclusions, MBA submitted:

- the proposed new clause 20.1 was less complex than the existing provision;

- the proposed clause 20.1(b) extended the operation of the provision beyond tradespersons to "*any other employee*";

- the proposed clauses 20.1(b) and (c) should be confined to tools, clothing and protective equipment not conventionally or commonly associated with the performance of work by a tradesperson;

- the proposed clause 20.1(d) should allow for the provision of safety boots by the employer;

- MBA was opposed to the proposal for disability allowances to be rolled up into industry allowances differentiated by sector, because many of the disability allowances were not commonly payable; and

- it supported the grouping of allowances, but not on a sub-industry or sector specific basis.

[343] The HIA submitted that:

- it maintained its position that the tool and employee protection allowance should only be payable when the tools or equipment were actually supplied;

- it was concerned that the removal of the list of specified tools in clause 20.1 might create controversy over a requested reimbursement;

- any obligation to reimburse employees for the provision of tools must be preceded by discussion with the employer about the purchase and the employer's approval of the purchase, and proof of purchase should also be required;

- it supported the deletion of clause 20.1(d);

- it supported the rationalisation of the allowances in clauses 21 and 22 and the deletion of irrelevant and outdated allowances, but had concerns about the proposed approach;

- it supported the categorisation of allowances, but opposed an approach whereby residential construction would encompass both cottage construction and multi-unit apartment buildings, which were more akin to commercial construction; and

- it opposed increasing the industry allowance to compensate for the removal of disability allowances, because the industry allowance was an all-purpose payment and the disability allowances were not, and the majority of disability allowances were not payable in residential construction.

[344] The CCF submitted that it opposed the replacement in clause 20.1 of a requirement to provide or reimburse for specified tools with a more general requirement. It supported in

general the concept of the re-ordering and grouping of allowances, but did not support the abolition of disability allowances and a compensating increase in the industry allowance for reasons similar to those advanced by MBA and the HIA.

[345] The Ai Group opposed the proposed clause 20.1 to the extent that it modified the current obligation on the employer to supply or reimburse for specifically identified tools and equipment into a general obligation, and was concerned at the lack of any definition of "*standard tools*". It had no objection to the categorisation of allowances as expense, disability and skill allowances, but was concerned that abolishing the disability allowances and correspondingly increasing the industry allowance would create substantial cost increases for employers.

[346] The CFMMEU submitted that:

- it was not opposed to the removal of the detail of the equipment not covered by the tool and employee protection allowance;

- it was opposed to the deletion of the wording from the current clause 20.1(b) regarding mess personnel and the deletion of reimbursement for X-rays for refractory bricklayers in the current clause 20.1(d)(iii);

- the CFMMEU accepted that there was nothing different about the provisions of boots for refractory bricklayers, and that clause 20.1(e) of the proposed clause could be removed; and

- the CFMMEU broadly supported the categorisation of allowances in the Attachment to the August 2017 Statement, but opposed the establishment of differential industry allowances in place of the existing disability allowances.

[347] The AWU submitted that the current provision in clause 20.1(b)(vi) concerning mess personnel should be reproduced in the proposed new clause 20.1. The AWU was not opposed to the concept of abolishing some existing allowances and compensating employees with a commensurate increase to the industry allowances, but considered that the goal of simplification would be compromised if different industry allowances were created for different sectors. It submitted that the quantum of the industry allowance (retained as a single allowance) should be increased by an amount which ensured employees were not disadvantaged overall, and that the non-monetary conditions which formed part of the current hot work and powdered lime dust provisions (clauses 22.2(b)(ii) and 22.4(b)(iii)) should be retained.

[348] The AMWU supported the submissions of the CFMMEU and the AWU concerning clause 20.1. It opposed any rationalisation of allowances which would result in employees having their take home pay reduced. In respect of the proposal to abolish the Lift Industry Allowance, the AMWU advanced extensive and detailed submissions in opposition to this proposal. It is not necessary to summarise those submissions except to say that we were persuaded by those submissions and, as will become immediately apparent, we decided not to proceed with that specific proposal in the August 2017 Statement.

December 2017 Statement and further proceedings

[349] After considering the submissions advanced by the parties in response to the August 2017 Statement, on 6 December 2017 we issued a further statement[106] (December 2017 Statement) setting out our more developed provisional views in relation to the allowances in clause 21 and 22 of the Building Award. Relevantly, the December 2017 Statement said:

> **"[4]** In relation to clause 21 *Site and general wage related allowances* and clause 22 *Special rates*, we have considered the submissions advanced by the parties, and we maintain at this stage the provisional view that the existing expense and skill allowances should be re-ordered to reflect those categories, and that the existing disability allowances should be abolished and replaced by adjusted industry allowances applicable in four different sectors of the building and construction industry. However we are persuaded that the lift industry allowance in clause 42 should not be abolished, and it will be retained in its current form.
>
> **[5]** Having regard to the parties' submissions, our current provisional view is that the existing allowances (excluding the lift industry allowance) should be categorised as set out in the attachment to this statement, and that the industry allowance provision in clause 21.2 should be restructured to appear as follows:
>
> **21.2 Industry allowances**
>
> **(a)** The following industry allowances shall be paid, in addition to the rates prescribed in clause 19 – Minimum Wages, for work in each of these sectors in lieu of all disability allowances:
>
> **General building and construction** industry allowance: ***(amount to be determined)'***
>
> **Civil construction** industry allowance: ***(amount to be determined)***
>
> **Metal and engineering construction** industry allowance: ***(amount to be determined)***
>
> **Residential building and construction** industry allowance: ***(amount to be determined)***
>
> **(b)** For the purposes of determining the applicable industry allowance, the definitions in clause 4.3 shall apply. However, the following definition of "residential building and construction" will apply for the purposes of determining the industry allowance applicable to that sector:
>
> **Residential Building and Construction** means:

[106] [2017] FWCFB 6487

(i) The activities identified in subclause 4.3(a) undertaken in relation to a single occupancy residential building which is not a multistorey building.

(ii) In this subclause:

multistorey building means a building which will, when complete, consist of four or more storey levels;

complete means the building is fully functional and all work which was part of the principal contract is complete;

storey level means structurally completed floor, walls, pillars or columns, and ceiling (not being false ceilings) of a building and will include basement levels and mezzanine or similar levels (but excluding half floors such as toilet blocks or store rooms located between floors); and

floor level means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

[6] A conference in relation to the provisional approach set out in paragraphs [4] and [5] above will be conducted by Deputy President Gostencnik on **19 December 2017**. A listing for this conference will separately be issued. At this conference the parties will have the opportunity to comment upon and endeavour to reach a consensus about the proposed categorisation of allowances and the proposed sectoral definitions for the industry allowances. The parties will also have a further opportunity to advance *realistic* proposals for the quantification of the sectoral industry allowances and endeavour to reach a consensus about this issue. In the absence of further constructive assistance from interested parties concerning this issue, it may become necessary for us to determine the amounts of the sectoral industry allowances without further recourse to the parties."

[350] As contemplated in the December 2017 Statement, Deputy President Gostencnik conducted a conference of interested parties on 19 December 2017, and he conducted a further conference on 25 January 2018. There were further exchanges of material and discussion between the parties following the latter conference. The parties did not advance any substantive proposals consistent with the December 2017 Statement, and maintained their opposition to the provisional view expressed. They reached partial agreement as to the grouping of the existing allowances into five categories: expense related allowances, all-purpose skill related allowances, other skill related allowances, all-purpose disability allowances, and other disability allowances. There was disagreement between the parties concerning the categorisation of the following allowances:

- clause 21.1 – Special allowance: the HIA contended this was not an expense related allowance;

- clause 21.8 – Refractory bricklaying allowance: the CFMMEU contended that this was an all-purpose allowance, but MBA disagreed;

- clause 21.11 – Air-conditioning industry and refrigeration industry allowances: the CFMMEU contended that this was an all-purpose allowance, but the employer parties contended that it was not;

- clause 21.13 – In charge of plant: the CFMMEU contended that this was an all-purpose allowance, but the employer parties' position was that it was not;

- clause 22.2(t) – Pile driving: the CFMMEU contended that this was an all-purpose allowance, but MBA disagreed;

- clause 22.3(h) – Second-hand timber: MBA contended that this was a disability related allowance, not an expense-related allowance.

[351] The parties also reached agreement as to a cross-referencing correction in clause 20.2, *Meal allowance* and, and as to the relationship between other disability allowances generally and specifically in relation to refractory bricklaying (clause 22.8), air-conditioning industry and refrigeration industry (clause 21.11), asbestos eradication (clause 22.2(i)), and lift industry (clause 42).

Consideration

[352] The various applications concerning clause 20, 21 and 22 have highlighted a number of issues of concern about those provisions which have caused us to conclude that in their current form they to do not achieve the modern awards objective. In relation to clause 20.1, which concerns the tool and employee protection allowance entitlements, the provision is unclear, over prescriptive and potentially obsolete. The tool allowance for the identified categories of tradespersons in clause 20.1(a) does not identify the tools for which the allowance is payable. It does not explicitly require the tradespersons to provide or use any tools for which allowance is provided. Curiously, clause 20.1(b) sets out prescriptive lists of tools which are *not* covered by the tool allowance, and thereby raises uncertainty as to the tools that are covered by the allowance. For example, in respect of stonemasons, the list of additional tools not covered by the tool allowance includes "*all cutting tools, except mash hammers, squares, pitching tools and straight edges up to four feet (1.2 metres) in length*", which suggests that the allowance covers mash hammers, squares, pitching tools and straight edges up to four feet or 1.2 meters - but this is far from clear. "*Civil construction employees*" have a separate list which includes "*waterproof protective clothing required by an employee for particular tasks being performed*". There is no separate category of "*civil construction employee*" to whom a tool allowance is provided, so presumably this refers to any of the identified categories of tradespersons in clause 20.1(a) when they work in the civil construction sector - but this is also far from clear. If this is the case, the provision might arguably be read as meaning that, outside the civil construction sector, the tool allowance *does* cover "*waterproof protective clothing required by an employee for particular tasks*

being performed". The currency of the listed tools is also in doubt, and no party was able to confirm that the lists reflected contemporary circumstances.

[353] The rationale and currency of other aspects of clause 20.1 are also doubtful. Clause 20.1(d) contains special provisions for safety boots in relation to refractory bricklayers, but it is entirely unclear why the position with respect to these boots is distinct from the general provision for safety boots in clause 20.2(b)(viii). Clause 20.1(d)(iii) provides for the reimbursement of an employee's X-ray once every six months on request if engaged in refractory brickwork or in a tuberculosis home or hospital, but it is accepted that tuberculosis homes or hospitals as standalone institutions no longer exist in Australia. We also do not know whether six-monthly X-rays in the prescribed circumstances represent contemporary, safe or appropriate medical practice. Furthermore the provision is predicated on the employee incurring expense to obtain an X-ray, which may indicate that it pre-dates the establishment of Medicare and is unlikely to be consistent with current medical charging practices.

[354] Clauses 21 and 22 contain a large and miscellaneous collection of allowances, which are undifferentiated in terms of whether they are payable for the exercise of additional skills, compensate for a disability or reimburse for an expense incurred. In a number of cases it is difficult to ascertain whether the allowance is payable on an all-purpose. Some allowances may commonly be paid, such as the multi-storey allowance in clause 21.4. A number of others are obscure or would rarely be paid, such as the laser safety operator allowance (clause 21.6), slushing (clause 22.3(e)), second-hand timber (clause 22.3(h)) and the grindstone allowance (clause 22.3(k)). The last is payable to each carpenter or joiner when a grindstone or wheel is *not* made available (presumably in circumstances where the employee must provide or source a grindstone or wheel). Some allowances appear to be irrelevant to employees working on construction sites, such as the allowance in clause 22.3(r) for plant operators working in landfill and garbage tips. Some provisions are not concerned with allowances at all, but make provision for other entitlements. For example, clause 22.3(l)(i) requires a painter in brewery cylinders or stout turns to be allowed a paid "*15 minute spell in the fresh air at the end of each hour worked*", which in substance amounts to a safety requirement. Clause 20.1(c), which specifies equipment to be provided to employees working with toxic substances in areas lacking adequate natural ventilation is another example of a safety requirement not associated with any pay entitlement. Some provisions appear to compensate for the disabilities associated with at-risk working environments; these include fumes (of sulphur or other acid – clause 22.3(j)), asbestos eradication (clause 22.3(l)), and acid work (clause 22.3(n)).

[355] In an overall sense, the scheme of allowances in clauses 20-22 does not constitute a fair relevant safety net, having regard in particular to their impact on the regulatory burden (s 134(1)(f)) and the need to ensure a simple, easy to understand, stable and sustainable modern award system (s 134(1)(g)).

[356] However, having raised these issues for consideration, we do not consider that any of the employer proposals to vary the allowance provisions would properly address these issues or achieve the modern awards objective. In respect of MBA's claim, although there are some allowances which are not referable to an identifiable disability, we consider that MBA's case (particularly the Attachment to Mr Solomon's first witness statement) significantly overstates the position and incorrectly identifies a range of provisions as dealing with matters that were

dealt with by WHS legislation (both primary and subordinate). For example, Mr Solomon included the industry allowance in clause 21.2 as dealing with matters dealt with by WHS legislation, when plainly, it is an amount payable as compensation for general disabilities associated with the industry. Two other examples will suffice. Mr Solomon included the carpenter-diver allowance in clause 21.7 as a matter encompassed by WHS legislation, but clearly it is an allowance payable for the exercise of specialist skills. He also included the first aid allowance, which is also clearly a skill-based payment. MBA's approach does not provide an appropriate platform for reform of the allowances in the Building Award even though, as earlier discussed, it has identified at least some particular provisions which require attention. We deal with these later in our decision.

[357] MBA's submission that provisions in the Building Award concerning reimbursement of employees for the provision of personal protective equipment in clause 20.1(b)(viii) may be inconsistent with legislative requirements has more substance. For example, regulation 44(2) of the *Work Health and Safety Regulation 2017* (NSW) provides, in relation to personal protective equipment used to minimise a risk to health and safety, that the "person conducting a business or undertaking who directs the carrying out of work must provide the personal protective equipment to workers at the workplace, unless the personal protective equipment has been provided by another person conducting a business or undertaking". There may be a question whether reimbursement of an employee who in accordance with a workplace requirement purchases and provides the equipment would constitute compliance with this provision. However that is not a question which it is necessary for us to resolve. No party submitted that the common practice of employees providing their own safety boots should cease. The practice has obvious benefits in terms of employee comfort and hygiene. The deletion of clause 20.1(b)(viii) would only result in the removal of an entitlement for the reimbursement of the expense incurred by the employee. If an employer provides items listed in clause 20.1(b)(viii), no expense is incurred by the employee and thus no reimbursement is required. We do not consider that step would meet the modern awards objective.

[358] The HIA's claim with respect to the tool and employee protection allowance in clause 20.1 of the Building Award deals with one discrete aspect of the provision, namely the lack of any explicit provision requiring the identified tradespersons to maintain and provide the tools and equipment. We do not consider that the tool allowance should be payable only in respect of weeks in which the tools are required to be provided by the employer. The project nature of the work of tradespeople in the building and construction industry will usually require them to purchase and maintain the standard tools of the trade, even where they may not be required by a particular employer on a particular project for a particular period of time. We do not consider that tradespeople should for that reason be denied reimbursement for the ongoing cost of maintaining tools of trade. However the approach we propose to adopt discussed further below imposes a requirement that a tradesperson will maintain and where necessary provide the standards tools of trade as the basis for payment of the tool allowance.

[359] The CFMMEU's proposal for a facilitative provision allowing a number of disability allowances to be rolled up into a single consolidated special rate has some conceptual attraction. It reflects the approach commonly taken in enterprise agreements in the industry, where a single site allowance is usually payable to employees instead of the range of award disability allowances. However the actual proposal suffers from a number of defects. First, the proposed amount of the allowance, 7.9% of the weekly standard rate, is clearly excessive.

Secondly, the consolidated allowance would only be payable by agreement between the employer and the employee. This would not achieve simplicity nor reduce the administrative burden associated with the assessment and payment of the various allowances. Thirdly, the limited list of disability allowances proposed to be encompassed by the consolidated allowance appears to us to be inadequate. Accordingly we do not consider that the CFMMEU proposal would meet the modern awards objective, and it is rejected. However the concept of rolling some or all of the disability allowances into a single payment has merit, and is one which we propose to pursue as discussed below.

[360] The CFMMEU's claim for a communication equipment allowance is rejected. There was no evidence before us as to the extent to which the identified items are actually used by employees under the Building Award, whether these items are usually provided or required by the employer, and whether there has been any disputation about the provision or use of the items or about the reimbursement of employees who provide and use these items. We are not persuaded the provision is necessary to achieve the modern awards objective.

[361] In relation to the CCF dirty work allowance claim, we are not persuaded that there is any significant difficulty in the application of this allowance. In any event the proposal is moot given the approach we intend to take in relation to disability allowances.

[362] In relation to the tool and employee protection allowance provision in clause 20.1(a) of the Building Award, we have determined to proceed with the approach set out in the August 2017 Statement. That approach is intended to achieve the following objectives:

- to make it clear that the tool allowance is payable on the basis that the identified tradespersons generally maintain and provide the standard tools of trade;

- to remove the over-prescriptive, arbitrary and potentially outdated lists of tools not covered by the tool allowance, and replace it with a general employer obligation to provide or reimburse for the provision by the employee of tools other than the standard tools of the trade;

- to establish a general obligation for the employer to provide or reimburse for the provision of the employee of protective clothing or equipment, in lieu of current provisions which are over-prescriptive and potentially outdated;

- to maintain the current general prescription with respect to safety boots;

- to remove the provision concerning clothing for mess personnel, which we consider to be substantially outdated and over-prescriptive, and better dealt with by a general prescription concerning clothing; and

- to remove the clearly outdated provision concerning reimbursement for X-ray expenses.

[363] We consider these to be consistent with the modern awards objective.

[364] We have considered the submissions of the parties responsive to proposed clause 20.1 contained in the August 2017 Statement. To the extent we have not already addressed these submissions we conclude that:

- MBA's submission that the operation of clause 20.1(b) has been inappropriately extended should be rejected. The current provision has application beyond the identified trades (as is at least made clear by clause 20.1(b)(vii)), and we do not consider that a general prescription in respect of the provision of tools and protective and other clothing and equipment is inappropriate or does not achieve the modern awards objective.

- Clause 20.1(b), with respect to trades identified in clause 20.1(a), is confined to tools which are not standard tools of trade.

- As to the HIA's concerns as to the circumstances in which an employee may be entitled to reimbursement for tools, clothing and equipment, we will modify the provision to make clear that the relevant tools, clothing or equipment must be required *by the employer* and that reimbursement will only occur by agreement and absent agreement, the employer will be required to provide the tools, clothing and equipment.

- The CFMMEU's submissions that the capacity to claim reimbursement for X-rays under the current clause 20.1(d)(iii) should be retained in modified form is rejected. We consider the provision to be obsolete.

- The CFMMEU's submission that the position of refractory bricklayers with respect to safety boots is not different to the position of employees generally is accepted, and accordingly clause 20.1(e) of the proposed provision will be deleted.

- The AWU's submission that the current provision concerning clothing for mess personnel is rejected, but we will ensure that the general obligation concerning the provision or reimbursement for clothing is applicable to this situation by deleting the word "*safe*" from the proposed clause 20.1(c).

[365] We will also modify the title of clause 20.1 to reflect its modified content.

[366] The new clause 20.1 will be as follows:

"**20.1 Tools and protective or other clothing or equipment**

(a) An allowance in recognition of the maintenance and provision of the standard tools of trade must be paid for all purposes of the award in accordance with the following table:

Classification	Tool allowance $ per week
Artificial stoneworker, carpenter and/or joiner, carpenter-diver, carver, bridge and wharf carpenter, floor sander, letter cutter, marble and slate worker, stonemason or tilelayer	31.69
Caster, fixer, floorlayer specialist or plasterer	26.20
Refractory bricklayer or bricklayer	22.49
Roof tiler, slate-ridger or roof fixer, tradespersons in the metals and engineering construction sector	16.60
Signwriter, painter or glazier	7.61

(b) Where any other tools are required by the employer for the performance of work by a tradesperson covered by paragraph (a), or where in the case of any other employee any tools are required for the performance of work, the employer shall:

(i) by agreement with the employee, reimburse the employee for provision of the tools; or

(ii) provide the tools.

(c) Where any protective or other clothing or equipment, other than safety boots, is required by the employer for the performance of work, the employer shall:

(i) by agreement with the employee**,** reimburse the employee for provision of the clothing or equipment; or

(ii) provide the clothing or equipment.

(d) Where employees are required either by the employer or by legislation to wear steel toe capped safety boots the employer will reimburse employees for the cost of purchasing such boots on commencement of work. Subject to fair wear and tear, boots will be replaced each six months if required and sooner if agreed."

[367] We consider that the replacement of the existing clause 20.1 with the new provision is necessary for it to form part of a fair and relevant safety net and to achieve the modern awards objective, having regard in particular to the need to promote modern flexible work practices (s.134(1)(d) of the Act), the likely impact of the exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)), and the need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g)). We consider the new provision to be fairer, simpler, less prescriptive, more flexible, and adapted for contemporary circumstances.

[368] As to the consolidation of allowances in clauses 21 and 22, we intend to proceed with the general approach foreshadowed in the December 2017 Statement. For the reasons already explained, we consider the array of disability allowances for which provision is made in the Building Award is not consistent with the modern awards objective. The multistorey allowance, which is commonly paid and is relevant to a specific category of work, will be retained, but all other disability allowances will be abolished and replaced by an enhanced industry allowance, variable in quantum having regard to the particular industry sector in which an employee is engaged. However we no longer consider that the four industry sectors proposed in the December 2017 Statement are necessary, and our provisional view is that it is sufficient for there to be two sectors only: residential building and construction (defined by reference to the activities referred to in clause 4.10(a) of the Building Award undertaken in relation to single occupancy residential building which is not a multistorey building), and all other building and construction, including civil construction and metal and engineering construction.

[369] As to the quantum of the allowance, the Commission has not been assisted by reluctance of the industry parties to engage with the reforms proposed in the December 2017 Statement to simplify that which is clearly an overly-complex and outdated system of disability allowances that is no longer appropriate in a modern award. In those circumstances we proposed to state our provisional view concerning the quantum of the allowance, and then give interested parties one further opportunity to advance any alternative proposals, make any submissions or confer in relation to the quantum of the proposed sectoral industry allowances. It is obviously not possible in undertaking the exercise we propose to ensure that no employee will be worse off in any circumstance. Nor is it possible to ensure that some employees will not be better off than under the current system. Our general objective is to simplify the current system on the basis that it will generally be cost neutral for workforces over the longer term. The amount we propose for the industry allowance for the residential building and construction sector is an all-purpose amount of 4% of the weekly standard rate per week, and 5% for all other building and construction work. The amount for residential construction is lower because many of the disability allowances are either not applicable at all to, or rarely paid in, that sector. These new allowances will be payable in lieu of the following allowances:

Special allowance (clause 21.1)
Industry allowance (clause 21.2)
Underground allowance (clause 21.3)
Plant room allowance (clause 21.4(e))
Refractory bricklaying allowance (clause 21.8)
Coffer dam worker (clause 21.9)
Air-conditioning industry and refrigeration industry allowances (clause 21.11)
Insulation (clause 22.2(a))
Hot work (clause 22.2(b))
Cold work (clause 22.2(c))
Confined space (clause 22.2(d))
Swing scaffold (clause 22.2(e))
Explosive power tools (clause 22.2(f))
Wet work (clause 22.2(g))
Dirty work (clause 22.2(h))

Toxic substances (clause 22.2(i))
Fumes (clause 22.2(j))
Asbestos (clause 22.2(k))
Asbestos eradication (clause 22.2(l))
Furnace work (clause 22.2(m))
Acid work (clause 22.2(n))
Heavy blocks (clause 22.2(o))
Bitumen work (clause 22.2(p))
Height work (clause 22.2(q))
Suspended perimeter work platform (clause 22.2(r))
Employee carrying fuels, oils and greases (clause 22.2(s))
Pile driving (clause 22.2(t))
Dual lift allowance (clause 22.2(u))
Stonemasons (clause 22.2(v))
Towers allowance (clause 22.3(a))
Cleaning down brickwork (clause 22.3(b))
Bagging (clause 22.3(c))
Plaster or composition spray (clause 22.3(d))
Slushing (clause 22.3(e))
Dry polishing of tiles (clause 22.3(f))
Cutting tiles (clause 22.3(g))
Roof repairs (clause 22.3(i))
Grindstone allowance (clause 22.3(k))
Brewery cylinders (clause 22.3(l))
Spray application – painters (clause 22.3(n))
Pneumatic tool operation (clause 22.3(o))
Bricklayer operating cutting machine (clause 22.3(p))
Hydraulic hammer (clause 22.3(q))
Waste disposal (clause 22.3(r))
Pipe enamelling (clause 22.4(a))
Powdered lime dust (clause 22.4(b))
Sand blasting (clause 22.4(c))
Live sewer work (clause 22.4(d))
Timbering (clause 22.4(e))
Special work (clause 22.4(f))
Compressed air work (clause 22.4(g))
Cutting stone (clause 22.4(h))

[370] The current provisions in the Building Award identified above will be entirely removed.

[371] The remaining allowances are either expense-related allowances contained in clause 20 (which will include the re-formulated clause 20.1 which we have earlier set out) or skill-based allowances. The second-hand timber allowance in clause 22.3(h) will be abolished because of its lack of contemporary relevance. The remaining skill-based allowances are:

Laser safety officer allowance (clause 21.6)
Carpenter-diver allowance (clause 21.7)
First aid allowance (clause 21.10)
Electrician's licence allowance (clause 21.12)
In charge of plant (clause 21.13)
Computing quantities (clause 22.3(j))
Certificate allowance (clause 22.3(m))

[372] We will allow interested parties 28 days from the date of this decision to file any further submissions they wish to make concerning the quantum of the sectoral industry allowances. Interested parties may also, during that period, request that a further conference or hearing be conducted in relation to this issue.

10. ORDINARY HOURS OF WORK

Current provisions

[373] Clause 33—Ordinary hours of work of the Building Award currently provides as follows:

> **33 Ordinary hours of work**
>
> **33.1** Except as provided in clause 34—Shiftwork, the ordinary working hours will be 38 per week, worked between 7.00 am and 6.00 pm, Monday to Friday, in accordance with the following procedure.
>
> **(a) Hours of work and rostered days off**
>
> **(i)** The ordinary working hours will be worked in a 20 day four week cycle, Monday to Friday inclusive, with eight hours worked for each of 19 days and with 0.4 of an hour on each of those days accruing towards the twentieth day, which will be taken as a paid day off. The twentieth day of that cycle will be known as the rostered day off (RDO), and will be taken as outlined in clauses 33.1(a)(i) to 30.1(a)(iii). Payment on such a rostered day off will include accrued entitlement to the allowances prescribed in clauses 25.2 to 25.7. A rostered day off will be taken on the fourth Monday in each four week cycle, except where it falls on a public holiday, in which case the next working day will be taken instead.
>
> **(ii) Agreement on alternate RDOs**
>
> Where an employer and a majority of employees at an enterprise agree, another day may be substituted for the nominated industry rostered day off.

(**iii) Agreement on banking of RDOs**

- Where employees are employed on distant work covered by clause 24.1, an employer and a majority of those employees on distant work may agree to accrue up to five rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer.

- Where the majority of the employees request consultation with their representative(s), that consultation will take place at least five days prior to its introduction.

- Any agreed arrangement must provide that 13 rostered days are taken off by an employee for 12 months' continuous service.

(iv) Each day of paid leave taken and a public holiday occurring during any cycle of four weeks will be regarded as a day worked for accrual purposes.

(v) An employee who has not worked, or is not regarded by reason of clause 33.1(a)(iv) as having worked a complete 19-day four week cycle, will receive pro rata accrued entitlements for each day worked or regarded as having been worked in such cycle, payable for the rostered day off, or in the case of termination of employment, on termination.

(vi) Except where agreement has been reached in accordance with clauses 33.1(a)(ii) and 33.1(a)(iii), the prescribed rostered day off or any substituted day may be worked where it is required by the employer and such work is necessary:

- to allow other employees to be employed productively; or

- to carry out out-of-hours maintenance; or

- in the case of unforeseen delays to a particular project or a section of it or other reasons arising from unforeseen or emergency circumstances on a project;

in which case, in addition to accrued entitlements, the employee will be paid penalty rates and provisions as prescribed for Saturday work in clause 37—Penalty rates.

(vii) Agreement on working other than the rostered day off cycle

Where an employer and the majority of employees employed at a particular enterprise agree that due to the nature of an

employer's operations it is not practicable for the foregoing four week cycle to operate, they may agree to an alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day.

(viii) Early starts

The working day may start at 6.00 am or at any other time between that hour and 8.00 am and the working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period. The change to the start time requires agreement between the employer and the employees and their representative(s), if requested.

(b) Hours of work—part-time employees

(i) Notwithstanding the provisions of this clause and clause 34—Shift work, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off, and further provided that such employee will not work on the rostered day off.

(ii) An employer and employee may agree that the part-time employee accrues time towards a rostered day off as provided by this clause and clause 34—Shift work. In such instances, the part-time employee will accrue pro rata entitlements to rostered days off in accordance with clause 33.1(a)(v).

(c) Washing time

The employer will provide sufficient facilities for washing and five minutes will be allowed before lunch and before finishing time to enable employees to wash and put away gear.

(d) Work in compressed air

The working hours and conditions of employees working in compressed air will be those as from time to time prescribed in the code of the *Standards Association of Australia for work in compressed air, Part 1 Airlock Operations*.

(e) Hours—underground work

(i) **Underground** means in any trench, shaft, drive or tunnel more than 6.1 metres (20 feet) below the surface of the ground or any

drive or tunnel over 4.6 metres (15 feet) in length or where the drive or tunnel is timbered irrespective of the depth, or any live sewer more than 2.4 metres (8 feet) below the surface of the ground. Nothing in this clause will entitle a person working in a trench by pot and shot method or otherwise at a depth less than 6.1 metres (20 feet) below the surface of the ground to be paid as a miner.

(ii) The hours of work of employees working underground and all dependent work above the ground will begin at the whistle and end at the surface. The hours of work for underground work will be 38 per week worked in accordance with the provisions of clauses 33.1(a)(i) and 33.1(a)(ii). Each day's work will include half an hour crib break and if two shifts are worked they will be worked between the hours of 6.00 am and midnight.

(iii) A week's work will be 30 hours per week, exclusive of crib time, except in the following cases:

- miners driving tunnels with a superficial area not exceeding 12.2 metres (40 feet);
- miners sinking shafts over 15.2 metres (50 feet) in depth; and
- persons packing and/or scabbling in dead ends and/or boodler working.

The claims

HIA

[374] HIA sought that the chapeau to clause 33.1, and clause 33.1(a), of the Building Award be replaced with the following:

"**33. Ordinary hours of work**

Except as provided elsewhere in this award, the ordinary hours of work for an employee are 38 or an average of 38 hours per week not exceeding 152 hours in 28 days.

33.1 Ordinary Hours of Work – Rostered Day Off (RDO) Cycle

(a) Ordinary hours must be worked as eight hours per day, between 7.00 am and 6.00 pm Monday to Friday, over a 20 day four week cycle, with 0.4 of one hour of each day worked accruing as a paid RDO in each cycle.

(b) Each day of paid leave taken (except the paid RDO) and any public holiday occurring during any cycle of four weeks will be regarded as a day worked for accrual purposes.

33.2 Determining the RDO

(a) Where ordinary hours of work are set in accordance with clause 33.1 the paid RDOs must be implemented:

(i) by the employer fixing one day in a cycle in which all employees will be off; or

(ii) by the employer rostering employees off on various days in a cycle so that each employee has a paid RDO during the cycle; or

(iii) by any other method which is agreed by the employer and a majority of employees.

(b) Where any paid RDO falls on a public holiday, the next working day must be taken as the paid RDO unless an alternative day is agreed in writing between the employer and an employee.

33.3 Pro-Rata entitlements

(a) An employee, who has not worked a complete 19-day four week cycle, will receive pro rata accrued entitlements for each day worked or in the case of termination of employment, on termination.

33.4 Banking RDOs

(a) An employee and the employer may agree to a banking system of up to a maximum of five RDO's to be taken at times mutually convenient to the employer and the employee.

(b) When an RDO is banked, an employee is required to work on what would normally have been the employee's RDO.

(c) When working on an RDO under this banking system clause 33.5 does not apply.

(d) Five days' notice in writing must be provided by either party before taking banked RDOs.

(e) If employment comes to an end any banked RDOs must be paid to the employee at the ordinary time hourly rate.

(f) The employer must maintain a record of:

(i) the number of RDOs banked; and

(ii) the date on which an employee takes a banked RDO.

33.5 Working on an RDO

(a) An employee, who works on a paid RDO that was fixed in accordance with clause 33.2 or any substituted day, must be paid in accordance with the provisions prescribed for Saturday work in clause 37 of this award.

33.6 Ordinary Hours of Work – Averaging of Hours

(a) Where it is agreed between a majority of employees and the employer that a paid RDO in each cycle is not practicable then agreement may be reached in writing on an alternative method of implementing ordinary hours, including:

(i) 38 hours within a work cycle not exceeding seven consecutive days;

(ii) 76 hours within a work cycle not exceeding 14 consecutive days;

(iii) 114 hours within a work cycle not exceeding 21 consecutive days;

(iv) 152 hours within a work cycle not exceeding 28 consecutive days; or

(v) any other work cycle during which a weekly average of 38 ordinary hours are worked.

(b) Not more than 10 hours exclusive of meal breaks are to be worked in any one day. :

(c) Overtime will be payable for all hours worked outside the ordinary hours of work as determined in accordance with clause 33.6(a) above."

[375] In summary, HIA's proposed variation would:

- provide an option for employers to implement a system for the averaging of hours;
- enable an employer to choose whether to fix one day in the cycle for all employees to take a rostered day off or to roster employees to take their rostered days off on different days; and
- allow the banking of rostered days off on agreement between the employer and employee.

MBA

[376] MBA sought the following variations to clause 33:

(1) Deletion of the words "*nominated industry rostered day off*" clause 33.1(a)(ii), to be replaced by a reference to "*rostered days off as prescribed in clause 33.1(a)(i)*".

(2) Removal from clause 33.1(a)(iii) of the limitation on agreements regarding the banking of rostered days off from only applying to employees on distant work and increasing the number of days that can be banked.

(3)The deletion of clause 33.1(a)(vi), to be replaced with the following:

> **"(vi)** Except where agreement has been reached in accordance with clauses 33.1(a)(ii) and 33.1(a)(iii), the rostered day off or any substituted day may be worked where it is required by the employer and such work is necessary:
>
> - to allow other employees to be employed productively; or
> - to carry out out-of-hours maintenance; or
> - in the case of unforeseen delays to a particular project or a section of it or other reasons arising from unforeseen or emergency circumstances on a project;
>
> in which case the employee is entitled to:
>
> - be paid penalty rates and provisions as prescribed for Saturday work in clause 37 – Penalty rates or;
> - cash-out the prescribed rostered day off or any substituted day; or
> - bank the prescribed rostered day off or any substituted day, to be taken at a later date as agreed between the parties."

(4)The deletion of clause 33.1(d) relating to work in compressed air.

(5)A variation to clause 33.1(e)(iii) to clarify the ordinary hours of work for underground work.

CFMMEU

[377] The CFMMEU sought the variation of clause 33.1 of the Building Award to specify the daily ordinary hours of work of casual employees to ensure consistency with daily hire and weekly hire employees and remove any ambiguity that may currently exist. The proposed variation was to add the following new provision:

> "**33.1(f) Hours of work - casual employees**

(i) The maximum ordinary hours of work of a casual employee shall be eight hours per day and 38 hours per week worked between 7am and 6pm Monday to Friday. All hours worked in excess of ordinary hours (per day and/or per week) and on weekends and public holidays will be paid at the appropriate penalty rates.

(ii) If a casual employee works under an RDO system of hours of work, .4 of an hour of the ordinary hours worked each day, Monday to Friday, shall accrue towards a paid rostered day off.

(iii) All other provisions of clause 33 shall apply."

Evidence

HIA

[378] The HIA relied on the evidence of Laura Marantz, HIA Workplace Advisor for Victoria and Tasmania, in support of its claim.[107] Ms Marantz gave evidence that on or about 1 September 2016 she was asked to review records of the Individual Flexibility Agreements (IFAs) of members with which the HIA had assisted. Attached to her witness statement was a de-identified list of these IFAs which identified the amendment to Building Award provisions to which employers and employees had agreed. This showed that in the large majority of IFAs, the RDO system was removed (so that employees would simply work 38 hours per week) in return for higher pay. The HIA also relied on the results of the HIA Survey annexed to the witness statement of Kirsten Lewis, which showed that 67% of the respondent employers did not provide RDOs to their employees.

MBA

[379] The MBA called evidence from Cameron Spence in support of its claims.[108] Mr Spence gave evidence that, with regard to clause 33.1(a)(ii), while the award retained a reference to the "*nominated industry rostered day off*", the industry did not in fact not nominate RDOs. He said that if a workplace was governed by a "*CFMMEU enterprise bargaining agreement*", an employer was required to provide 20 RDOs per annum which the agreement mandated be taken in accordance with an industry calendar negotiated at the peak level and issued by the CFMMEU at set times throughout the year, "*typically on the days immediately preceding and following a long weekend*". Such weekends were known colloquially as "*lock-down weekends*". Even if an employer was not covered by an agreement containing this provision, the employer would commonly follow the lock-down weekend for the 13 days mandated under the award.

[380] Mr Spence gave evidence that he regularly received calls from members asking if the restriction on banking RDOs under the Building Award was negotiable and informing him employees regularly approached them seeking to cash out an RDO. Mr Spence said he suspected many employers may be cashing out RDOs on an individual basis despite this not being permitted under the award, and expressed the view that members would benefit from

[107] Exhibit 29, Witness Statement of Laura Marantz dated 1 December 2016

[108] Exhibit 33, Witness Statement of Cameron Spence dated 9 December 2016; Transcript 5 April 2017 PN1858-PN2124

having greater flexibility in determining when RDOs should be taken. He provided examples of employees who wished to bank RDOs to take as a block at the end of the year, or employees with childcare commitments who would rather have greater capacity to choose to negotiate when to take an RDO. Members had also on a number of occasions expressed confusion about which entitlements should be provided to employees who were required to undertake necessary work on a RDO. Mr Spence said that in his experience, the industry's expectation and interpretation of the relevant clause was that on a day where an RDO has been substituted by agreement and necessary work was undertaken, employees were not paid penalty rates. He said that the MBA's proposed amendments to the relevant clause would provide greater clarity and flexibility to parties when necessary work when undertaken on an RDO.

[381] MBA also relied on the evidence of Mr Glover.[109] In relation to work in compressed air, Mr Glover gave evidence that the reference to AS4774.1-2003, which was the former Australian Standard for working in compressed air, was both out-of-date and effectively required members to buy a costly Standard document to ascertain their obligations, which Mr Glover considered to be inappropriate. With respect to underground work, Mr Glover gave evidence that the ordinary hours of work for underground workers in the Building Award, with the exception of miners driving tunnels and sinking shafts and boulder work, was stated to be 30 hours for no apparent reason. The previous *National Building and Construction Industry Award* did not have any provision for a week's work being less than 38 hours.

[382] The MBA also relied on the evidence of Mr Solomon, which we have earlier summarised. The CFMMEU relied on the evidence of Dr Gerard Ayers in response, which we have also summarised above.

Submissions

HIA

[383] HIA submitted that the variations it proposed would allow employers to better respond to the cyclical and project based nature of the building industry and increase capacity to respond to market conditions. Greater flexibility in the way hours of work can be arranged under the Building Award will support the performance of businesses in the residential construction industry, ultimately improving the performance and competitiveness of the national economy. The award RDO system was a constant source of frustration for HIA members, the majority of which did not actually operate under the RDO system, and many employees did not wish to work on the RDO system as demonstrated by the IFAs in which RDOs had been traded for higher pay. The HIA opposed the new clause 33.1(f) proposed by the CFMMEU, submitting that the variation would actually create ambiguity and uncertainty as well as adding to labour costs and regulatory burden.

MBA

[384] In relation to its claim concerning clause 33.1(a)(ii), MBA submitted that as the practice of determining a nominated industry rostered day off was abandoned when the

[109] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

Building Award was made, its proposed change would serve to delete an outdated provision, and would have no material effect on the operation of the clause or the entitlement it provides for employees. MBA submitted that clause 33.1(a)(iii) was also outdated, and its proposed variation would retain the existing concept of banking rostered days off but would allow greater flexibility for a far larger portion of the building and construction industry workforce.

[385] MBA submitted that the existing clause 33.1(a)(vi) was a source of confusion within the sector, and the variation it sought would clarify the position and eliminate this confusion. The proposed variation also provided an additional option for employees and employers to achieve greater flexibility. In relation to clause 33.1(d), the "standard" to which it referred had been replaced with *AS 4774.1 – 2003 – Work in compressed air and hyperbaric facilities – work in tunnels, shafts and caissons*. MBA submitted that the clause should be deleted as it referred to an out-of-date standard and placed an unreasonable burden on employers by requiring them to purchase a costly instrument in order to comply with the award standard. In relation to clause 33.1(e)(iii), it was submitted that the provision was erroneously drafted, and the ordinary hours for underground work should be amended to 38. MBA submitted that that the purpose of clause 33.1(e)(iii) was to clarify the provision of crib time for underground workers, and that the clause should be varied to remedy the inconsistency with clause 33.1(e)(ii), which referred to a 38 hour week.

[386] In relation to the CFMMEU's claim, MBA submitted that there was no requirement for clarification of clause 33.1, submitting that there was no confusion amongst industry participants and that the application of the above provision is well understood.

CFMMEU

[387] In relation to the HIA claim, the CFMMEU submitted that the only evidence relied upon by HIA was the survey of members and a reference to IFAs made by its members, with which the CFMMEU had raised significant problems. Employers and employees could make alternative arrangements to the use of an RDO system by way of IFAs or majority agreement under clause 33.1(a)(vii) of the Building Award. The costs of making an IFA were not significant, and that HIA had provided no evidence to suggest otherwise. The CFMMEU submitted that the variation proposed by HIA would reduce employee entitlements and therefore reduce employee earnings. Such a reduction in the existing safety net of fair and relevant minimum terms and conditions established in the award modernisation proceedings would require more substantial evidence. The CFMMEU also submitted that the variation to clause 33.1(a)(iii) sought by MBA was unnecessary, and MBA had provided no evidence in support of it. There was nothing preventing an employer and the majority of employees to agree on banking RDOs through an enterprise agreement. The CFMMEU opposed the proposed variation to clause 33.1(a)(vi), and again submitted that MBA had provided no evidence to support it. MBA's proposal would reduce employees' entitlements and provide no flexibility for the employee.

[388] In relation to MBA's claim concerning clause 33.1(d), the CFMMEU recognised that the provision referred to an outdated Australian standard, but submitted that the intent of the clause was to meet the relevant standard, including the maximum number of hours an employee may work in compressed air, and was appropriate to include in the award. The cost burden on employers in purchasing a copy of the relevant standard would be insignificant

compared to the cost of providing the compressed air equipment and relevant facilities. It proposed that the provision be redrafted as follows:

> "**33.1(d) Work in compressed air**
>
> The working hours and conditions of employees working in compressed air will be those as from time to time prescribed by the relevant Australian Standard for work in compressed air relating to work in tunnels, shafts and caissons."

[389] The CFMMEU conceded that clause 33.1(e)(iii) was poorly worded and did not reflect its intended operation, but did not support its deletion. It proposed a variation as follows:

> "**33.1(e)(iii)** Except in the following cases – miners driving tunnels with a superficial area not exceeding 40 feet and for miners sinking shafts over 50 feet in depth and persons packing and/or scabbling in dead ends and/or boodler working therewith – 30 hours, exclusive of crib time, will constitute a week's work."

[390] In relation to its claim, the CFMMEU submitted that clause 33.1 should be varied to add a new provision to specify the daily ordinary hours of work of casual employees, to ensure consistency with weekly and daily hire employees and to avoid any ambiguity. In the last respect the Fair Work Ombudsman had identified that it had received inquiries as to when a casual employee was entitled to overtime penalty rates, and there was some uncertainty in the Building Award in this respect.

ABI and NSWBC

[391] ABI and the NSWBC support HIA's proposed variation, submitting that the HIA has advanced a meritorious case and demonstrated that the variation meets the modern awards objective. They opposed the CFMMEU's proposed variation.

Ai Group

[392] Ai Group opposed the CFMMEU's claim, submitting that it was not supported by evidence and that no difficulties with the existing provisions had been encountered.

AWU

[393] The AWU submitted that the ordinary hours of work conditions in clause 33.1 of the Building Award were unique and had been carefully developed to provide an appropriate safety net for the building and construction industry. The AWU submitted that the HIA's proposed change would dramatically alter the safety net conditions regarding how work is performed in the construction industry and as such would require a substantial amount of probative evidence to displace the prima facie position that the current terms met the modern awards objective, which had not been provided.

[394] With regard to clause 33.1(d), the AWU submitted that it was an unsubstantiated assertion that an employer who intended to operate in a compressed air environment would consider paying $163.48 to have access to safety information to be an unreasonable burden. In

relation to clause 33.1(e)(iii), it was submitted that it was clear that the intent was to prescribe a lower weekly figure of 30 hours per week for employees who performed the duties identified in the clause. The lower weekly hours recognised the conditions associated with miners driving comparatively narrow tunnels, sinking comparatively deep shafts and packing and/or scabbling in dead ends and boodler working.

CEPU

[395] The CEPU submitted that MBA's and the HIA's proposed variations to clause 33.1 would potentially result in a diminution of pay for workers, as where currently overtime rates apply, the variation would allow for payment to be made at ordinary rates. The CEPU submitted that no probative evidence or cogent reasons have been provided for this variation and consequently the claims should be rejected.

Provisional conclusions and further submissions

[396] In the August 2017 Statement, we expressed the provisional view that clause 33 should be replaced in its entirety by the following new provision:

"**33. Ordinary hours of work**

(a) Except as provided in clause 34 – Shiftwork, the ordinary working hours will be 38 per week (averaged over a 20 day four week cycle to allow for the accrual and taking of rostered days off (RDO)), worked between 7.00am and 6.00pm, Monday to Friday, in accordance with the following procedure.

(i) Hours of work and accrual towards rostered days off

Ordinary working hours will be eight hours in duration each day, of which 0.4 of one hour of each day worked will accrue towards an RDO and 7.6 hours will be paid. An employee will therefore accrue 7.6 hours towards an RDO each 19 days of ordinary hours worked.

(ii) Accrual towards an RDO on days not worked

An employee will accrue 0.4 of one hour of each day towards an RDO for any public holiday where an employee is not required to work and for each day of paid leave take. This will not apply on a day an employee takes a RDO.

(iii) Taking the accrued RDO

A. An accrued RDO will be taken in one of the following ways:

1. the employer fixing by written roster published 7 days before the commencement of a 20 day four week cycle one day during that cycle on which all employees will take an RDO; or

2. the employer fixing by written roster published 7 days before the commencement of a 20 day four week cycle different days during that cycle on which particular employees will take an RDO so that each employee takes an RDO during the cycle; or

3. by any other method that is agreed by the employer and a majority of that employer's employees and recorded in writing.

B. A roster published in accordance with subclause 33(a)(iii)A1 or A2 must not require an employee to take an RDO on a day during a 20 day four week cycle that is a public holiday.

(iv) RDO banking

A. An employee and the employer may agree to allow an employee to bank an accrued RDO that would be taken under one of the ways fixed under subclause 33(a)(iii) and in that event the following will apply:

1. The number of accrued RDOs banked must not exceed five at any time.

2. If an accrued RDO is banked, an employee is required to work on the day the employee's RDO was otherwise fixed under subclause 33(a) (iii). In that event subclause 33(a)(v) does not apply.

3. An accrued RDO that is banked will be taken on a day that is agreed between employer and the employee that is a day on which ordinary working hours may be worked. An employer must not unreasonably withhold an agreement for an employee to take an accrued RDO that is banked on a particular day.

4. The employer must maintain a record of:

- The number of accrued RDOs banked by each employee; and
- The date on which each employee takes a banked accrued RDO.

(v) Requirement to work on a day that is a RDO

A. An employer may by written notice given to an employee not less than 48 hours beforehand require that employee to work on an RDO that is fixed in accordance with subclause 33(a)(iii) if the work is necessary:

1. to allow other employees to be employed productively; or

2. to carry out out-of-hours maintenance; or

3. in the case of unforeseen delays to a particular project or a section of it; or

4. any other reasons arising from unforeseen or emergency circumstances on a project;

B. An employee who works on an RDO as required by the employer will be paid penalty rates as prescribed for Saturday work in clause 37—Penalty rates.

(vi) Payment for an RDO

Payment for each RDO taken by an employee will include accrued entitlement to the allowances prescribed in subclauses 25.2 to 25.7.

(vii) Entitlement on termination of employment

If an employee's employment is terminated for any reason then, in addition to any other payment to which the employee becomes entitled the employer must pay to the employee:

A. an amount equal to the payment the employee would have received had the employee taken any accrued RDO yet to be taken and any banked accrued RDO; and

B. an amount equal to the payment the employee would have received had the employee taken an RDO for the period representing the number of hours and minutes that have accrued towards an RDO.

(c) Hours of work – part-time employees

(i) Notwithstanding the provisions of this clause and clause 34 – Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off, and further provided that such employee will not work on the rostered day off.

(ii) An employer and employee may agree that the part-time employee accrues time towards a rostered day off as provided by this clause and clause 34 – Shiftwork. In such instances, the part-time employee will accrue pro rata entitlements to rostered days off in accordance with subclause 33(a)(i).

(d) Other conditions for working ordinary hours

(i) Early starts

The working day may start at 6.00am or at any time between that hour and 8.00am and the working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period. The change to the start time requires agreement between the employer and the employees and their representative(s), if requested.

(ii) Washing time

The employer will provide sufficient facilities for washing and five minutes will be allowed before lunch and before finishing time to enable employees to wash and put away gear.

(iii) Work in compressed air

The working hours and conditions of employees working in compressed air will be those as from time to time prescribed in the code of the *Standards Association of Australia for work in compressed air, Part 1 Airlock Operations*.

(iv) Hours – underground work

A. **Underground** means in any trench, shaft, drive or tunnel more than 6.1 metres (20 feet) below the surface of the ground or any drive or tunnel over 4.6 metres (15 feet) in length or where the drive or tunnel is timbered irrespective of the depth, or any live sewer more than 2.4 metres (8 feet) below the surface of the ground. Nothing in this clause will entitle a person working in a trench by pot and shot method or otherwise at a depth less than 6.1 metres (20 feet) below the surface of the ground to be paid as a miner.

B. The hours of work of employees working underground and all dependent work above the ground will begin at the whistle and end at the surface. The hours of work for underground work will be 38 per week worked in accordance with the provisions of clause 33.1(a). Each day's work will include half an hour crib break and if two shifts are worked they will be worked between the hours of 6.00 am and midnight.

C. A week's work will be 30 hours per week, exclusive of crib time, except in the following cases:

1. miners driving tunnels with a superficial area not exceeding 12.2 metres (40 feet);

2. miners sinking shafts over 15.2 metres (50 feet) in depth; and

3. persons packing and/or scabbling in dead ends and/or boodler working."

[397] In response to this provisional view expressed in the August 2017 Statement, the HIA submitted that:

- it opposed the removal of the current clause 33.1(vii), which was a facilitative provision which permitted opting out of the RDO system, on the basis that this would have a detrimental impact of flexibility, efficiency and productivity;

- it supported the deletion of clause 33.1(a)(ii);

- it pressed for the averaging of hours to be permitted;

- it was concerned about a requirement for a written roster in the proposed clause 33(a)(iii), which did not reflect current practices particularly amongst small businesses;

- opposed the introduction in proposed clause 33(a)(v) of a new obligation to provide employees with at least 48 hours written notice of the need to work on an RDO; and

- supported the adoption of provisions that would enable employees to bank RDOs, but the proposed provision should require that an employee provide written notice to the employer of the employee's request to take a banked RDO at least five days before taking the banked RDO.

[398] MBA submitted that the provisionally-proposed hours clause was less complex than the existing provision, but identified the following issues:

- it was opposed to the requirement in proposed clause 33(a)(v) for 48 hours' notice if an employee was required to work on a RDO, which contradicted the notion in the same clause that work on a RDO may be necessary due to unforeseen delays or other reasons arising from unforeseen or emergency circumstances;

- there was no provision for the cashing-out of RDOs;

- in respect of proposed clause 33(d)(iii) (working in compressed air), the MBA proposed the following wording which it said was agreed with the AWU:

  "The employment conditions and associated entitlements set by this award shall apply. Limitations on time spent working in compressed air and the physical conditions under which such work is performed shall be subject to the applicable Australian Standard"; and

- it maintained the position that the reference to 30 working hours in relation to underground work was an error, and should be 38.

[399] The CFMMEU submitted that the proposed hours provision involved significant detriment to employees, in that it removed any certainty as to when RDOs are to be taken (currently the fourth Monday in each four week cycle), and reduced the ability of employees to plan ahead. It also gave absolute power to employers to determine when RDOs are to be taken, and removed any requirement to reach agreement about this. It also did not address what happened to the accrued entitlement to a RDO when an employee was required to work on what would have been the rostered RDO.

[400] The Ai Group submitted that the requirement to provide an employee with 48 hours' written notice to work on a RDO was onerous, unnecessary and would result in a loss of flexibility, and employees were compensated for the change by the payment of penalty rates.

[401] The CCF submitted that the proposed clause simplified the existing provision by allowing RDOs to be provided in alternative ways, but was opposed to the requirements to provide a written roster and to give 48 hours' notice for an employee to work on a RDO. The CCF supported the banking of RDOs without the existing restrictions, but submitted that if more than one day of banked RDOs was to be taken, there should be a requirement for the employee to give written notice of this more than two weeks' in advance. The CCF also expressed concern that there was no capacity under the proposed clause to work the 38-hour week other than on a RDO system.

[402] The AWU submitted that:

- it was opposed to the deletion of the fourth Monday in each four-week cycle as the default RDO and any substantial broadening of the ability to bank RDOs;

- the proposed clause 33(a)(v)(B) would significantly reduce current conditions, because it permitted an employee to be required to work on a RDO on penalty rates without entitling the employee to an alternative RDO or to be paid out for the accrued RDO;

- in relation to working in compressed air, it had reached agreement with MBA about an alternative wording of the provision (as set out above in relation to MBA's further submissions); and

- the proposed clause 33(d)(iv)(C) replicated the existing provision concerning underground work, which was erroneously drafted, and the provision should be corrected to read:

"A week's work will be 30 hours per week, exclusive of crib time, ~~except~~ in the following cases:

1. miners driving tunnels with a superficial area not exceeding 12.2 metres (40 feet);

2. miners sinking shafts over 15.2 metres (50 feet) in depth; and

3. persons packing and/or scabbling in dead ends and/or boodler working."

[403] The AMWU supported the submissions of the CFMMEU and the AWU.

Consideration

[404] We consider that in a number of respects the current hours provision does not achieve the modern awards objective. First, the provision is excessively inflexible in relation to its requirement (in clause 33.1(a)(i)) for the taking of RDOs, in that the default position is that each award-covered employee must take the RDO on the same identified day in the roster cycle. In effect the provision requires the business of an award-covered employer to shut down one day in every four weeks. Although clause 33.1(a)(ii) allows an alternative day to be

agreed upon by a majority vote of employees, this would still appear to require employees to take an RDO on a common day. Clause 33.1(a)(vii) allows for other alternative methods of working the 38-hour week to be implemented, but only by agreement with the majority of employees. Clause 7.1(a) permits IFAs to be entered into between the employer and individual employees which would allow a substitute method of taking RDOs or otherwise working the 38-hour week, but that does not in our view provide an efficient mechanism for an employer to avoid the consequences which the current clause 33.1(a)(ii) entails. We accept that on larger construction projects covered by enterprise agreements it is common practice for employers to operate on the basis of a common industry RDO (albeit taken on the basis of the industry calendar referred to in Mr Spence's evidence), and that employers on such projects may consider this practice appropriate. However in other parts of the industry, particularly the residential construction sector, this practice is not considered appropriate by employers as it inhibits the productive performance of work, and there is no good reason this should continue to be the case. We do not consider the default position imposed by clause 33.1(a)(i) is an appropriate feature of a fair and relevant safety net, having regard in particular to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d) of the Act) and the likely impact of any exercise of modern award powers on business, including on productivity (s.134(1)(f)).

[405] Secondly, the facilitative provision in clause 33.1(a)(ii) allows the substitution of another day for the "*nominated industry rostered day off*". This expression is not defined in the Building Award, but appears to be a reference to the industry RDO system referred to in Mr Spence's evidence rather than the four-weekly RDO referred to clause 33.1(a)(i). If so, this renders the provision disjunctive with the rest of the scheme in clause 33 and as a result it cannot be said to be part of a relevant safety net having regard in particular to the need for a simple and easy to understand modern award system (s.134(1)(g) of the Act).

[406] Thirdly, clause 33.1(a)(iii) confines the ability of employees to bank RDOs to the circumstances where employees are engaged in distant work and a majority of employees agree. We consider that these restrictions are excessively inflexible and may operate to the detriment of individual employees for whom the banking of RDOs may be convenient (for example, for use during school holidays or other family purposes or as an annual leave supplement). This inflexibility is not part of a fair safety net especially having regard to the need to promote flexible modern work practices (s.134(1)(d) of the Act).

[407] Fourthly, as submitted by the CFMMEU, clause 33 in its current form does not provide for any maximum number of daily ordinary hours for casual employees (after which overtime penalty rates would be payable). Nor does it do so for part-time employees. In this respect also, the clause is not a fair and relevant standard, having regard in particular to the needs of the low paid (s.134(1)(a)) and the need to provide additional remuneration for employees working overtime (s.134(1)(da)(i) of the Act).

[408] Fifthly, clause 33.1(d) refers to an obsolete Australian Standard, and thus cannot be part of a relevant safety net.

[409] Sixthly, clause 33.1(e)(iii) provides that, in respect of underground work, a "*week's work will be 30 hours per week, exclusive of crib time*" except in three specified circumstances. This contradicts clause 33.1(e)(ii), which provides for a 38 hour week for

underground work. Clause 33.1(e)(iii) also *excludes* from the operation of the 30 hour week (presumably 32½ hours inclusive of crib breaks) circumstances which on one view would be more likely to attract a shorter working week. This provision is taken from the *Australian Workers' Union Construction-on-site and Civil Engineering (A.C.T.) Award 1999*, and did not appear in the main building and construction awards which the Building Award replaced, namely the *National Building and Construction Industry Award 2000*, the *Australian Workers' Union Construction and Maintenance Award 2002* and the *National Metal and Engineering On-site Construction Industry Award 2002*. It had its origins in a provision first appearing in the *Civil Engineering Construction-On-Site (A.C.T.) Award 1973*. The provisions in those awards, although poorly drafted, made it apparent that, unlike the current provision, the 30 hour week was applicable to the circumstances set out in the current clause 33.1(e)(iii).

[410] Consistent with the general approach contained in the August 2017 Statement, we consider that clause 33 should be varied in the following major respects in order for it to achieve the modern awards objective:

(1) Employers will have the capacity to roster RDOs either on the basis that all employees will take their RDOs on single day in a 20-day work cycle, or alternatively employees may be rostered to take their RDOs on different days during the cycle. In this respect we accept the submissions made by the HIA.

(2) As a concomitant of the capacity of the employer to roster employees' RDOs on different days across the 20-day work cycle, the employer will be required to issue a written roster seven days in advance of the commencement of the work cycle.

(3) All employees will be given the capacity to bank RDOs, as the HIA submitted should be the case.

[411] There are some additional changes we will make to clause 33 which were not addressed in the proposed variation contained in the August 2017 Statement. We also propose to alter aspects of that proposed variation, specifically:

(1) The clause will be reformatted and renumbered to give it a more logical structure.

(2) We will add a daily maximum number of ordinary hours for casual employees, consistent with the submissions of the CFMMEU, and also for part-time employees. Our provisional view is that this daily maximum should be set at eight hours consistent with the position applying to full-time employees.

(3) In relation to working rostered days off, we will provide that this may occur by agreement with the employee without restriction as to the circumstances, or upon the provision of 48 hours' notice in specified circumstances. We will also make it clear that an employee who works on a

RDO will retain the accrued RDO in addition to the penalty rates to be paid for working on the RDO.

(4) We will remove the prohibition, currently contained in clause 33.1(b)(i), upon part-time employees working on a rostered day off.

(5) For reasons earlier explained, we consider that the current clause 33.1(e)(iii) should be deleted altogether rather than amended in accordance with the re-drafted provision proposed by the AWU. There was no evidence before us that the provision has any practical operation. Enterprise agreements applicable to current tunnelling projects do not disclose the operation of a 30-hour week in any circumstances. The rationale for the provision is not discoverable. To the extent that it may possibly reflect a safety standard, it is sufficient if the generally-applicable hours provisions are made subject to any relevant safety standard for underground work. This may be combined with a provision to the same effect for working in compressed air.

[412] The provision we propose to make to reflect the above conclusion is as follows:

33. Ordinary hours of work

33.1 Except as provided in clause 34–Shiftwork, the ordinary working hours will be 38 per week (averaged over a 20 day four week cycle to allow for the accrual and taking of rostered days off (RDO)), worked between 7.00am and 6.00pm Monday to Friday in accordance with the following procedures:

(a) Hours of work and accrual towards rostered days off

Ordinary working hours will be eight hours in duration each day, of which 0.4 of one hour of each day worked will accrue towards a RDO and 7.6 hours will be paid. An employee will therefore accrue 7.6 hours towards a RDO each 19 days of ordinary hours worked.

(b) Accrual towards an RDO on days not worked

An employee will accrue 0.4 of one hour of each day towards a RDO for any public holiday where an employee is not required to work and for each day of paid leave taken. This will not apply on a day an employee takes a RDO.

(c) Taking the accrued RDO

(i) An accrued RDO will be taken in one of the following ways:

- on one day during a 20 day four week cycle on which all employees will take a RDO in accordance with a written

roster fixed by the employer and issued 7 days before the commencement of that cycle; or

- on a day during a 20 day four week cycle during which particular employees will take their RDOs on different days in accordance with a written roster fixed by the employer and issued 7 days before the commencement of that cycle; or

- by any other method that is agreed by the employer and a majority of that employer's employees and recorded in writing.

(ii) The means by which a written roster under clause 33.1(c) may be issued include but are not limited to the following:

- by giving an employee a copy of the written roster; or

- by placing a copy of the written roster on the notice board(s) at the workplace; or

- by sending the written roster to the employee by post in a prepaid envelope to an employee's usual residential or postal address, by facsimile transmission, or by email or other electronic means; or

- by any other means agreed to by the employer and employee.

(iii) A roster issued in accordance with clause 33.1(a)(i) must not require an employee to take an RDO on a day that is a public holiday.

(d) RDO banking

An employee and the employer may agree to allow the employee to bank an accrued RDO that would otherwise be taken under one of the ways fixed under subclause 33.1(c)(i) and in that event the following will apply:

(i) The number of accrued RDOs banked must not exceed five at any time.

(ii) If an accrued RDO is banked, an employee is required to work on the day the employee's RDO was otherwise fixed under clause 33.1(c)(i). In that event subclause 33.1(e) does not apply.

(iii) An accrued RDO that is banked will be taken on a day that is agreed between employer and the employee and on which ordinary working hours may be worked. An employer must not unreasonably withhold agreement for an employee to take a banked RDO on a particular day requested by the employee.

(iv) The employer must maintain a record of:

- the number of accrued RDOs banked by each employee; and
- the date on which each employee takes a banked accrued RDO.

(e) Requirement to work on a day that is a RDO

(i) The employer may require an employee to work on an RDO that is fixed in accordance with clause 33.1(c)(i) by agreement with the employee, or upon the provision of not less than 48 hours' notice where the work to be performed is necessary because of unforeseen delays to a particular project or a section of it or any other reasons arising from unforeseen or emergency circumstances on a project.

(ii) An employee who works on a day rostered for the taking of a RDO in accordance with 33.1(e)(i) will be paid penalty rates as prescribed for Saturday work in clause 37 –Penalty rates, and will retain the accrued RDO.

(f) Entitlement on termination of employment

If an employee's employment is terminated for any reason then, in addition to any other payment to which the employee becomes entitled the employer must pay to the employee:

(i) an amount equal to the payment the employee would have received had the employee taken any accrued RDO yet to be taken and any banked accrued RDO; and

(ii) an amount equal to the payment the employee would have received had the employee taken an RDO for the period representing the number of hours and minutes that have accrued towards an RDO.

33.2 Agreement on working other than the rostered day off cycle

Where an employer and the majority of employees employed at a particular enterprise agree that due to the nature of an employer's operations it is not

practicable for an employee to be provided with an RDO in each four week cycle, they may agree to an alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day. Any such agreement shall be recorded in writing.

33.3 Hours of work – part-time employees

(a) The daily ordinary hours of work of a part-time employee shall not exceed 8 hours.

(b) Notwithstanding the provisions of this clause and clause 34 – Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards an RDO.

(c) An employer and employee may agree that the part-time employee accrues time towards an RDO as provided by this clause and clause 34– Shiftwork. In such instances, the part-time employee will accrue pro rata entitlements to rostered days off in accordance with subclause 33.1(a).

33.4Hours of work – casual employees

The daily ordinary hours of work of a casual employee shall not exceed 8 hours.

33.4 Other conditions for working ordinary hours

(a) Early starts

The working day may start at 6.00am or at any time between that hour and 8.00am and the working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period. The change to the start time requires agreement between the employer and the employees and their representative(s), if requested.

(b) Washing time

The employer will provide sufficient facilities for washing and five minutes will be allowed before lunch and before finishing time to enable employees to wash and put away gear.

(c) Work in compressed air and underground

The working hours of employees working in compressed air or underground shall be subject to any applicable safety standards.

[413] Because the provision above contains elements which were not contained in the draft provision in the August 2017 Statement, we will give interested parties an opportunity to file any further submissions in respect of the proposed new provision within 28 days of the date of this decision.

11. SHIFTWORK

Current provisions

[414] Clause 34 of the Building Award deals with shiftwork, and clause 34.1(a) defines the type of shifts that may be worked as follows:

> **34.1 General building and construction and metal and engineering construction sectors**
>
> **(a) Definitions**
>
> For the purposes of this clause:
>
> **afternoon shift** means a shift commencing at or after 1.00 pm and before 3.00 pm
>
> **night shift** means a shift commencing at or after 3.00 pm and before 11.00 pm
>
> **morning shift** means a shift commencing at or after 4.30 am and before 6.00 am
>
> **early afternoon shift** means a shift commencing on or after 11.00 am and before 1.00 pm.

The claim

[415] MBA seeks the variation of clause 34.1(a) to include a definition of "*early morning shift*" that would cover work starting between 11.00 pm and 4.30 am, with separate provision to be made for a shift loading of 50%.

Evidence

MBA

[416] Mr Glover gave evidence concerning this claim.[110] He said that whilst rare, there were circumstances in which employees needed to carry out work on commercial jobs or commercial fit outs beginning in that span of hours, and there was a genuine need for this gap to be filled. During cross-examination Mr Glover agreed that a shift starting at 10.30pm and

[110] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

finishing 8 hours later would cover the hours of 11.00pm to 4.30am. He did however indicate that he had had discussions with members that had contracts requiring them to start between the hours of 11.30pm and 4.30am.

Submissions

MBA

[417] MBA submitted that the proposed variation would provide clarity and overcome a deficiency in the Building Award that arose when changes were made to redefine shifts using the time at which they commenced rather than the time at which they finished.

CFMMEU

[418] The CFMMEU initially submitted that this variation was unnecessary, or in the alternative that a more simple solution would be to extend the starting time for the night shift. However after further consideration it subsequently advised, in a further written submission dated 22 June 2017, that it consented to MBA's proposed variation.

CEPU

[419] The CEPU submitted that MBA's proposed variation was advanced on the same basis during the 2012 Award Review, when it was rejected for lack of evidence. They submitted that the proposal should be rejected now for the same reason. We were not subsequently advised whether the CEPU had altered its position in line with that of the CFMMEU.

Consideration

[420] To the extent that the Building Award does not accommodate the working of ordinary hours in the sectors covered by clause 34.1 at a time when, if only to a limited extent, productive work is capable of being performed, it does not achieve the modern awards objective. MBA's proposed variation, with which the CFMMEU agrees, will facilitate the performance of such work. The proposed shift loading of 50% is fair, particularly having regard to the fact that the existing loading for afternoon and night shift in those sectors is, as provided by clause 34.1(b), also 50%. We consider that MBA's proposed variation is necessary to achieve the modern awards objective, having regard in particular to the need to promote flexible work practices and the efficient and productive performance of work (s 134(1)(d)) and the need to provide additional remuneration for employees working on shifts (s 134(1)(da)(iv)). The variation will be made.

12. OVERTIME

Current provisions

[421] Clause 15 of the Building Award concerns apprentices. Clause 15.3, provides:

> **15.3 Overtime and shiftwork**

(a) When overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by the award will apply, based on the applicable ordinary time hourly rate. No apprentice/trainee will work overtime or shiftwork on their own or without supervision.

(b) No apprentice under the age of 18 years will be required to work overtime or shiftwork unless they so desire.

(c) No apprentice will, except in an emergency, work or be required to work overtime or shiftwork at times which would prevent their attendance at the Registered Training Organisation as required by any statute, award, regulation or the contract of training applicable to them.

[422] Clause 36.7 of the Building Award provides:

36.7 Except in an emergency, no trainee will work or be required to work overtime or shiftwork at times which would prevent the employee's attendance at a Registered Training Organisation, as required by any statute, award or regulation.

The claim

[423] MBA proposed that clause 15.3(b) and (c) be deleted and clause 36.7 be varied as follows:

"**36.7** Except in an emergency, no trainee or apprentice will work or be required to work overtime or shiftwork at times which would prevent the employee's attendance at a Registered Training Organisation, as required by any statute, award or regulation."

Submissions

MBA

[424] MBA submitted that the variation proposed sought only to consolidate clauses 36.7 and 15.3(b) of the Building Award, on the basis that clause 15.3(b) was essentially a replication of clause 36.7 and should be deleted.

AWU

[425] The AWU submitted that whilst there was some overlap between clause 15.3(c) and clause 36.7 of the Building Award, clause 15.3(b) operated quite differently. Clause 15.3(b) imposed a restriction on an employer requiring an apprentice under the age of 18 years to work overtime or shiftwork, which applied generally and did not require any connection to training obligations. The AWU further submitted that MBA's claim was misleading and should be rejected as no amendment was required to the current conditions.

CFMMEU

[426] The CFMMEU opposed the claim and submitted that MBA provided no evidence to support the proposed variation. It also submitted that the variation added nothing to the interpretation of the award and could mislead employers and apprentices as to what special provisions applied to apprentices in regard to overtime and shiftwork.

Consideration

[427] We do not consider that there is any overlap in the existing provisions which requires modification in order to achieve the modern awards objective. The provisions have separate work to do. Clause 15.3(b) requires overtime and shiftwork for apprentices under the age of 18 to be voluntary. Clause 15.3(c) prohibits an apprentice (of any age) being required to perform overtime or shiftwork so as to prevent attendance at their Registered Training Organisation except in an emergency. Clause 36.7 prohibits a trainee (of any age) being required to perform overtime or shiftwork so as to prevent attendance at their Registered Training Organisation except in an emergency. MBA's claim is rejected. However we will add a cross-referencing note to clause 36.7 as follows: "*Note: overtime and shiftwork for apprentices is dealt with in clause 15.3*".

13. ANNUAL LEAVE

Current provisions

[428] Clause 38 of the Building Award contains annual leave provisions. Those relevant to the claims of the parties are set below:

"**38.1 Leave entitlement**

(a) Annual leave is provided for in the NES.

(b) For the purpose of the additional week of leave provided by the NES, a shiftworker means a **continuous shiftworker** as defined in this award.

38.2 Payment for annual leave

(a) Instead of the **base rate of pay** as referred to in s.90(1) of the Act, an employee under this award, before going on annual leave, must be paid, in advance, the amount which they would have received for working ordinary time hours if they had not been on leave.

(b) In addition to the payment prescribed in clause 38.2(a), an employee must receive during a period of annual leave a loading of 17.5% calculated on the following rates, loadings and allowances if such rates, loadings and allowances would have been received by the employee for working ordinary time hours had the employee not been on annual leave:

- clause 19.1(a)—Minimum wages;

- clause 21.2—Industry allowance;
- clause 21.3—Underground allowance;
- clause 20.1—Tool and employee protection allowance;
- clause 24—Living away from home—distant work;
- clause 25—Fares and travel patterns allowance; and
- clause 19.2—Leading hands.

This loading will also apply to proportionate leave on lawful termination.

(c) Instead of the payment in respect of annual leave loading provided for in clause 38.2(b), an employee who would have worked on shiftwork had they not been on leave and where the employee would have received shift loadings prescribed by clause 34—Shiftwork, had they not been on leave during the relevant period and such loadings would have entitled them to a greater amount than the loading of 17.5%, then the shift loading as prescribed in clause 34 will be included in the rate of wage prescribed by clause 38.2(b) instead of the 17.5% loading.

(d) Electronic funds transfer (EFT) payment of annual leave

Despite anything else in this clause, an employee paid by electronic funds transfer (EFT) may be paid in accordance with their usual pay cycle while on paid annual leave."

The claims

[429] MBA sought to add the following sentence to clause 38.1(a): "*Provided that continuous service for purposes of this clause is as defined in clause 3.1 of this award*".

[430] HIA sought to amend clause 38.2(b) of the Building Award to remove the inclusion of the fares and travel patterns allowance from the calculation of annual leave loading.

Evidence

MBA

[431] Mr Glover gave evidence[111] to the effect that MBA's suggested amendment would be a useful signpost and would have the effect of drawing attention to the definition of continuous service in clause 3.1.

[111] Exhibit 38, Witness Statement of Peter Glover dated 9 December 2016; Transcript 5 April 2017 PN2398-PN2551

HIA

[432] HIA relied on the evidence given by Ms Marantz, to demonstrate that individual flexibility agreements in the industry commonly provided for higher rates of pay in compensation for, among other things, the removal of the annual leave loading.

Submissions

MBA

[433] MBA submitted that the definition of continuous service in the Building Award is consistent with and no different in material effect to the definition that existed in the NES, albeit they were expressed differently. It submitted that the benefit of making the proposed variation was to point users of the Building Award to the definition in the award with which they were currently familiar.

HIA

[434] In support of its proposed variation to clause 38.2(b), HIA submitted that, in practice, many employees in the residential construction industry used individual flexibility arrangements to manage their annual leave loading and incorporate it into one higher "*all up rate*". It further submitted that, as the fares and travel patterns allowance is not taken into account under clause 25.10(c) of the Building Award in the calculation of annual leave, its inclusion in calculating annual leave loading is confusing and imposes an unjustifiable regulatory burden on businesses. HIA also submitted that the removal of the requirement to factor in this allowance into the calculation of annual leave loading will make the provision simpler to administer and make the Building Award easier to understand.

ABI and NSWBC submissions

[435] ABI and the NSWBC supported the HIA's proposed variation to clause 38.2(b).

AWU

[436] The AWU was not opposed to MBA's amendment to clause 38.1 of the Building Award.

[437] The AWU submitted that HIA has not provided any evidence to substantiate its claim with respect to clause 38.2(b), stating that the only justification provided is an alleged administrative burden on employers. It submitted that, given the sophistication of payroll systems which are readily available to employers today, this variation would save a very small amount of working time for the person or persons processing annual leave payments. The AWU submitted that a significant reduction to the minimum terms and conditions of employment for employees covered by the Building Award cannot be necessary for this reason alone.

CFMMEU

[438] The CFMMEU submitted that it did not believe the MBA's proposed variation was necessary but made no other submission on the issue. In relation to the HIA's proposed variation, it submitted that it would reduce the award safety net. No evidence had been advanced to support the proposed variation, which had been advanced in similar terms in the 2012 Award Review and rejected.

CEPU

[439] The CEPU submitted that HIA's proposed variation was previously sought during the 2012 Award Review process and, as no supporting evidence or cogent reasons for the variation had been provided, it should be rejected now.

Consideration

[440] We do not consider that MBA's proposed variation is necessary to meet the modern awards objective. There is no relevant deficiency in the drafting of clause 38.1 which requires clarification. In any event, clause 38.1(a) does not confer a substantive entitlement. It merely points the reader to where the annual leave entitlement is to be found.

[441] In relation to the HIA's claim, we consider that the references to the rates, loadings and allowances in clause 38.2(b) are unnecessarily complex. Clause 38.2(a) requires annual leave pay to be calculated on the basis of the amount the employee would have received for working ordinary time hours if the employee had not been on leave. Clause 38.2(b) provides that the 17.5% loading should be calculated on the specifically identified rates, loadings and allowances, and not (in accordance with standard industrial practice) calculated simply on the amount payable under clause 38.2(a). There is no discernible rationale for the loading to be calculated on a different basis under clause 38.2(b) to the base payment under clause 38.2(a). Clause 38.2(b) should simply provide that the 17.5% loading is to be calculated and paid by reference to the amount identified in clause 38.2(a). We consider therefore that clause 38.2(b) should be varied to provide: "*In addition to the payment prescribed in clause 38.2(a), an employee must receive during a period of annual leave a loading of 17.5% calculated on that payment*."

14. FOREPERSONS AND SUPERVISORS

Current provisions

[442] Clause 43 of the Building Award relates to forepersons and supervisors in the metal and engineering construction sector. Clause 43.2(a) sets weekly minimum wage rates (expressed as the higher of an average of weekly wage rates of the persons supervised plus a weekly increment, or a specified weekly rate) for forepersons and supervisors. Clause 43.2(b) then provides:

> "**43.2 Wages**
>
> …

(b) Employees paid the wage rates in clause 43.2(a) will not receive overtime payments, shift work premiums, special rates, meal allowances, allowances for travelling and board, motor allowances, first aid allowances and other additional amounts specified in clauses 25—Fares and travel patterns allowance, 24—Living away from home—distant work, and 22—Special rates."

[443] Clause 43.5 provides:

"**43.5 Conditions of employment**

(a) The conditions of employment that apply to employees covered by this part will not be less favourable than those prescribed under this award.

(b) Where it has been the custom to do so and the employer and employee agree, time off with pay may be taken instead of payment for overtime work, shift work, or work on Sundays or holidays. The amount of time taken is to be equivalent to the pay the employee would otherwise have received for working overtime."

The claim

[444] The AMWU proposed to delete clause 43.2(b) and replace it with the following:

"**43.2 Wages**

…

(b) The calculation of the minimum wage rates in accordance with 43.2(a) will not include overtime payments, shift work premiums, special rates, meal allowances, allowances for travelling and board, motor allowances, first aid allowances and other additional amounts specified in clauses 25—Fares and travel patterns allowance, 24—Living away from home— distant work, or 22—Special rates.

Note: This does not mean that these entitlements are not applicable to Forepersons and Supervisors. They are only excluded for the purpose of calculating the minimum wage in accordance with 43.2(a). See also clause 43.5."

Submissions

AMWU

[445] The AMWU submitted that its proposed variation would remove any apparent restriction on the payment of the entitlements identified in clause 43.3(b) to forepersons and supervisors and clarify that the provision only excluded these payments from the calculation of the minimum wage payable under clause 43.2(a). It would also remove the apparent contradiction with clause 43.5(a), which required the conditions of employment of forepersons and supervisors to be not less than those prescribed elsewhere in the award. If forepersons and supervisors did not receive the entitlements identified in clause 43.2(a), they would be worse off contrary to clause 43.5.

MBA

[446] The MBA did not oppose the AMWU's proposal.

Ai Group

[447] The Ai Group opposed the variation sought by the AMWU. It submitted that the propositions advanced by the AMWU were unsupported assumptions, and that if the Full Bench had intended to replicate Appendix B of the *National Metal and Engineering On-site Construction Industry Award 2002* in the modern award then it would have done so. The Ai Group submitted that there was no contradiction between clause 43.2(b) and clause 43.5, and that clause 43.2(b) was clear in that employees who were paid the additional rates were not entitled to receive overtime and other such payments. The AMWU had failed to establish that there had been an error or that its claim was necessary to ensure that the award achieved the modern awards objective, and accordingly the claim should be rejected.

HIA

[448] The HIA submitted that the adoption of the proposed variation would represent a significant change to the Building Award, and that the AMWU had failed to provide substantive evidence in support of this change.

Consideration

[449] It may readily be accepted that there are difficulties in the way that clause 43 is drafted. Clause 43.2(b), read literally, provides that forepersons and supervisors are not to receive the range of entitlements referred to. It is difficult to identify what offsetting advantage such employees receive under the clause to justify the loss of these entitlements, since presumably the additional remuneration referred to in clause 43.2(a) is to take account of the additional work value involved in supervisory duties rather than to "buy out" the benefits specified in clause 43.2(b). Clause 43.5(a) is confusing, because it refers to employees "*covered by this part*" (presumably "this part" being clause 43 as a whole), and it refers to conditions of employment applying to such employees being no less favourable "*than those prescribed under this award*", without identifying the conditions of employment. Clause 43.5(a) tends to support the proposition that the entitlements referred to in clause 43.2(b) are not intended to be applicable at all to forepersons and supervisors. But this is at odds with clause 43.5(b) which allows, by custom and agreement, time off to be taken in lieu of overtime and shift work – entitlements which, under clause 43.3(2)(b) are said not to be payable to forepersons and supervisors.

[450] Clause 43 as it stands does not meet the modern awards objective at least because it fails to set a simple and easy to understand standard for compliance. However we do not consider that the difficulties we have identified should be resolved simply by varying the provision in the manner proposed by the AMWU. There are more significant difficulties in clause 43 which the AMWU variations would not resolve. The prescribed method of calculating the wages of forepersons and supervisors is inherently complex. It is doubtful whether the provision properly sets a safety net minimum rate in accordance with the modern

awards objective. Clause 43 also sets specific provisions for the payment of wages to forepersons and supervisors (clause 43.3) and notice periods (clause 43.4), for reasons that are not apparent.

[451] Our provisional view is that the appropriate course is to restructure and simplify clause 43 so that it does no more than set properly fixed minimum rates for forepersons and supervisors, either by way of a minimum weekly rate of pay or an allowance. The dollar amounts currently prescribed by clause 43.2 would appear to be appropriate for this purpose. We will invite further submissions in relation to this provisional view before we make a final decision.

15. ALTERNATIVE WORKING ARRANGEMENTS

Current provision

[452] Clause 31 of the Joinery Award concerns alternative working arrangements. Relevantly, clause 31.1 provides as follows:

> **31. Alternative working arrangement**
>
> **31.1** By written agreement between the employer and the employees, the ordinary hours of work may be altered from those allowed under clauses 28–Ordinary hours of work and rostering, 29–Breaks or 30–Overtime to suit the needs of a particular enterprise, factory, workshop or section, provided that:
>
> …
>
> **(b)** the agreement must be made by at least 60% of employees in the enterprise, factory, workshop or section affected by the alteration; and
>
> …

The claim

[453] The MBA proposed that clause 31.1(b) be varied so that the requirement for agreement of at least 60% of employees be changed to a majority of employees.

Submissions

MBA

[454] MBA submitted that a 60% majority for a facilitative provision was unnecessary and contrary to the standard of a simple majority in award provisions of this nature.

CFMMEU

[455] The CFMMEU opposed the proposed variation and submitted that as the MBA had provided no empirical or probative evidence to justify a variation to the award the variation should be rejected.

Consideration

[456] We cannot identify any reason the agreement of at least 60% of employees in a facilitative provision is necessary to meet the modern awards objective. The variation proposed by the MBA shall be made.

16. PENALTY RATES

Current provisions

[457] Clause 32 of the Plumbing Award provides as follows:

> **32. Penalty rates**
>
> **32.1 Weekend work**
>
> **(a)** All employees who are directed by the employer to work ordinary hours between midnight on a Friday and midnight on a Saturday will receive:
>
> **(i)** plumbing and mechanical services in Victoria - a 50% loading calculated on their minimum hourly rate of pay for the first ordinary hour worked provided that this clause will cease to operate on 31 December 2014; or
>
> **(ii)** plumbing and mechanical services in Victoria - a 50% loading calculated on their minimum hourly rate of pay for the first ordinary hour worked provided that this clause will cease to operate on 31 December 2014; or
>
> **(iii)** all other employees - a 50% loading calculated on their minimum hourly rate of pay for the first two ordinary hours worked; and
>
> **(iv)** a 100% loading calculated on their minimum hourly rate of pay for the remaining ordinary hours worked thereafter.
>
> **(b)** All employees who are directed by the employer to work ordinary hours between midnight on a Saturday and midnight on a Sunday will receive a 100% loading calculated on their minimum hourly rate of pay for such ordinary hours worked.
>
> **(c)** All employees who are required to work overtime on a weekend will be paid in accordance with clause 33.
>
> **(d)** An employee directed to work ordinary hours in accordance with this clause will be allowed a meal break in accordance with clause 30.1 and a daily rest break in accordance with clause 30.3.

32.2 Shiftwork

(a) Where an employee is:

(i) given no less than 48 hours' notice prior to the commencement of shiftwork by the employer: and

(ii) directed by the employer to work ordinary hours between midnight on Sunday and midnight on Friday for five or more consecutive shifts:

the employee will receive a loading of 33% calculated on their ordinary hourly rate of pay for such ordinary hours worked.

(b) Where an employee is:

(i) given less than 48 hours' notice prior to the commencement of shiftwork by the employer; or

(ii) directed by the employer to work ordinary hours between midnight on Sunday and midnight on Friday for less than five consecutive shifts;

the employee will receive a loading of 50% for the first two hours and 100% thereafter calculated on their minimum hourly rate of pay for such ordinary hours worked.

(c) Where an employee, after having worked a shift, finishes at a time when reasonable means of transport are not available, the employer will provide the employee with a conveyance to their home or pay the employee their current wage for the time reasonably spent occupied in reaching their home.

(d) An employee directed to work ordinary hours in accordance with this clause will be allowed:

(i) an unpaid meal break of not less than 30 minutes, to be taken no more than five hours after the commencement of the employee's shift; and

(ii) a paid rest break of not more than 10 minutes, to be taken no more than two hours after the commencement of the employee's shift.

32.3 Public holidays

(a) All employees who are directed to work ordinary hours on a public holiday or substitute days as prescribed in clause 37—Public holidays,

will receive a 150% loading calculated on their minimum hourly rate of pay, for such ordinary hours worked.

(b) A plumbing and mechanical services employee required to perform any work on a public holiday will be afforded at least four hours' work or paid for four hours at the appropriate rate.

(c) An employee directed to work ordinary hours in accordance with this clause will be allowed a meal break in accordance with clause 30.1 and a daily rest break in accordance with clause 30.3.

32.4 Loadings

(a) All loadings will be exclusive of each other (i.e. only one loading will be payable at any given time).

(b) Loadings will not apply where overtime is payable."

[458] The MPG sought to replace clause 32 of the Plumbing Award with the following clause:

"32.1 Shiftwork

Between Midnight on Sunday and Midnight on Friday

(a) Where an employee is directed by the employer to work ordinary hours between midnight on Sunday and midnight on Friday, and such employee is:

(i) given no less than 48 hours' notice prior to the commencement of shiftwork by the employer; and

(ii) such work is for five or more consecutive shifts;

the employee will receive a loading of 33% calculated on their ordinary hourly rate of pay for such ordinary hours worked,

or,

where such employee is:

(iii) given less than 48 hours' notice prior to the commencement of shiftwork by the employer; or

(iv) directed by the employer to work ordinary hours between midnight on Sunday and midnight on Friday for less than five consecutive shifts;

the employee will receive a loading of 50% for the first two hours and 100% thereafter calculated on their minimum hourly rate of pay for such ordinary hours worked.

Between midnight on a Friday and midnight on a Saturday

(b) Where an employee is directed by the employer to work ordinary hours between midnight on a Friday and midnight on a Saturday, such employee will receive:

(i) a 50% loading calculated on their minimum hourly rate of pay for the first two ordinary hours worked; and

(ii) a 100% loading calculated on their minimum hourly rate of pay for the remaining ordinary hours worked thereafter.

Between midnight on a Saturday and midnight on a Sunday

(c) Where an employee is directed by the employer to work ordinary hours between midnight on a Saturday and midnight on a Sunday, such employee will receive a 100% loading calculated on their minimum hourly rate of pay for such ordinary hours worked.

Public holidays

(d)(i) Where an employee is directed to work ordinary hours on a public holiday or substitute days as prescribed in clause 37—Public holidays, such employee will receive a 150% loading calculated on their minimum hourly rate of pay, for such ordinary hours worked.

(d)(ii) A plumbing and mechanical services employee required to perform any work on a public holiday will be afforded at least four hours' work or paid for four hours at the appropriate rate.

32.2 Travel

(a) Where an employee, after having worked a shift, finishes at a time when reasonable means of transport are not available, the employer will provide the employee with a conveyance to their home, or pay the employee their current wage for the time reasonably spent occupied in reaching their home.

32.3 Loadings

(a) All loadings will be exclusive of each other (i.e. only one loading will be payable at any given time).

(b) Loadings will not apply where overtime is payable

32.4 Breaks

(a) An employee directed to work ordinary hours in accordance with clause 32.1 – Shiftwork will be allowed a meal break in accordance with clause 30.1 – Meal Breaks and a daily rest break in accordance with clause 30.3 – Daily Rest Breaks.

32.5 Overtime

(a) An employee directed to work overtime after having worked / or before working ordinary hours in accordance with clause 32.1 – Shiftwork, will be paid in accordance with clause 33 - Overtime."

Submissions

[459] The MPG submitted that its proposed variation to clause 32 was not intended to vary or remove any entitlements, but to make the clause more "user friendly". ABI, the NSWBC and the CEPU supported the variation.

Consideration

[460] The variations proposed will be made subject to a review by the Commission's plain language drafting expert. We note the current award uses both "minimum hourly rate" and "ordinary hourly rate". The use of these terms will be addressed within the context of the technical and drafting matters before the Group 4 Award Stage Full Bench. A determination will then be issued to give effect to the variations.

17. OVERTIME – PLUMBING AWARD

[461] The MPG proposed that clause 33 of the Plumbing Award, which is concerned with overtime entitlements, be varied to provide that "*each day's overtime stands alone*". This was agreed to by ABI, the NSWBC and the CEPU.

[462] We are not satisfied that the agreed variation should be made. Clause 29 of the Plumbing Award deals with ordinary hours of work, and relevantly provides as follows:

29. Ordinary hours of work over a four week work cycle

29.1 The average ordinary hours worked will be 38 per week for a four week work cycle.

29.2 Subject to the provisions of this clause, ordinary working hours will be worked in a 20 day, four week cycle, Monday to Friday inclusive, with 19 days of eight hours each, between the hours of 7.00 am and 6.00 pm, with 0.4 of one hour each day worked accruing to be paid as a rostered day off (RDO) in each cycle.

29.3 Ordinary working hours

Subject to clause 29.4—Early start and clause 32—Penalty rates, ordinary hours are worked between 7.00 am and 6.00 pm Monday to Friday inclusive.

29.4 Early start

By agreement between the employer and its employees, the working day may begin at 6.00 am or at any other time between that hour and 8.00 am and the working time will then begin to run from the time so fixed. The daily rest breaks, meal breaks and finishing time must be adjusted accordingly.

...

29.6 Alternative methods of arranging ordinary hours and rostered days off

(a) An employer and the majority of its employees may agree to an alternate method of arranging ordinary hours of work, and arranging RDOs.

(b) Matters upon which agreement may be reached include:

(i) how the hours are to be averaged within a work cycle;

(ii) the duration of the work cycle, provided that such duration will not exceed three months;

(iii) rosters which specify starting and finishing times;

(iv) substitution of RDOs;

(v) accumulation of RDOs;

(vi) arrangements which allow for flexibility in the taking of RDOs; and

(vii) the arrangement of ordinary hours which exceed eight hours on any day, provided such hours are within the spread of hours in clauses 29.3 or 29.4.

[463] Clause 33.1(a) provides for overtime penalty rates to be paid "*In respect of all time worked beyond the ordinary hours of work prescribed in clause 29, Ordinary hours of work over a four week cycle...*".

[464] The current position is therefore as follows. Clause 29.1 provides for averaging of the 38-hour week across a 4-week cycle. Clause 29.2 establishes a default means of doing this by which employees work 19 8-hour days and enjoy a rostered day off in each 4-week cycle. Clause 29.3 provides that ordinary hours are to be worked between the hours of 7.00am to 6.00pm, subject to an agreed early start under clause 29.4 Clause 29.6 provides for alternate methods of working the 38-hour week over a 4-week cycle by agreement with the majority of employees, which may include working days which exceed 8 hours provided that they are worked within the prescribed span of ordinary hours. Overtime under clause 33.1(a) is therefore payable in the following circumstances:

- for work performed in excess of 152 hours over a 4-week cycle;
- for work performed outside the span of 7.00am to 6.00pm, Monday to Friday, subject to any early start adjustment to the span pursuant to clause 29.4;
- under the default method of working ordinary hours in clause 29.2, for work in excess of 8 hours in a rostered working day;
- if an alternative method of arranging working hours is adopted pursuant to clause 29.6, for work in excess of the daily rostered working hours on a working day (which may exceed 8 hours).

[465] We consider the current provisions, as described, to be clear and consistent with the modern awards objective. The proposed variation is not directed to any identifiable problem, uses archaic language and on one view would prevent longer than 8-hour days being worked as part of an alternate method of working the 38-hour week without overtime penalty rates being required to be paid. For these reasons we consider that clause 33.1 if varied as proposed would not meet the modern awards objective.

18. OTHER MATTERS

National Training Wage

[466] Claims concerning the National Training Wage provisions of the Building Award will be the subject of a separate decision.

Payment of wages

[467] We note that a number of claims relating to payment of wages under the Building Award are currently before a separate Payment of Wages Full Bench for determination.

19. NEXT STEPS

[468] Draft determinations will be issued to give effect to the variations to the Construction Awards identified at paragraphs [139], [143], [145]-[146], [153], [156], [184], [202], [294], [365]-[366], [420], [427], [441], [456] and [460] above. Interested parties will be given a period of 14 days to comment on the form of these draft determinations. The variations shall take effect on and from 1 December 2018.

[469] In relation to the matters identified in paragraphs [151]-[152], [244], [246], [372], [412]-[413] and [451] above, interested parties may file any written submissions within 28 days of the date of this decision. Any request for a further hearing in relation to any of these matters may be made in the same time period and will be considered by us.

VICE PRESIDENT

Appearances:

S. Crawford, solicitor, for the AWU
R. Boanza and T. Angelopoulos for the CCF
P. Coffey and G. Noble for the CEPU
S. Crawshaw SC and S. Maxwell for CFMMEU
P. Krajewski for the FPA
M. Adler for the HIA
S. Schmitke and R. Sostarko for MBA
P. Eberhard for the MPG
V. Paul for AiG
L. Hogg for ABI and the NSWBC
M. Nguyen for the AMWU
C. Coate for the NFIA

Hearing details:

2017.
Melbourne:
3 - 5 April, 10 - 12 April

Printed by authority of the Commonwealth Government Printer

<PR700840>