

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)

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

17th April 2019

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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. Reply submissions were required to be filed by 4pm on 19th April 2019.
3. The following parties made submissions on the provisional issues affecting awards in which the CFMMEU (Construction and General Division) (CFMMEU C&G) has an interest:
 - Australian Business Industrial and the NSW business Chamber Ltd (ABI)¹
 - Australian Industry Group (AIG)²
 - AMWU³
 - AWU⁴
 - CFMMEU – Manufacturing Division (CFMMEU MD)⁵
 - Housing Industry Association (HIA)⁶
 - Master Builders Australia (MBA)⁷
4. As the submissions filed by the union parties were generally supportive of the submission filed by the CFMMEU C&G on 2nd April 2019⁸ no reply to them is necessary. This reply submission therefore only addresses the issues raised by the employer parties in their submissions.

Response to Provisional View at Paragraph [13]

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-abinswbc-010419.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-aig-220319.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201815-17-sub-draftsch-amwu-270319.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-awu-250319.pdf>

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-cfmmeu-md-080419.pdf>

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-hia-220319.pdf>

⁷ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-sub-mba-250319.pdf>

⁸ <https://www.fwc.gov.au/sites/awardsmodernfouryr/am201615-sub-cfmmeu-020419.pdf>

5. 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.
6. The response of the employer parties on this issue was consistent with that of the CFMMEU C&G in not opposing the provisional view, therefore no further submission is necessary.

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 AIG to include the words “(full-time employees)” below the heading of the column containing minimum weekly rates across all exposure drafts.
8. The MBA and AIG submissions did not address this issue. The HIA⁹, like the CFMMEU C&G, opposes the provisional view in regard to the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*. The ABI, although not generally opposing the provisional view, did express a view that it may be appropriate for this issue to be considered by the Commission during the amendment of each individual award to see whether any confusion may arise.¹⁰
9. The CFMMEU C&G maintains its opposition to the provisional view for the reasons outlined in the 2nd April 2019 submission (see paragraphs 7 to 10).

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

10. The employer responses on the cross- referencing proposal, at paragraph [33] of the Statement, are a mixed bag. The MBA submission is silent on the issue; the ABI¹¹ do not oppose the Full Bench proposal; the HIA support the proposal for the *Building and Construction General On-site Award 2010*¹² but not for the *Joinery and Building Trades*

⁹ HIA, op cit., at paragraphs 3.1.2 to 3.1.7

¹⁰ ABI, op cit., at paragraph 3.5

¹¹ Ibid, at paragraph 4.1

¹² HIA, op cit., at paragraph 3.2.6

*Award 2010*¹³; and the AIG appear to support the proposal but with the opportunity for any award specific considerations¹⁴.

11. As stated in its earlier submission the CFMMEU C&G supports the cross-referencing proposal, but after considering the employer submissions recognises that award specific variations may be necessary to cater for occupational coverage of some awards (e.g. the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Joinery and Building Trades Award 2010*).

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 AIG in relation to the annual leave loading issue as set out in that paragraph be adopted in all exposure drafts.
13. None of the employer parties support the wording proposed in paragraph [67]. The ABI¹⁵ and AIG¹⁶ have proposed their own different variations as to what wording they prefer to be used, and the HIA say that the formulations of the provisions in the *Building and Construction General On-site Award 2010* and *Joinery and Building Trades Award 2010* are not problematic and should not be changed.¹⁷
14. The CFMMEU C&G does not support either of the proposals put forward by the ABI and AIG and repeats its earlier submission that in light of the 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.

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

¹³ Ibid, at paragraph 3.2.9

¹⁴ AIG, op cit., at paragraphs 7 to 9

¹⁵ ABI, op cit., at paragraph 5.3

¹⁶ AIG, op cit., at paragraph 20

¹⁷ HIA, op cit., at paragraphs 4.1.7 and 4.1.8

- Whether unpaid leave taken during a shutdown period counts as service.
16. There is a consensus of opinion amongst the employer parties that the model shutdown provision should not be included in those awards that already contain a shutdown provision. This is consistent with the view put forward by the CFMMEU C&G.
 17. In regard to the issue of whether unpaid leave taken during a shutdown period counts as service the AIG¹⁸ and HIA¹⁹ say that absent an award provision dealing with the issue, s.22 of the FW Act governs the issue. The ABI²⁰ appear to refer only to s.22 of the FW Act.
 18. As noted in the CFMMEU C&G 2nd April 2019 submission, both the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010* include provisions recognising unpaid leave taken during a shutdown period as service.²¹ Other awards that contain similar provisions have been identified by the AMWU, AWU, CEPU and CFMMEU MD.
 19. The CFMMEU C&G reaffirms its earlier submission 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 and continues to rely on and support the submissions of the CFMMEU (Mining and Energy Division) on this issue.
 20. **Response to Provisional View at Paragraph [95]**
 21. The HIA²² and MBA²³ both submit that the issue of the inclusion of hourly rates tables for the *Building and Construction General On-site Award 2010* will be affected by any final decision made by the Construction Awards Full Bench in AM2016/23, and seek to reserve the right to comment until after any such decision is made. The HIA however, also expresses a view supporting the provisional view outlined at paragraph [95] in regard to the *Joinery and Building Trades Award 2010*.²⁴
 22. The CFMMEU C&G recognises that any further decision of the Construction Awards Full Bench will likely have an impact on the hourly rates to be included in the *Building and Construction General On-site Award 2010* (and possibly the *Joinery and Building Trades*

¹⁸ AIG, op cit., at paragraphs 63 to 68

¹⁹ HIA, op cit., at paragraphs 4.2.5 to 4.2.8

²⁰ ABI, op cit., at paragraphs 8.1 to 8.5

²¹ CFMMEU C&G, op cit., at paragraph 17

²² HIA, op cit., at paragraphs 4.3.2 to 4.3.3

²³ MBA, op cit.

²⁴ HIA, op cit., at paragraph 4.3.5

Award 2010), but this does not affect the CFMMEU C&G's continued opposition to the proposal at paragraph [95] for the reasons set out in its earlier submission.²⁵

²⁵ CFMMEU C&G, *op cit.*, at paragraphs 20 to 23