

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/23 & AM2014/260 Building and Construction General on-site Award 2010

Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following submissions in support of variations to the Foreperson and Supervisors' provisions of the *Building and Construction General on-site Award 2010 (Building Industry Award)*.
2. The variations to the *Building and Construction General On-site Award 2010* which are proposed by the AMWU will correct changes which were made erroneously during the Part 10A Award Modernisation proceedings.
3. These submissions will outline:
 - a. The variation that is being proposed by the AMWU;
 - b. The history of changes made to the Foreperson and Supervisor clauses during Award Modernisation;
4. The history will show that the current clauses had been incorrectly adapted during the Part 10A Award Modernisation process and should be varied.
5. The variation is self evident and necessary to correct an error created during the Award Modernisation process which also results in ambiguity from conflicting clauses.
6. The intention of the AMWU is not to establish any new entitlements of conditions. The purpose of the AMWU's proposed variations is to ensure that the entitlements and conditions which were supposed to be translated into the Modern Award are done so correctly.

What variations are proposed?

7. The AMWU proposed variation is for:
 - a. ***Changes to the restrictions on penalties and other allowances*** at clause 43.2(b) so that they align with the original restriction in the National Metal and Engineering on-site Construction Award 2002 (MECA 2002) and in the National Metal and Engineering On-site Construction Industry Award 1989 (MECA 1989), which is to restrict them for the purposes of calculating the minimum wage and not to restrict access to the entitlements altogether.
 - b. ***A note*** to clarify the interaction with clause 43.5 and to confirm the application of the entitlements.
8. The draft determination is attached to this submission at [Attachment A](#).
9. The clause being inserted specifies clearly how the calculations are to be determined but also includes a clear explanation that the entitlements may still be applicable to the Forepersons or Supervisors.

What is the relevant history of these clauses?

Summary

10. In summary, the history of the relevant clauses demonstrate that it was always intended that the conditions of employment such as overtime and shift allowances etc, should be applicable to Forepersons and Supervisors. The particular dramatic change in the language between the pre-reform Award and the Modern Award without any explanation or statement was a mistake that at worst potentially changes the legal effect of the clause and at best creates ambiguity between the two clauses.

The current clauses

11. The relevant clauses which need to be historically analysed are the current clauses 43.2(b) and 43.5 of the *Building and Construction General On-site Award 2010*. The current clauses read as follows:

“43.2

...

(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.

...

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.”

12. The important aspect to note in 43.2(b) is that employees who are paid according to the Forepersons and Supervisors wage rates “will not receive” a range of entitlements.
13. This appears to contradict clause 43.5, which stipulates that conditions of employment that apply to employees covered by this part, being the Forepersons and Supervisors will not be less favourable than those prescribed under this award.

Metal Industry Award 1984

14. The first award covering metal and engineering Foremen and Supervisors in the Building and Construction On-site industry was the Metal Industry Award. Foremen and Supervisors were included in Part V of the Metal Industry Award 1984.¹

National Metal and Engineering On-site Construction Industry Award 1989 (AW790722)

15. The *National Metal and Engineering On-site Construction Industry Award 1989* (MECA 1989) was made to replace the Metal Industry Award 1984's operation in On-site construction work.
16. Part III of the MECA contained Award terms specifically for Foremen and Supervisors. The contents of Part III are attached to this Submission at **Attachment B**.
17. Part A of Part III of the MECA sets out the minimum wage rates, which are now translated into the table at 43.2(a) in the Modern Award.
18. The relevant term of the MECA 1989 whose eventual translation into the Modern Award has varied its intended meaning is the following Part B sub-clause of clause 6:

"6 – Wages

...

Part B – General

(a) *The calculation of wage rates in accordance with Part A hereof shall exclude over-time 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 8, 9 or 10 of Part I.*"
19. Clauses 8, 9 and 10 of Part I which are referenced are clauses about Fares and travelling allowances, Living away from home allowances and Special rates respectively.
20. It is apparent that the intention for excluding the particular entitlements, was only for the purposes of "*The calculation of wage rates in accordance with Part A hereof*" and not to exclude them from applying to the employees generally.
21. Also of relevance is clause 8 which expressly stipulates the following:

"8 – Conditions of Employment

¹ Metal Industry Award 1984 – Part V – Foremen and Supervisors Print F5010

(a) The conditions of employment to apply to employees covered by this part shall not be less favourable than those prescribed under Parts I and II.

(b) Provided that where it has been the custom to do so and the employer and the employee agree, time off with pay may be taken in lieu of payment for overtime work, shift work, or work on Sundays or holidays.”²

22. It would seem apparent that the conditions of employment in Part I would be applicable to Foremen and Supervisors in Part III, since Part III contained very few provisions and did not even include such basic provisions as Annual Leave, Redundancy and Hours of Work which are found in Part I. It also did not contain any of the provisions which are named in part B of clause 6 such as over-time, shift penalties, allowances etc.
23. The specific exception in relation to TOIL also makes it clear that Overtime is intended to be applicable, unless the circumstances described exist.
24. Part II applied to the Lift Industry. It may have been necessary to specify Part II applied to Foremen and Supervisors, because the application clause of Part II indicated it applied to tradesmen and their assistants working in the Lift Industry. This may have been ambiguous in relation Foremen and Supervisors.
25. These clause were also present in a revised form in the Award which subsequently replaced the MECA 1989.

National Metal and Engineering On-site Construction Industry Award 2002 (AP816828CRV)

26. The *National Metal and Engineering On-Site Construction Industry Award 2002* (MECA 2002) replaced the MECA 1989 Award.
27. The structure of the MECA 2002 was fundamentally different to the MECA 1989. Instead of Parts to the Award, the MECA 2002 included an Appendix B, which applied to Foremen and Supervisors. It again seems apparent that the Award terms of the MECA 2002 applied to Foremen and Supervisors, including such entitlements as Hours of Work, Annual Leave, Overtime, Shift penalties etc.
28. Clause 6 Part B – General (a) of the MECA 1989 is now clause 4.2.1 of clause 4.2 Part B – general in Appendix B of MECA 2002 and is expressed in substantially the same form and with the same clear intention:

“4.2 Part B - general

4.2.1 The calculation of wage rates in accordance with 4.1 shall exclude 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 20 – Fares and travelling allowances, 21 –Living away from home – distant construction sites or 22 – Special rates.”

² Clause 8 of Part III of MECA 1989 AW790722

29. Clause 4.2.1 continues to only restrict the particular entitlements from being included in the “calculation of wage rates.” The calculation of the wage rates being for the purposes of the minimum rate, from which other entitlements are calculated.
30. Clause 8 of MECA 1989 is now clause 7 of Appendix B in MECA 2002 and is expressed in substantially the same form with the same clear intention and with only one exception in relation to TOIL:

“7. CONDITIONS OF EMPLOYMENT

7.1 The conditions of employment to apply to employees covered by this part shall not be less favourable than those prescribed under this award.

7.2 Provided that where it has been the custom to do so and the employer and employee agree, time off with pay may be taken in lieu of payment for overtime work, shift work, or work on Sundays or holidays.”

31. The clause continues to stipulate that the conditions of employment for Foremen and Supervisors should not be less favourable than those of employees to whom the Award applies generally. It also continues to contain the specific exception in relation to TOIL.

Part 10A Award Modernisation proceedings

32. During Award Modernisation an Exposure Draft³ of the Building and Construction General On-site Award 2010 (Exposure Draft) was released by the Full Bench for consultation after interested parties had lodged material. The Exposure Draft for dated January 2009 contained coverage of Metal and Engineering. However, it didn't contain the specific wages for Metal and Engineering Forepersons or General Forepersons.
33. The Exposure Draft did include definitions for Forepersons and General Forepersons as well as an allowance for Foreperson and Subforeperson, and there is the reference to Forepersons in the definition for the classification CW/ECW8.
34. Following the release of the Exposure Draft, the various parties then made submissions about the contents of the Exposure Draft. Because there were no wages or entitlements specific to the MECA Forepersons or General Forepersons for parties to comment on, the subsequent submissions about the Exposure Draft focus on whether or not Forepersons should be included.
35. The two AiGroup submissions⁴ about the Exposure Draft oppose the inclusion of Forepersons in the award system, generally, as a principle.

³ http://www.airc.gov.au/awardmod/databases/building/Exposure/building_construction_exposure.pdf

⁴ AiGroup Submission Stage 2

http://www.airc.gov.au/awardmod/databases/building/Submissions/AiG_allstage2_submission_ED.pdf AiGroup Submission Supplementary Specifically about Building Award

http://www.airc.gov.au/awardmod/databases/building/Submissions/AIG_build_con_ed.pdf

36. The AMWU submissions⁵ sought for the original Appendix B from the MECA 2002 to be inserted into the Modern Award.
37. Following the consideration of the submissions from the parties about the Exposure Draft the Australian Industrial Relations Commission made the Modern Award.
38. The *Building and Construction General On-site Award 2010*⁶ made by the AIRC appeared to insert the provisions from the Appendix B of the old MECA 2002. However, there were changes made to the form of the clauses. These clauses were not put out for exposure or for parties to comment upon. Further, the changes made were not explained or accompanied with any reasons from the Commission. However, there was a Full Bench decision which accompanied the Modern Award which was made.
39. The Award Modernisation Full Bench decision⁷ accompanying the Award included the following explanation:

"[69] The final award incorporates some alterations in the definitions clause, including minor changes to adult apprentice and air-conditioning work definitions. We have also added a definition of continuous service, reflecting the award definition in the National Building and Construction Industry Award 2000 (Building and Construction Award),²⁰ to apply in respect of redundancy arrangements and the living away from home-distant work provision. We have removed foreperson/supervisor and general foreperson/supervisor from the definitions clause, placing that definition with special conditions for foremen and supervisors in the metal and engineering construction sector within Part 7 – Industry Specific Provisions. These special provisions reflect Appendix B of the National Metal and Engineering On-site Construction Industry Award 2002 (Metal and Engineering On-site Award)."²¹" (emphasis added)
40. It is apparent that the intention was to translate Appendix B of the MECA 2002 award into the Modern Award.
41. However, the clause about the exclusion of particular entitlements from the calculation of the minimum wages that was supposed to reflect the clause in the MECA 2002 did not look like the clause from the MECA 2002 and has a potentially different meaning and intention.
42. Looking at the clauses side by side, it is apparent that there is a different meaning that can be attributed to the clauses.
43. The fact that the person redrafting the clause concluded that this did not result in changing the legal effect, warrants a note being inserted to clarify the operation of the clause.

⁵AMWU Submissions about Building Award

http://www.airc.gov.au/awardmod/databases/building/Submissions/AMWU_building_ED.doc

⁶ First Building and Construction General On-site Award 2010 made by the AIRC

<http://www.airc.gov.au/awardmod/databases/building/Modern/building.pdf>

⁷ Award Modernisation Stage 2 [2009] AIRCFB 345

<http://www.airc.gov.au/awardmod/databases/building/Decisions/2009aircfb345.htm>

<i>MECA 2002 Clause</i>	<i>Modern Award Clause</i>
<p><i>4.2.1 The calculation of wage rates in accordance with 4.1 shall exclude 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 20 – Fares and travelling allowances, 21 –Living away from home – distant construction sites or 22 – Special rates</i></p>	<p><i>(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.</i></p>

Conclusion

44. The AMWU submits that the error is self-evident and the Commission should change the words in clause 43.2(b) and to add a note to confirm that the conditions are applicable to employees and to clarify the effect of the clause. The changes proposed by the AMWU are detailed in the Draft Determination at Attachment A.

End

9 December 2016

Attachment A - Proposed Draft Determination

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3 Division 4 – 4 Yearly Review of Modern Awards
s.156(2)(b)(i)

Building and Construction General on-site Award 2010 (MA000010)

Building and Construction industry

AM2016/23 & AM2014/260

VICE PRESIDENT HATCHER

SYDNEY, X XXX 2017

Review of modern awards to be conducted.

- [1] Further to the decision and reasons for decision <<decision reference>> in AM2016/260 and AM2016/23, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, the Building and Construction General on-site Award 2010 is to be varied as follows.

Clause 43.2

- [2] Delete current clause 43.2 (b) and replace with the following (b) and (c):

43.2

- (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.

VICE PRESIDENT

NATIONAL METAL AND ENGINEERING ON-SITE CONSTRUCTION
INDUSTRY AWARD 1989 [AW790722]

PART III - FOREMEN AND SUPERVISORS

1 - TITLE

This Part shall be known as - Part III - Foremen and supervisors.

2 - DELETED

3 - APPLICATION

(a) Subject to any exceptions and exemptions specified herein, this Part shall only apply to foremen and supervisors of employees engaged on work as prescribed by clause 2 of Part I.

(b) Deleted.

(c) Provided that this Part shall not apply to any sole trader, partnership, firm, company or corporation where, as at the date of this award the total number of employees, irrespective of the location employed by that sole trader, partnership, firm, company or corporation, is less than 30.

4 - DEFINITIONS

(a) "Foremen/supervisor" shall mean an employee (other than a leading hand) appointed as such or required by his employer to be mainly engaged in the direct supervision of employees including those employed as leading hands, covered by Parts I and II.

(b) "General foreman/supervisor" shall mean an employee appointed as such or required by his employer to be mainly engaged in the direct supervision and co-ordination of the work of at least two foremen/supervisors (as defined) but shall not include employees to whom the Metal Industry Awards Parts II [Print F5144 [M0041]], III [Print C1744 [M0042]; (1974) 163 CAR 388], or IV [Print D1642 [M0043]; (1976) 183 CAR 98] applies or site managers, nor departmental heads and the like.

5 - PAYMENT OF WAGES

Wages may be paid in cash, by cheque, or into a bank account which is nominated by the employee.

NATIONAL METAL AND ENGINEERING ON-SITE CONSTRUCTION
INDUSTRY AWARD 1989 [AW790722]

Pt III - contd

6 - WAGES

PART - A

The weekly wage rate for a foreman/supervisor (as defined) and a general foreman/supervisor (as defined) shall be as follows:

[Pt III:6:Pt A(a) varied by V001 V004; corrected by V004a; varied by V009 V016 V025 V029 V036 V041 V042; V043-V043a ppc 21Jun00]

(a) Where three or more tradesmen,, excluding leading hands, are supervised by a foreman/supervisor.

The weekly wage rates shall be calculated as follows:

(i) Foreman/supervisor

By adding \$87.20 to the average of the weekly wage rates for 38 ordinary hours of work, including payments applicable from time to time to the tradesmen (excluding leading hands) supervised by a foreman/supervisor.

Provided that where the weekly wage rate determined by this calculation is less than \$539.70 the minimum wage rate to be paid shall be \$539.70 per week.

(ii) General foreman/supervisor

By adding \$66.90 to the highest weekly wage rate paid for 38 ordinary hours work to a foreman/supervisor supervised.

Provided that the minimum wage rate to be paid shall be \$600.40 per week.

[Pt III:6:Pt A(b) corrected by A-a; varied by V001; corrected by V001a; varied by V004; corrected by V004a; varied by V009 V016 V025 V029 V036 V041 V042; V043 ppc 21Jun00]

(b) Where other than three or more tradesmen are supervised by a foreman/supervisor.

The weekly wage rates shall be calculated as follows:

NATIONAL METAL AND ENGINEERING ON-SITE CONSTRUCTION
INDUSTRY AWARD 1989 [AW790722]

Pt III:6:Pt A - contd

(i) Foreman/supervisor

By adding \$88.90 to the average of the weekly wage rates for 38 ordinary hours work, including payments, applicable from time to time to the adult employees (excluding leading hands) supervised by a foreman/supervisor.

Provided that where the weekly wage rate determined by this calculation is less than \$521.00 per week or where juniors and/or apprentices only are supervised, the minimum wage rate to be paid shall be \$521.00 per week.

(ii) General foreman/supervisor

By adding \$66.90 to the highest weekly wage rate paid for 38 ordinary hours work to a foreman/supervisor supervised. Provided that the minimum wage to be paid shall be \$581.70 per week.

[Pt III:6:Pt A(c) inserted by V016; substituted by V025 V029 V036 V041 V042; V043 ppc 21Jun00]

(c) The amounts set out in Part A above have been adjusted to give effect to \$15.00 per week arbitrated safety net adjustment.

PART B - GENERAL

(a) The calculation of wage rates in accordance with Part A hereof shall exclude over-time 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 8, 9 or 10 of Part I.

(b) Where the employee is employed other than on a weekly basis, the following shall apply:

- (i) Where employed on a fortnightly basis - the wage rates to be paid shall be the weekly rate calculated in accordance with Parts A of this clause multiplied by two.
- (ii) Where employed on a bi-monthly basis (twice monthly) - the wage rate to be paid shall be the weekly rate calculated in accordance with Part A of this clause multiplied by 52 and then divided by 24.
- (iii) Where employed on a monthly basis - the wage rate to be paid shall be the weekly wage rate calculated in accordance with Part A of this clause, multiplied by 52 and then divided by 12.

NATIONAL METAL AND ENGINEERING ON-SITE CONSTRUCTION
INDUSTRY AWARD 1989 [AW790722]

Pt III:6:Pt B - contd

[Pt III:6:Pt B(c) varied by V008 from 17May91]

(c) Provided further that a foreman/supervisor or a general foreman/supervisor or an officer of MEWU nominated in accordance with section 286 of the Industrial Relations Act 1988 as the case requires may inspect the appropriate payrolls for the purpose of ensuring that the wage rate has been correctly calculated.

7 - CONTRACT OF EMPLOYMENT

(a) The employer shall in writing advise an employee covered by this award whether the contract of employment is on a weekly, fortnightly, bi-monthly, or monthly basis.

(b) Once the basis of the contract of employment has been so advised, it shall cover the period over which the wages are to be paid. The period of notice or payment in lieu of notice required to terminate the contract of employment shall be that fixed in accordance with the contract of employment as advised pursuant to subclause (a) hereof.

(c) Nothing in this Part shall detract from the employer's right to dismiss any employee without notice for neglect of duty or misconduct.

8 - CONDITIONS OF EMPLOYMENT

(a) The conditions of employment to apply to employees covered by this part shall not be less favourable than those prescribed under Parts I and II.

(b) Provided that where it has been the custom to do so and the employer and employee agree, time off with pay may be taken in lieu of payment for overtime work, shift work, or work on Sundays or holidays.

9 - NOTIFICATION OF CLASSIFICATION, RATES OF PAY
AND EMPLOYMENT CONDITIONS

Within one month of commencing the employment an employee shall, if he so requests, be advised by his employer of the award classification and the details of the total remuneration applicable to him and whether or not and over what period of time it includes any element compensating him in whole or in part of overtime work, shift work or work on Sundays or holidays. Further, on request, an employer shall advise an employee of other details of the conditions of employment applicable to him.

If an employee requests that details of his employment conditions be provided in writing the employer shall take all reasonable steps to satisfy the request.