

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/15

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

4 yearly review of modern awards – plain language re-drafting
(AM2016/15)

**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND
ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON MATTERS
ARISING FROM THE STATEMENT [2019] FWCFB 1255**

2nd April 2019

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

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) in accordance with the transitional provisions of Schedule 1, Part 5 – Amendments made by the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018, of the *Fair Work Act 2009* (the FW Act).
2. On the 28th February 2019 the Full Bench issued a Statement ([2019] FWCFB 1255) setting out the current status of matters before the Plain Language Full Bench and the next steps in the plain language project. In the Statement the Full Bench set out provisional views on a number of matters and invited interested parties to comment on those provisional views. Any such comments were required to be filed by 4pm on 22nd March 2019.
3. On 18th March 2019 the CFMMEU (Construction and General Division) (CFMMEU C&G) sought and was granted an extension of time until Tuesday 2nd April 2019 to file its submission. This submission is made in accordance with that extended timeframe.

Response to Provisional View at Paragraph [13]

4. In paragraph [13] of the Statement the Full Bench set out its provisional view that the *Vehicle Manufacturing, Repair, Services and Retail Award*, the *Manufacturing and Associated Industries and Occupations Award* and the *Building and Construction General On-site Award* not be redrafted in plain language at this time. The Full Bench indicated that in 2020 consideration would be given to the further re-drafting of awards in plain language, and that the aforementioned awards would be considered for inclusion in that process.
5. The CFMMEU C&G has a substantial interest in both the *Manufacturing and Associated Industries and Occupations Award* and the *Building and Construction General On-site Award*, and is not opposed to the provisional view set out in paragraph [13].
6. The CFMMEU C&G would however seek clarification as to the status of the *Mobile Crane Hiring Award* (Mobile Crane Award) and the *Joinery and Building Trades Award* (Joinery Award) which are also before the same Full Bench dealing with the *Building and Construction General On-site Award*. As the Mobile Crane Award and Joinery Award are not specifically mentioned in paragraph [13] it is assumed that these awards will be re-drafted in plain language and therefore be part of the current process before this Full Bench. This submission proceeds on that assumption.

Response to Provisional View at Paragraph [27]

7. In paragraph [27] the Full Bench indicated a provisional view to adopt the approach suggested by the Ai Group to include the words “(full-time employees)” below the heading of the column containing minimum weekly rates across all exposure drafts. The CFMMEU does not support this provisional view for the following reasons.
8. Firstly, the rates in the table are minimum classification rates not minimum pay rates. This was made clear by the AIRC Full Bench during the Award Modernisation proceedings who decided that,

“[43] Some parties, particularly in the building, metal and civil construction group of industries, proposed the inclusion in modern awards of rolled-up wage rates i.e. rates comprised of minimum wages and all-purpose allowances, such as industry allowances. In our statement of 23 January 2009¹⁰ we decided against such an approach in relation to the draft Electrical, Electronic and Communications Contracting Award 2010 despite the submissions of the National Electrical and Communications Association (NECA) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). It remains our view that minimum classification rates should be shown separately from all-purpose allowances in modern awards. The combination of minimum classification rates and industry allowances would confuse minimum award payments of two different types, prescribed for different purposes. It is essential that properly fixed minimum classification rates are retained and shown separately in modern awards, in order to maintain consistent properly fixed minimum classification rates. The development and maintenance of properly fixed minimum rates have been important underpinning elements of the Commission’s awards since August 1988.¹¹ A stable system of minimum wage relativities has developed throughout much of the award system over the last twenty years. A departure from those relativities would have the potential to destabilise minimum wage fixation and generate unsustainable claims. Because of that potential we are not prepared, given the limited debate that has occurred so far, to move away from the principle that minimum wages should be kept separate from allowances.”¹

9. Although the AIRC Full Bench was dealing with a slightly different issue, what is clear is that the purpose of the minimum wages tables in modern awards was to set out the minimum

¹ 2009 AIRCFB 345

classification rates and not the minimum weekly award rates of pay. The minimum weekly award rate of pay will obviously differ depending on whether any all purpose allowances are payable, if the employee works part-time, if the employee is a casual, if the employee is a shiftworker, or in the case of some awards if the employee is engaged on a daily hire basis.

10. Secondly, the CFMMEU C&G submits that inserting the words “full-time employee” will, in a number of awards, potentially create confusion rather than reduce it. The preferred alternative approach would be not to include the words proposed by the Ai Group, but instead add a sub clause below the table along the following lines,

“X.2 The rates in clause X.1 prescribe minimum classification rates only. The actual minimum rate of pay will depend on the employees type of employment and whether any loadings, penalty rates or all purpose allowance are payable. See summary of hourly rates of pay in Schedule XX.”

This sub clause would obviously need to be tailored on an award by award basis.

Response to Full Bench Cross-References Proposal at Paragraph [33]

11. The CFMMEU C&G does not oppose the Full Bench proposal, at paragraph [33], that the cross referencing issue in the coverage sub-clauses dealing with on-hire and group training employees be resolved by referring to the relevant industry instead of a clause reference.

Response to Full Bench Annual Leave Loading Proposal at Paragraph [67]

12. The Full Bench decision proposes, at paragraph [67], that the suggestion of the Ai Group in relation to the annual leave loading issue as set out in the paragraph be adopted in all exposure drafts. The CFMMEU C&G opposes this proposal.
13. As noted in paragraph [63] the Full Bench agreed that there is a problem with terminology relating to shiftwork penalties, loadings and rates. The Full Bench went on to say that proposed amendments to terminology will be made on an award by award basis during the light touch process, and that parties will be given the opportunity to make submissions about the proposed changes. In light of this award by award approach to terminology, it would be inappropriate to determine the wording for clauses dealing with annual leave loading (which will ultimately be affected by any decisions made on such terminology) on a totally different basis. This is clearly an issue which requires an award by award approach.

14. The CFMMEU C&G would add that it agrees with the Full Bench comment that the solution proposed by Ai Group “*may make the award more complex and difficult for users to apply*”². The CFMMEU C&G, whilst maintaining its position that the matter be dealt with on an award by award basis, suggests that a simpler approach be considered such as:

X.3 Annual Leave Loading

- (a) Employees who would have worked on day work, Monday to Friday, had they not been on leave, will receive a loading of 17.5% in addition to the payment for the period of annual as specified in clause X.2.
- (b) Employees who would have worked on shiftwork or whose ordinary hours would have included weekend work, had they not been on leave, will receive either:
 - (i) the loading specified in clause X.3.(a); or
 - (ii) where greater, a loading equivalent to:

the relevant shiftwork/weekend penalty rate -100%

Response to Paragraph [84]

15. At paragraph [84] the Full Bench invited parties to make submissions on the following:

- Whether the modern awards that currently contain shutdown provisions should be varied to include the model term at Attachment D;
- Any award specific variations that should be made; and
- Whether unpaid leave taken during a shutdown period counts as service.

16. The CFMMEU C&G does not support the insertion of the model term into awards that currently contain shut down provisions. The existing shutdown provisions contained in the annual leave clauses of modern awards are already tailored to the ways in which the various industries operate, and some e.g. *the Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*, limit the operation of the shutdown provision to the Christmas-New Year period and require greater notice periods from the employer (e.g. 2 months’ notice) of any such close down. These clauses have been in

² [2019] FWCFB 1255 at paragraph [68].

existence for many years, and are well understood by the parties and the employers and employees in the respective industries. The clauses should not be disturbed without any evidence that the clauses are not working and/or substantive reasons as to why the clause should be varied.

17. In regard to the issue of whether unpaid leave taken during a shutdown period counts as service the CFMMEU C&G submits that it should. Although a number of awards are silent on this issue, others clearly address it. The *Mobile Crane Hiring Award 2010* in clause 26.4(a)(iv) states that “*All time during which an employee is stood off without pay for the purposes of this subclause will be deemed to be time of service for the purpose of annual leave accrual*”, and the *Joinery and Building Trades Award 2010* at clause 32.7(d) states “*any leave taken by an employee as a result of a close-down pursuant to clause 32.7 also counts as service by the employee with their employer*”.
18. The CFMMEU C&G submits that all awards that contain an annual leave shutdown clause should include a provision that states that unpaid leave taken during the shutdown counts as service by the employee with their employer. The CFMMEU C&G rely on and support the submissions of the CFMMEU (Mining and Energy Division) on this issue (see paragraphs 7 to 20 of the 22nd March 2019 submission).

Response to Provisional View at Paragraph [95]

19. In paragraph [96] of the Statement the Full Bench invites interested parties to comment on the proposal in paragraph [95] which sets out an approach as to the way in which the tables of hourly rates of pay in the relevant schedule to an award should be categorised. The suggested approach appears to be one where, for awards that contain all purpose allowances, the table will only include ordinary hourly rates if the award contains an all purpose allowance that applies to all employees and that allowance has been incorporated in the rates in the hourly rates table. This would suggest that awards that contain all purpose allowances that do not apply to all employees will only contain minimum hourly rates in the schedule.
20. The CFMMEU C&G is opposed to this approach. Both the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010* contain a number of all purpose allowances e.g. industry allowance, tool allowance and leading hand allowance, and in the case of the *Building and Construction General On-site Award 2010* the follow the job loading for daily hire employees. Notwithstanding that the issue of all-purpose allowances in the *Building and Construction General On-site Award 2010* is still to be finally determined by the Construction Awards Full Bench (particularly in regard to the level

of the industry allowance/s) the other all purpose allowances i.e. tool allowance, leading hand allowance and follow the job loading, will remain.

21. The CFMMEU C&G is concerned that if the tables of hourly rates in the relevant schedule do not include the all purpose allowances then the tables serve no useful purpose. The tables would merely repeat the minimum classification hourly rates already contained in the minimum wages clause of the award, and not reflect the actual ordinary hourly rates required to be paid. Further, the note at the beginning of the schedule that states “*Employers who meet their obligations under this schedule are meeting their obligations under the award*”, is likely to mislead employers (and potentially members of the Commission in exercising the BOOT for agreements) as to the legal requirements under the award and potentially expose employers to costly litigation for underpayment of wages.
22. The CFMMEU C&G submits that it is not a particularly difficult task to include in the tables of hourly rates the ordinary hourly rates inclusive of all purpose allowances that apply for different employees. This has been done by industrial parties in preparing their own wage sheets ever since awards were first made. Whilst it is recognised that this would amount to a substantive change in approach by the Full Bench, it is submitted that the interests of employees and employers covered by the relevant awards would justify this change.
23. The CFMMEU C&G therefore submits that the best approach to the hourly rates of pay schedules would be to deal with them on an award by award basis. This would allow flexibility for individual awards to include the different all-purpose allowances applicable under the award where appropriate.