



DECISION

Fair Work Act 2009

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

Construction, Forestry, Mining and Energy Union
(AM2011/40)

JOINERY AND BUILDING TRADES AWARD 2010
(ODN AM2008/15) [MA000029]

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT ACTON

MELBOURNE, 24 OCTOBER 2011

Application to vary a modern award.

Introduction

[1] The Construction, Forestry, Mining and Energy Union (CFMEU) has made an application to vary the *Joinery and Building Trades Award 2010*¹ (JBT Award).

[2] They seek to vary the coverage clause of the JBT Award and to insert certain classifications into the classification structure and definitions in Schedule B to the JBT Award.

[3] The variations to the coverage clause would add the following underlined words to the coverage clause of the JBT Award:

“4. Coverage

4.1 This award 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. However, this award does not cover:

- (a) an employer who is outside the scope of clause 4.8(a) unless such employer employs an employee covered by clause 4.8(b) and the employer is not covered by another modern award containing a

classification which is more appropriate to the work performed by the employee...

4.8 Joinery and building trades industries and occupations means:

- (a) the following industries:
 - (i) joinery work.
 - (ii) shopfitting.
 - (iii) prefabricated building.
 - (iv) stonemasonry.
 - (v) glass and glazing contracting.
 - (vi) glass and glazing work.
 - (vii) blastcoating.
 - (viii) industrial spraypainting and sandblasting.
 - (ix) manufacture of fibrous plaster or of architectural ornaments of fibrous plaster, plaster or cement; the manufacture of fibrous plasterglass goods, and architectural modelling.
- (b) the following occupations:
 - (i) carver.
 - (ii) letter cutter.
 - (iii) carpenter.
 - (iv) joiner.
 - (v) signwriter.
 - (vi) painter (which includes blastcoater, spraypainter, sandblaster and shotblaster).
 - (vii) stonemason.
 - (viii) plasterer (including solid and fibrous plasterer, caster and modeller).
 - (ix) terrazzo worker.”

[4] The variations sought to Schedule B–Classification Structure and Definitions of the JBT Award are to insert:

- a new clause B.1.2(d)(ii) as follows:
 - (ii) cornice machine attendant,
- a new clause B.1.3(d)(vi) as follows:
 - (vi) mechanical cornice attendance and operator,
- a new clause B.1.4(d)(vii) as follows:
 - (vii) caster,
- a new clause B.1.5(d)(x) to (xvi) as follows:
 - (x) blastcoater
 - (xi) fibrous plasterer
 - (xii) sandblaster
 - (xiii) shophand
 - (xiv) shotblaster
 - (xv) spraypainter
 - (xvi) terrazzo worker, and
- a new clause B.1.6(d)(viii) as follows:
 - (viii) modeller.

[5] The application to vary was made pursuant to ss.134, 157 and 160 of the *Fair Work Act 2009* (Cth) (FW Act). The application has arisen from proceedings before Fair Work Australia (FWA) concerning the termination of modernisable instruments. Those proceedings caused the CFMEU to conclude that the coverage of some areas of work by modern awards was uncertain. The modernisable instruments concerned were the:

- *Blastcoaters Offsite Award - State 2002*²
- *Industrial Spraypainting and Sandblasting Award 1991*³
- *Plaster Plasterglass and Cement Workers Award No. A29 of 1989*⁴
- *Plasterers Shop Hands and Casters (State) Consolidated Award*⁵
- *Fibrous Plasterers (Factory) Award*⁶
- *Plasterers & Terrazzo Workers (Factory & Mixed Enterprise) Award*⁷
- *Building Trades Award*.⁸

[6] The CFMEU submits the industries of “blastcoating” and “industrial spraypainting and sandblasting” are related to the “painting trade” and the industry of the “manufacture of fibrous plaster or of architectural ornaments of fibrous plaster, plaster or cement; the

manufacture of fibrous plasterglass goods, and architectural modelling” are related to the “plastering trade”.

[7] The CFMEU submits the occupational variations sought are needed to clarify the occupational coverage of painters and plasterers and to include the occupation of terrazzo worker.

[8] The application is opposed by the Australian Industry Group (AIG), Master Builders Australia Limited (MBA), Australian Federation of Employers and Industries (AFEI), Australian Business Industrial (ABI) and “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU).

[9] The employer groups maintain the JBT Award is not relevantly ambiguous or uncertain and the proposed variations are not necessary to achieve the modern awards’ objective. They submit the variations would disturb award coverage, by creating some dual award coverage with the potential to substantially increase costs, for a large number of employers whose operations are currently covered by the *Manufacturing and Associated Industries and Occupations Award 2010*⁹ (Manufacturing Award) and the *Concrete Products Award 2010*.¹⁰ Further, they submit that FWA has insufficient material before it to be satisfied the CFMEU has allocated the occupational variations they seek to the appropriate levels in Schedule B of the JBT Award.

[10] The AMWU submitted that the variations “rather than removing any uncertainty that may or may not exist or providing simplicity and unnecessary overlap” might have the reverse unintended consequence.

Consideration

[11] It is relevant that the coverage clause of the JBT Award provides, in essence, that it covers:

- an employer of employees in certain industries who are covered by the classifications in the JBT Award, and those employees, and
- an employer of employees in certain occupations who are covered by the classifications in the JBT Award, and those employees, provided the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee.

[12] Each of the occupations currently listed in clause 4.8(b) of the JBT Award is specifically referred to in one of the classifications in Schedule B of the JBT Award. For example, a carver is classified at Level 7, a letter cutter at Level 6 and a painter, a stonemason and a plasterer at Level 5.

[13] I am not persuaded I should vary clause 4.8(a) of the JBT Award as sought by the CFMEU. The effect of those variations would be to have the JBT Award cover industries which are, at least in part, already covered by other modern awards. For example, some “painting” and “plastering” are covered by the Manufacturing Award. The variations,

therefore, are likely to create, rather than remove, ambiguity or uncertainty and are not necessary to correct an error.

[14] Further, the CFMEU's aim of having the JBT Award cover those employees not covered by another modern award can be achieved by having clause 4.8(b) of the JBT Award cover the occupations in which they are employed. That would involve listing the occupations separately in clause 4.8(b), so that the clause covered more than the eight occupations already listed, and varying its Schedule B-Classification Structure and Definitions to incorporate each of the new occupations at the appropriate level.

[15] The CFMEU, however, suggests that some of the occupations it seeks to add to clause 4.8(b) are part of occupations already listed in clause 4.8(b). To the extent that they are, there is no need to vary the JBT award to include those occupations because they are already part of the occupations in clause 4.8(b) and varying the JBT Award to do so is likely to cause ambiguity or uncertainty and is not necessary to correct an error.

[16] In respect of the other occupations that the CFMEU seeks to add to clause 4.8(b), the CFMEU has not yet made out a sufficient case for me to be satisfied the JBT Award, rather than another modern award, is the appropriate modern award for those other occupations or that the classification level in the JBT Award that they propose for each of those other occupations is appropriate. For these reasons, at this stage, I am not satisfied I should exercise my discretion to vary the JBT award.

[17] Accordingly, I dismiss the CFMEU's application in this matter. Nonetheless, given the bases on which I have dismissed the application, the CFMEU, through an employee covered by the JBT Award, may be able to make another application to include the relevant occupations in clause 4.8(b) and at appropriate levels in Schedule B of the JBT Award. Such an application would need to address the matters to which I have referred in the preceding paragraph.

The seal of the Fair Work Australia Commission is circular, featuring the coat of arms of Australia in the center. The text "SEAL OF FAIR WORK AUSTRALIA" is written around the perimeter of the seal. Below the seal, the text "SENIOR DEPUTY PRESIDENT" is printed.

SENIOR DEPUTY PRESIDENT

Appearances:

S. Maxwell, for the Construction, Forestry, Mining and Energy Union.

G. Noble, for the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU).

R. Calver, for Master Builders Australia.

C. Blades, for the Australian Federation of Employers and Industries.

G. Star, for Australian Business Industrial.

S. Smith, for the Australian Industry Group.

Hearing details:

2011.

Melbourne:

October, 12.

Final written submissions:

Construction, Forestry, Mining and Energy Union: 14 and 19 October 2011.

Master Builders Australia Ltd: 18 October 2011.

Australian Industry Group: 19 October 2011.

Endnotes:

¹ MA000029.

² AN140029.

³ AN160180.

⁴ AN160248.

⁵ AN120420.

⁶ AN150052.

⁷ AN150109.

⁸ AN170011.

⁹ MA000010.

¹⁰ MA000056.

Printed by authority of the Commonwealth Government Printer

<Price code C, MA000029 PR515982>