



28 November 2018

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4 YEARLY REVIEW OF MODERN AWARDS - CONSTRUCTION AWARD AM2016/23

This submission in reply is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). We confirm that we act on behalf of ABI and NSWBC in respect of the above matter.

On 8 November 2018, the Commission issued Directions for the filing of written submissions in the relation to the 4 yearly review of modern awards - Construction Awards [2018] FWCFB 6019 (**Decision**). Item [2] of the Directions require the parties to file submissions in reply by no later than 5.00pm on Wednesday 28 November 2018.

This submission in reply is filed in accordance with item [2] of the Direction.

1. SOIL TESTING

- 1.1 ABI and NSWBC oppose the Australian Manufacturing Workers' Union's (**AMWU**) proposed variation to Schedule B of the *Building and Construction General Onsite Award 2010 (Building Award)*, as found in Attachment A of its draft determination filed on 14 November 2018.
- 1.2 The AMWU's proposal and draft variation is identical to the AMWU's amended submission in reply filed on 24 March 2017, namely it seeks to amend the award classification for CW/ECW2 in Schedule B of the Building Award to include a definition of 'General Technician'. The purpose of this proposed amendment is to extend coverage of the Building Award to employees performing testing work.
- 1.3 AMWU submits that employees undertaking testing work (i.e. testing of soil, concrete and aggregate) are part of the 'Technical Field' of work, as defined in the Building Award at B1.13. Accordingly, the work of laboratory, scientific and engineering testing work has always been understood to be included in the 'technical field' of work.
- 1.4 ABI and NSWBC oppose the AMWU's proposed variation because:

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- (a) there is no evidence to suggest that work of testers of soil, concrete and aggregate are (or were ever intended to be) part of the 'Technical Field' definition in the Building Award;
- (b) there are already multiple classifications in the Building Award for employees working with concrete specifically CW/ECW1 - CW/ECW4, with such classifications relevant to employees undertaking work in the on-site building, engineering and civil construction industry;
- (c) there is no evidence to support the view that laboratory, scientific and engineering work has always been understood to be included in the 'technical field' of work; and
- (d) if the Building Award is varied in accordance with its proposal, it would be inconsistent with the modern award objectives.

1.5 In particular, the AMWU:

- (a) has alluded to the Full Bench decision in *The Australian Workers' Union v. Coffey Information Pty Limited* [2013] FWCFB 2894 (**Coffey**) but have not presented any reasons as to why the Commission should depart from that decision;
 - (b) has failed to address the issue that the Building Award is limited to work that is undertaken on-site and while businesses performing specialised testing work such as Coffey may perform work on construction sites, the employers (businesses) are not in the on-site building, engineering and construction industry¹ and therefore cannot fall within the coverage of the Building Award; and
 - (c) has failed to address the increased confusion about coverage issues due to the unnecessary overlap of modern awards (namely the Building Award and the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*);
 - (d) has failed to address the increased complexity to understand award coverage contrary to section 134(1)(g) of the *Fair Work Act 2009 (FW Act)*; and
 - (e) advances a position that supports an increased regulatory burden for businesses which is inconsistent with section 134(1)(f) of the FW Act.
- 1.6 ABI and NSWBC also oppose the Australian Workers Union's (**AWU**) position to amend the award classification for a CW/ECW2 in Schedule B to include reference to testing work.
- 1.7 AWU claims that the lack of testing work classification in the Building Award is due to a 'simple inadvertent omission by the Australian Industrial Relations Commission (**AIRC**) as part of the monumental award modernisation process'.
- 1.8 Additionally, the AWU continue to rely on its previously filed evidence and submissions to demonstrate that the CW/ECW 2 is the appropriate classification for testing work performed

¹ [2013] FWCFB 2894 at [86].

on a construction site despite the Full Bench's decision in Coffey that the most appropriate classification for employees undertaking such work is in the Manufacturing Award.

1.9 ABI and NSWBC oppose the AWU's position because:

- (a) the Full Bench has already determined in the Decision that the submissions and evidence previously filed by AWU did not demonstrate that the existing award coverage does not meet the modern awards objective and that it is necessary to alter the coverage in order to achieve the modern award objectives; and
- (b) if the Building Award is varied in accordance with AWU's proposal, it would be inconsistent with the modern award objectives.

1.10 In particular, the AWU:

- (a) has not presented any cogent reasons as to why the Commission should depart from the decision of the Full Bench in Coffey.;
- (b) has failed to address the issue or provide sufficient evidence that the Building Award is limited to work that is undertaken on-site and while businesses performing specialised testing work, such as Coffey, may perform work on construction sites, the employers (businesses) are not in the on-site building, engineering and construction industry² and therefore cannot fall within the coverage of the Building Award;
- (c) has provided insufficient evidence to conclude that the current classification structure in the Building Award is due to a mistake during the award modernisation process;
- (d) has failed to address the increased confusion about coverage issues due to the unnecessary overlap of modern awards (namely the Building Award and the Manufacturing Award);
- (e) failed to address the increased complexity to understand award coverage contrary to section 134(1)(g) of the *Fair Work Act 2009 (FW Act)*; and
- (f) advances a position that supports an increased regulatory burden for businesses which is inconsistent with section 134(1)(f) of the FW Act.

1.11 In this regard, ABI and NSWBC repeat and rely upon their written submissions dated 14 November 2018 and 20 March 2017.

1.12 ABI and NSWBC support the submissions made by the Master Builders Australia (**MBA**) and Australian Industry Group (**AIG**) in respect of this issue.

1.13 Accordingly, ABI and NSWBC submit that it would not be appropriate to vary the classification of the Building Award and that clause 4.10(b)(v) of the Building Award should be removed instead. In this regard, ABI and NSWBC repeat and rely upon its submissions filed on 14 November 2018.

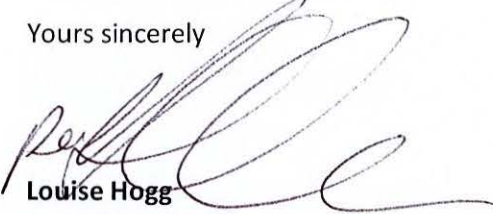
² [2013] FWCFB 2894 at [86].

2. INDUSTRY ALLOWANCE QUANTUM

- 2.1 ABI and NSWBC do not oppose the adoption of an enhanced industry allowance and the quantum proposed by the Full Bench, and in this regard support the submissions made by the MBA, AIG and Housing Industry Association (**HIA**).
- 2.2 Accordingly, ABI and NSWBC oppose the quantum proposed by the AWU, AMWU, Construction Forestry Maritime Mining Energy Union and the Communications Electrical and Plumbing Union of Australia.

If you have any questions, please contact Louise Hogg on (07) 3218 0905.

Yours sincerely



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