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10 March 2017

Fair Work Commission
Terrace Tower, 80 William Street
East Sydney NSW 2011
By email: amod@fwc.gov.au

BACKGROUND

1. On 26 October 2016 directions were issued by the Fair Work Commission (Commission) for the filing of material regarding claims to vary the 'Construction Awards'.[1]

2. These directions require the filing of reply evidence and submissions by 5pm on Friday, 10 March 2017.

3. The following reply submissions are filed on behalf of The Australian Workers' Union (AWU) in relation to the *Building and Construction General On-site Award 2010* (On-site Award).

[1] The *Building and Construction General On-site Award 2010*; *Joinery and Building Trades Award 2010*; *Mobile Crane Hiring Award 2010* and the *Plumbing and Fire Sprinklers Award 2010*

CONTENTS

1. THE ECONOMIC PERFORMANCE OF THE CONSTRUCTION INDUSTRY

Background

1. The Australian Bureau of Statistics (ABS) compiles a range of economic data about industries as defined by the Australian and New Zealand Standard Industrial Classification (ANZSIC).

2. The most relevant ANZSIC industry division for the purposes of the coverage of the On-site Award is Division E: Construction. This industry is defined as[2]:

   DIVISION E: CONSTRUCTION

   The Construction Division includes units mainly engaged in the construction of buildings and other structures, additions, alterations, reconstruction, installation, and maintenance and repairs of buildings and other structures.

   Units engaged in demolition or wrecking of buildings and other structures, and clearing of building sites are included in Division E Construction. It also includes units engaged in blasting, test drilling, landfill, levelling, earthmoving, excavating, land drainage and other land preparation.

3. On Friday, 17 June 2016 the ABS released its '8155.0 – Australian Industry, 2014-15' (ABS 8155.0) publication.

4. This publication contains a range of economic data about the construction industry which is relevant to the Commission's assessment of whether the On-site Award provides a fair and relevant safety net of employment conditions.

[2] http://www.abs.gov.au/ausstats/abs@.nsf/0/AF04F89CEE4E54D6CA25711F00146D76?opendocument

5. The publication is particularly relevant to an assessment of the economic performance of the construction industry since the On-site Award commenced operating in 2010 because it contains a large amount of both pre-2010 and post-2010 data.

6. A summary of the data considered most relevant by the AWU is provided below. The full report can be accessed here:

   http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8155.02014-15?OpenDocument

7. Some of the data summarised below is separated according to business size. The relevant business size definitions are[3]:

   - Small: less than 20 employees;
   - Medium: 20 to less than 200 employees; and
   - Large: 200 or more employees.

Employment numbers

8. Table 1 of ABS 8155.0 contains the following data about employment levels in the construction industry from 2006-07 to 2014-15:

Year	Employment at end of June '000
2006-07	973
2007-08	983
2008-09	983
2009-10	998
2010-11	1,069
2011-12	1,039

[3] See http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8155.0Glossary12014-15

2012-13	1,048
2013-14	1,059
2014-15	1,038

9. Table 5 of ABS 8155.0 contains the following data about employment levels in small businesses from 2008-09 to 2014-15:

Year	**Employment at end of June '000**
2008-09	697
2009-10	688
2010-11	670
2011-12	654
2012-13	633
2013-14	660
2014-15	729

10. The figures above do not demonstrate that the operation of the On-site Award since 2010 has resulted in a decrease in employment levels across the entire construction industry or for small business.

11. Employment across the construction industry has been consistently higher since the On-site Award commenced operating in 2010 and the highest level of employment for small business was achieved in 2014-15.

Salary and wage costs

12. The following data is taken from Table 1 of ABS 8155.0 and includes the total wages and salary cost for the industry from 2006-07 to 2014-15, the total expenses for this same period and the proportion of total expenses falling under the category of wages and salaries:

Year	Wages and salaries $m	Total expenses $m	Wages as a proportion of total expenses
2006-07	34,498	202,348	17%
2007-08	38,487	234,279	16%
2008-09	40,849	240,499	17%
2009-10	42,881	251,283	17%
2010-11	47,694	273,207	17%
2011-12	52,567	289,251	18%
2012-13	56,380	305,317	18%
2013-14	59,473	327,360	18%
2014-15	58,989	345,070	17%

13. These figures have been relatively stable since 2006-07 and demonstrate that wage and salary expenses consistently comprise less than one-fifth of total expenses in the construction industry.

14. Table 5 of ABS 8155.0 provides the same measurements for the period of 2008-09 to 2014-15 but separated according to the size of the relevant business.

15. The figures for small businesses are:

Year	Wages and salaries $m	Total expenses $m	Wages as a proportion of total expenses
2008-09	18,384	121,668	15%
2009-10	18,947	127,202	15%
2010-11	17,712	118,990	15%
2011-12	18,650	125,590	15%
2012-13	17,803	134,458	13%
2013-14	20,302	150,332	14%
2014-15	26,215	186,099	14%

16. These figures demonstrate wage and salary cost as a proportion of total business expense is lower for small business in the construction industry than it is for the industry measured as a whole.

17. Table 2 of ABS 8155.0 contains data about other labour costs including superannuation, workers' compensation and taxes. Wages and salaries constitute close to 90% of the total labour costs for the industry.

Profit levels

18. Table 1 of ABS 8155.0 contains the following data for 'Operating profit before tax' across the construction industry from 2006-07 to 2014-15:

Year	**Operating profit before tax $m**
2006-07	33,283
2007-08	24,508
2008-09	23,280
2009-10	35,615
2010-11	30,282
2011-12	29,548
2012-13	26,034
2013-14	32,254
2014-15	38,982

19. These figures demonstrate the average operating profit before tax from 2006-07 to 2009-10 across the construction industry was $29,172 million. From 2010-11 to 2014-15 the average operating profit before tax was $31,420 million.

20. Therefore, average operating profits before tax have been higher since the On-site Award commenced operating.

21. Table 5 of ABS 8155.0 contains the following 'Operating profit before tax' data for small businesses:

Year	Operating profit before tax $m
2008-09	15,304
2009-10	26,553
2010-11	22,818
2011-12	21,020
2012-13	17,705
2013-14	23,321
2014-15	27,690

22. The average operating profit before tax was higher for small businesses following the introduction of the On-site Award from 2010-11 to 2014-15 ($22,511 million) than it was in 2008-09 to 2009-10 ($20,929 million).

Comparison of profit levels with other ANZSIC industries

23. The figures in Table 4 of ABS 8155.0 demonstrate that based upon a measure of operating profit before tax, the construction industry was one of the most profitable industries in Australia from 2012/13 to 2014/15.

24. The construction industry was only surpassed in terms of profit levels by:

- Mining;
- Rental, hiring and real estate; and
- Professional, scientific; and technical services.

Summary

25. The figures cited above demonstrate a very sound economic performance from the construction industry in Australia since 2010 across all sizes of business.

26. The Commission should exercise caution in granting claims by the various employer parties in these proceedings to reduce current employment conditions for award-reliant employees when the ABS's economic data establishes that businesses in the construction industry have been able to operate quite profitably since the On-site Award commenced operating in 2010.

27. Finally, the table below contains figures cited above for employment numbers and operating profit before tax from 2006-07 to 2014-15.

Year	**Operating profit before tax $m**	**Employment at end of June '000**
2006-07	33,283	973
2007-08	24,508	983
2008-09	23,280	983
2009-10	35,615	998
2010-11	30,282	1,069
2011-12	29,548	1,039
2012-13	26,034	1,048
2013-14	32,254	1,059
2014-15	38,982	1,038

28. These figures show it cannot be assumed that higher profits for businesses in the construction industry will lead to greater employment opportunities.

29. This is relevant to assessing many of the claims made by employer groups that seek to lower current employment costs and refer to the prospect of higher employment levels.

2. REDUNDANCY

Claim

30. The Master Builders Association (MBA)[4], Civil Contractors Federation (CCF)[5] and Housing Industry Association (HIA)[6] all seek to reduce the current industry-specific redundancy entitlements in the On-site Award.

AWU response

31. The redundancy scheme in the On-site Award was a matter the AIRC dealt with in comparatively considerable detail.

32. In *Award Modernisation* [2009] AIRCFB 345 the Full Bench provided its rationale for the inclusion of the current industry-specific scheme from paragraphs [75] to [82]. This included a historical analysis and careful consideration of the relevant statutory provisions.

33. During the current 4-yearly review process, a Full Bench in *4 yearly review of modern awards* [2017] FWCFB 584 has previously stated the following in relation to an attempt by employer representatives to reduce the industry-specific redundancy scheme in the *Black Coal Mining Industry Award 2010*:

> ***[58]*** *We agree with the unions that we are not called upon to determine an appropriate redundancy provision for the black coal mining industry from scratch. The Full Bench in the 'Preliminary Jurisdictional Issues Decision' referred to the requirement to maintain a 'stable' modern award system. It also stated that regard must be had to the historical context*

[4] See MBA submission dated 2 December 2016 at paragraph 6

[5] See CCF submission dated 9 December 2016 at pages 3 to 21

[6] See HIA submission dated 2 December 2016 at paragraph 4

applicable to each modern award. There needs to be a good or 'cogent' reason to make a change to a Modern Award.

***[59]** We also reject the notion that having an industry-specific redundancy scheme with provisions that are more generous than the NES is inherently inconsistent with the modern awards objective. The legislative scheme, when combined with the award modernisation request made by the Minister, makes clear provision for such arrangements in modern awards where they are an established feature of an industry.*

***[60]** We do note that Clause 14 was put in the Modern Award largely by consent. That does not mean however that we should not proceed on the basis that prima facie the Modern Award achieved the modern awards objective at the time that it was made. In considering whether to make any changes to the Modern Award, we need to be satisfied that the award, as varied, would meet the modern awards objective of ensuring that it provides a fair and relevant minimum safety net.*

34. The case presented by the employer groups does not reach higher than a preference from some employers for the current redundancy entitlements to be reduced and a complaint that the scheme covers dismissals beyond the standard definition of a redundancy situation.

35. The Award Modernisation Full Bench was obviously aware that one of the critical aspects of the industry-specific scheme is that it applies to a broader range of dismissals than is generally the case with redundancy clauses. The Full Bench concluded this was appropriate for the industry and the review proceeds on the basis that *prima facie* the current conditions meet the modern awards objectives.[7]

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60](3)

36. In the context of a construction industry in Australia which is performing quite profitably, the case presented by the MBA, CCF and HIA does not justify a reduction to this important condition of employment.

3. JUNIOR WAGES

Claim

37. The MBA[8] and CCF[9] seek the insertion of junior rates into the On-site Award.

AWU response

38. The claim to reduce the minimum wages currently payable to employees covered by the On-site Award who are under the age of eighteen years involves the *varying* of modern award minimum wages as defined in section 284(4) of the FW Act.

39. Section 156(3) of the FW Act states the Commission can make a determination *varying* modern award minimum wages only if it "is satisfied that the variation is justified by work value reasons".

40. In an earlier case during the 4-yearly review of modern awards, a Full Bench of the Commission stated the following in relation to a claim to vary modern award minimum wages in the *Pastoral Award 2010*[10]*:*

> ***[48]*** *As s.156(4) makes clear, work value reasons are 'reasons justifying the amount that employees should be paid or doing a particular kind of work'. Work value reasons are reasons related to any of the following:*

[8] See MBA submission dated 2 December 2016 at paragraph 7

[9] See CCF submission dated 9 December 2016 at pages 22 to 37

[10] *4 yearly review of modern awards – Pastoral Award 2010* [2015] FWCFB 8810

'(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.'

***[49]** The factors identified in s.156(4) are consistent with the considerations which have historically informed work value assessments by the Commission and predecessor tribunals. Such assessments call for the exercise of broad judgment. 28 As Munro J observed in Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries29:*

'…experience of work value cases suggests that work value equivalence is a relative measure, sometimes dependent upon an exercise of judgment. A history of such cases would disclose that a number of evaluation techniques have been applied for various purposes and with various outcomes from time to time.'

41. The case presented by the employer groups to insert junior rates into the On-site Award is in very general terms and is essentially based upon the fact that junior rates appear in other modern awards. The evidence is clearly not sufficient for a work value case.

4. TRAVEL ALLOWANCE

Claims

42. The MBA seeks the following variations:

- The insertion of a clause 25.2.2 to clarify travel entitlements for employees in the metal and engineering sector: MBA submission dated 2 December 2016 - paragraph 12 (Metal and Engineering Claim);

- An increase in the radial area measurement from 50 kilometres to 75 kilometres: MBA submission dated 2 December 2016 - paragraph 13 (Radial Area Extension Claim); and

- The insertion of the words “and for no other private use” in clause 25.8(b): MBA submission dated 2 December 2016 – paragraph 14 (Private Use of Vehicle Claim).

43. The CCF seeks the following variations:

- The insertion of a new sub-clause 25.10(a)(iii) stating travel allowances are not payable to employees who do not work on a building site as part of their normal duties: CCF submission dated 9 December 2016 – pages 50 to 56 (Building Sites Only Claim); and

- The deletion of clause 25.8(b) to the effect that employees provided with a work vehicle free of charge for a purpose related to their contract of employment will not receive the travel allowance: CCF submission dated 9 December 2016 – pages 57 to 59 (No Allowance for Drivers Claim).

44. The HIA seeks the following variations:

- Amendments to the current radial area provisions: HIA submission dated 2 December 2016 – paragraph 6.3 (Radial Area Amendment Claim); and

- Inserting additional exclusions from receipt of the travel allowance: HIA submission dated 2 December 2016 – paragraph 6.4 (Allowance Exclusion Claim).

AWU response

45. The employer groups have submitted a range of diverse and at times conflicting claims in relation to the fares and travel patterns allowance.

46. It would be difficult for the Commission to be satisfied that any one of the variations sought by the employer groups is *necessary* to ensure the On-site Award meets the modern awards objectives when the employer groups have such differing views about the drafting of the clause.

47. For example, the MBA's Radial Area Extension Claim seeks to keep the current approach to calculating radial area distance but increase the relevant radial area measurement from 50 kilometres to 75 kilometres.

48. The HIA appears content with the 50 kilometres measurement but wants the approach to calculating the distance varied.

49. The CCF then go even further with their Building Sites Only Claim by seemingly suggesting the travel allowance should not even be paid to workers in the civil construction industry.

50. This would be a strange outcome in circumstances whereby the main pre-modern instrument relied upon by the Award Modernisation Full Bench for the civil construction industry contained a fares and travel allowance entitlement in relatively similar terms to the current provision.[11]

51. The MBA, CCF and HIA all propose amendments to clause 25.8(b) of the On-site Award: MBA – Private Use of Vehicle Claim, CCF – No Allowance for Drivers Claim and HIA – Allowance Exclusion Claim.

52. The concerns about this clause are difficult to understand given its operation is entirely contingent on what the employer agrees to in a contract of employment and then on what directions are issued to the relevant employee.

[11] Clause 23 of the *Australian Workers' Union Construction and Maintenance Award 2002*

53. The payment of a travel allowance to an employee falling within the terms of clause 25.8(b) should be acknowledged as a beneficial condition by employers as it allows them to avoid paying travelling time as time worked.

54. The concern from the employer parties (MBA – Metal and Engineering Claim, CCF – Building Sites Only Claim and HIA – Allowance Exclusion Claim) in relation to employees who don't work on-site receiving the travel allowance appears misplaced given clause 4.9 of the On-site Award clearly confines its operation to work performed on-site.

55. In summary, an array of proposed variations have been presented to the Commission which comprise one common theme – an attempt to reduce the occasions whereby employers must pay the travel allowance.

56. The differing proposals is a reflection that there is not one clearly identifiable problem with the current clause – the employer groups are simply searching for arguments that could justify a reduction to the current conditions. None of these arguments is sufficient to displace the *prima facie* position that the On-site Award is currently meeting the modern awards objectives.[12]

57. It is clear from the Award Modernisation Full Bench's Decision dated 3 April 2009 that careful consideration was given to the terms of the fares and travel patterns allowance.[13]

58. This was highlighted by Senior Deputy President Watson in dealing with an HIA application to vary clause 25 of the On-site Award in the 2012 Transitional Review where he stated:

> *Clause 25 – Fares and travel patterns allowance was included in the Building On-site Award in its current form by the Award Modernisation Full Bench having regard to the terms of pre-modern instruments and*

[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60](3)

[13] *Award Modernisation* [2009] AIRCFB 345 at [89]

the submissions of interested parties, including, at the exposure draft stage, reflecting a formulation of travel and distant work provisions of the MBA.[14]

59. The reference to the MBA relates to the Award Modernisation Full Bench's reliance on an MBA formulation for the fares and travel patterns allowance when developing an exposure draft of the On-site Award as cited in paragraph [43] of its Statement dated 23 January 2009.[15]

60. For all these reasons, the array of differing claims about the travel allowance can be dealt with in one consistent manner – they can all be dismissed.

5. ALLOWANCES AND SAFETY ISSUES

General claim

61. The MBA seek a range of variations to the On-site Award on the basis of alleged conflict between the award provisions and safety laws: MBA submission dated 16 December 2016.

General AWU response

62. There is nothing remarkable about an award prescribing additional compensation for the performance of duties that give rise to a greater safety risk.

63. Shift work provides a good example of how industrial conditions and safety laws can interact to regulate the performance of potentially dangerous work.

[14] *Master Builders Australia Limited* [2013] FWC 4576 at [234]

[15] *Award Modernisation* [2009] AIRCFB 50 at [43]

64. It is now well established that the performance of shift work, particularly night shift work, can increase safety risks because there is a higher likelihood of fatigue.

65. The risks are summarised in Safe Work Australia's 'Guide for Managing the Risk of Fatigue at Work' publication which can be found here:

http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/825/Managing-the-risk-of-fatigue.pdf

66. However, these increased risks have not led to the prohibition of shift work in Australia. Given the economic benefits which can arise for employers via the performance of shift work, a compromise position has instead been reached whereby:

- Safety laws impose strict obligations on employers and occupiers in terms of ensuring workplaces are safe; and

- Workers receive additional compensation in the form of shift loadings in recognition of the disabilities associated with shift work.

67. The example of shift work demonstrates that it is overly simplistic to propose that any award condition which provides additional compensation to an employee because they are being exposed to a potentially dangerous working environment should be deleted.

Specific example: swing scaffold or bosun's chair

68. The MBA misrepresents the operation of clause 22.2(e)(ii) at paragraph 5.27 of their 16 December 2016 submission.

69. This clause does not imply that any apprentice with 2 years of experience is safe to perform this type of work.

70. Rather, the clause supplements safety laws by imposing an additional limitation: an apprentice can only use a swing scaffold or bosun's chair if they can safely undertake this work and they must have at least two years' experience.

Specific example: confined space

71. The MBA state at paragraphs 5.36 to 5.41 of their 16 December 2016 submission that the definition of "confined space" in clause 22.2(d) suggests an employee can be required to work in a confined space without ventilation in circumstances whereby safety laws require the provision of respiratory equipment.

72. However, the provisions can coexist. An employer must comply with safety laws without fail. If the conditions in clause 22.(d) are satisfied – an employee is entitled to receive the confined space allowance.

73. Hence an employer may be required to provide respiratory equipment to an employee and pay a confined space allowance. There is no inconsistency in this outcome.

Specific example – underground hours of work

74. The MBA is seeking to delete the reference to 30 weekly hours in clause 33.1(e) of the On-site Award: MBA submission dated 16 December 2016 – paragraphs 6.2 to 6.7.

75. The AWU provided correspondence to the Commission in relation to this matter on 7 July 2016.[16]

[16] See https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014260-corr-awu-070716.pdf

76. This correspondence identified that the current conditions in clause 33.1(e)(iii) appear to have their origin in clause 21.7 of the *Australian Workers' Union Construction-on-site and Civil Engineering (A.C.T) Award 1999* and the draft award submitted by the CFMEU during award modernisation.[17]

77. Whilst imperfectly drafted, it is reasonably clear that the intent of clause 33.1(e)(ii) and (iii) of the On-site Award is to prescribe standard weekly hours of 38 for employees working underground but a lower figure of 30 weekly hours for employees who perform the duties identified in clause 33.1(e)(iii).

78. The lower weekly hours recognise the conditions associated with:

- Miners driving comparatively narrow tunnels (less than 40 feet);
- Miners sinking comparatively deep shafts (over 50 feet); and
- Packing and/or scabbling in dead ends and boodler working.

79. The Commission may be assisted by the following definitions of "boodler" and "scabbler" which appear in clause 30 of the *Australian Workers' Union Construction and Maintenance (Western Australia) Award 2003*:

> ***30.12 Boodler** means an employee shovelling underground or in trenches 1.8 metres or more in depth.*
>
> ***30.51 Scabbler** means an employee using a scabbling tool for the purpose of trimming the sides, roof or floor of tunnels or rock excavations and for the purpose of this definition the term **scabbling tool** shall mean a pick shaped implement or gad generally used for the purpose of scabbling.*

80. However, the Commission may not be assisted by the fact that this award defines these terms and then fails to use them again.

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[17] See clause 24.8.3 of the draft award found here: http://www.airc.gov.au/awardmod/databases/building/Draft/CFMEU_correspondence_190109_building.pdf

81. In any event, the following variation to the start of clause 33.1(e)(iii) will be sufficient to clarify the intended effect of the provision:

> *A week's work will be 30 hours per week, exclusive of crib time, ~~except~~ in the following cases…*

Specific example: working in compressed air

82. The AWU agrees with the MBA's proposition at paragraph 6.9 of its 16 December 2016 submission that the reference to *Standards Association of Australia for work in compressed air, Part 1 Airlock Operations* in clause 33.1(d) should be amended to *AS 4774.1 – 2003 – Work in compressed air and hyperbaric facilities – work in tunnels, shafts and caissons*.

83. However, the AWU does not accept the MBA's unsubstantiated assertion at paragraph 6.10 of its submission that an employer who intends to operate in a compressed air environment would consider paying $163.48 to have access to safety information to be an "unreasonable burden".

Specific example: heavy blocks

84. The MBA raise concern at paragraph 7.5 of their 16 December 2016 submission that clause 22.2(o) of the On-site Award could convey that an employee can be required to lift blocks which weigh, for example, 50 kilograms without mechanical assistance because an allowance is payable where the blocks being lifted weigh more than 20kg and no maximum weight is identified.

85. However, clause 22.2(o) of the On-site Award simply reflects the fact that there are no maximum lifting weights in safety legislation or regulations. As is pointed out in Safe Work Australia's October 2014 'Fact or Fiction' fact

sheet[18] - the amount an individual can safely lift differs according to personal attributes. Hence a maximum amount cannot be specified in the On-site Award.

86. This is another example whereby safety laws regulate what duties a worker can perform and the On-site Award provides additional compensation for certain duties when they can be safely undertaken.

Specific example: powdered lime dust

87. We accept there is some merit in the MBA's point at paragraph 7.12 of their 16 December 2016 submission that clause 22.4(b) of the On-site Award is "clumsily worded".

88. We also agree that the reference to exposure for a period greater than one hour in clause 22.4(b)(i) is unnecessary and should be deleted.

89. The key elements of this clause are:

- Employees must use the protective clothing identified in clause 22.4(b) and the employer must provide this clothing or reimburse the employee for the cost of purchasing it;

- An employer must maintain the washing facilities specified in clause 22.4(b)(iii); and

- The payment of the allowance in clause 22.4(b)(v) when an employee performs duties associated with the use of powdered lime dust.

90. A clause that simply reflects these key elements can work in conjunction with safety laws without issue.

[18] See http://www.safeworkaustralia.gov.au/sites/swa/media-events/safety-month/pages/swam-fact-or-fiction

Specific claim: categorisation of allowances

91. In relation to the MBA's proposition at paragraph 10 of its 16 December 2016 submission, the AWU is not opposed to allowances being categorised as either related to expense, skill or disability.

92. The exposure draft process will provide the parties with a further opportunity to try and reach agreement on a suitable approach.

6. LIVING AWAY FROM HOME ALLOWANCE

Claim

93. The MBA[19] seek variations to clarify the operation of the board and lodging conditions in clause 24.3(a)(ii) of the On-site Award and the fares allowance condition in clause 24.7(d). The CCF seek to insert monetary values for meal allowances.[20]

AWU response

94. The MBA and CCF submissions do not explain the alleged problems with the current provisions in sufficient detail to allow a meaningful response and no evidence has been presented to demonstrate why the variations are *necessary*.

95. Further, if the Full Bench grants the variations sought to the living away from home conditions by the CFMEU in these proceedings, which are supported by the AWU, it appears the issues referred to by the MBA and CCF will fall away.

[19] MBA submission dated 2 December 2016 at paragraphs 10 and 11

[20] CCF submission dated 9 December 2016 at pages 46 to 49

7. HOURS OF WORK AND RDOs

Claim

96. The MBA seeks the following variations:

- The deletion of reference to "nominated industry rostered days off" in clause 33.1(a)(ii)[21];
- An extension of the current provisions regarding the banking of RDOs[22]; and
- A reduction to the current conditions received by an employee who is directed to work on an RDO.[23]

97. The HIA seek variations to allow for the averaging of hours, the rostering of RDOs and the banking of RDOs by agreement.[24]

AWU response

98. The AWU opposes the variations sought by the MBA and the HIA.

99. Whilst the day work ordinary hours of work conditions in clause 33.1 of the On-site Award are unique, they have been carefully developed to provide an appropriate safety net for this industry.

100. The changes proposed would dramatically alter the safety net conditions regarding how work is performed in the building and construction industry.

[21] MBA submission dated 2 December 2016 at paragraph 17
[22] MBA submission dated 2 December 2016 at paragraph 18
[23] MBA submission dated 2 December 2016 at paragraph 19
[24] HIA submission dated 2 December 2017 at paragraph 8

101. As a result, a substantial amount of probative evidence would need to be presented to displace the *prima facie* proposition that the current terms meet the modern awards objectives.[25]

102. The MBA and HIA have not presented anywhere near the required level of evidence.

8. TOOL ALLOWANCE

Claim

103. The HIA seeks a variation to clause 20.1(a) of the On-site Award to limit the payment of the tool and employee protection allowance specified therein: HIA submission dated 2 December 2016 at paragraph 5.

AWU response

104. It is clear the allowance in clause 20.1(a) is a longstanding part of the minimum wages of the identified classes of tradespeople as opposed to an allowance which is contingent on the existence of any specified circumstances. This explains why it is payable on an all-purpose basis.

105. It is also clear that the HIA have tried this same claim previously during the 2012 Transitional Review to no avail.[26]

106. The HIA has not presented any new evidence to establish that this variation is *necessary* and the claim should be dismissed.

9. PIECE RATES

[25] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60](3)

[26] *Master Builders Australia Limited* [2013] FWC 4576 at [213] to [217]

Claim

107. The MBA seeks a variation to delete reference to a piecework agreement being made "without coercion or duress": MBA submission dated 2 December 2016 – paragraph 9.

AWU response

108. The Award Modernisation Full Bench of the AIRC has previously considered whether to delete reference in the *Horticulture Award 2010* to a piecework agreement being genuinely made "without coercion or duress".

109. The Full Bench determined:

> *The additional safeguards relating to the making of a piecework agreement proposed in the joint application are necessary and will be included. We should add that neither provision is inconsistent with the terms of the consolidated request.*[27]

110. No justification has been provided for a departure from this Full Bench decision in relation to the On-site Award.

111. The current clause should pose no concerns to an employer unless they intend to engage in coercion or duress. If an employer does engage in this behaviour, it is entirely appropriate that they can potentially be prosecuted for acting in breach of the On-site Award.

10. COVERAGE VARIATION – ROAD MAKING

Claim

[27] *Horticulture Award 2010* [2009] AIRCFB 966 at [18]

112. The CCF seeks a variation to delete clause 4.10(b)(ii) of the On-site Award: CCF submission dated 9 December 2016 – pages 60 to 66.

AWU response

113. The CCF's claim to vary the coverage of the On-site Award to exclude road making and associated work is flawed and should be rejected for the following reasons.

114. Firstly, the CCF have provided no evidence whatsoever in support of their claim. The Decision in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*[28] states (our emphasis):

> *…where a significant change is proposed it must be supported by a submission which addressed the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*.

The lack of evidence presented by the CCF is sufficient in itself to justify the rejection of this claim.

115. Secondly, the CCF has provided an inaccurate summary of the relevant pre-modern awards on page 61 of their submission.

116. The *Australian Workers' Union Construction and Maintenance Award 2002* (AWU Construction Award) was one of the main pre-modern instruments relied upon by the Award Modernisation Full Bench in developing the On-site Award.[29]

117. The AWU Construction Award did cover road making work and specifically referred to the occupations of: bitumen sprayer (CW1), bitumen sprayer

[28] [2014] FWCFB 1788 at [60](3)

[29] *Award Modernisation* [2009] AIRCFB 50 at [32]

(CW3) and bitumen sprayer (driver) (CW4). The On-site Award contains these same occupations and classification levels.

118. Hence the CCF's submission on page 60 that the On-site Award "introduced asphalt and bitumen work to the award coverage for the first time" is incorrect.

119. Thirdly, the Award Modernisation Full Bench specifically considered the interaction between the coverage of the On-site Award and the *Asphalt Industry Award 2010* at paragraph [39] of its Decision dated 4 September 2009[30]:

> *We have retained roadmaking within the coverage clause of the award. Roadmaking, in this context, is intended to comprehend those elements of roadmaking associated with the asphalt industry and undertaken by employers within the industry as defined. Other roadmaking activity, undertaken by employers within the civil construction sector of the building, engineering and civil construction industry, will fall within the coverage of the Building, Engineering and Civil Construction Industry General On-site Award 2010.*

120. The *Jurisdictional Issues* decision states "previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so".[31]

121. Finally, Senior Deputy Watson was asked to consider the interaction between the On-site Award and the *Asphalt Industry Award 2010* again in the 2012 Transitional Review process. SDP Watson determined: "the distinction between the two modern awards in respect of roadmaking is clear from the decision of the Award Modernisation Full Bench".[32]

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[30] *Award Modernisation* [2009] AIRCFB 826 at [39]

[31] [2014] FWCFB 1788 at [60](3)

[32] *Master Builders Association Limited* [2013] FWC 4576 at [129]

11. OVERTIME – TRAINEES AND APPRENTICES

Claim

122. The MBA seek the deletion of clause 15.3(b) of the On-site Award and an amendment to clause 36.7: MBA submission dated 2 December 2016 at paragraph 21.

AWU response

123. Whilst there is some overlap between clause 15.3(c) and clause 36.7 of the On-site Award, clause 15.3(b) operates quite differently.

124. Clause 15.3(b) imposes a restriction on an employer requiring an apprentice under the age of 18 years to work overtime or shift work. This applies generally and does not, in contrast to clause 15.3(c) and clause 36.7, require any connection to training obligations.

125. Hence the MBA's claim is misleading and it should be rejected. No amendment is required to the current conditions.

12. DIRTY WORK ALLOWANCE

Claim

126. The CCF seek the insertion of a new sub-clause to clarify when the dirty work allowance in clause 22.2(h) of the On-site Award is payable.

AWU response

127. Whilst the CCF present this claim as a clarification exercise, the actual effect would be to significantly reduce the circumstances whereby the dirty work allowance is paid.

128. This arises from the introduction of reference to substances or materials not commonly found on building and construction sites and an exclusion if the substances or materials are covered by other disability allowances.

129. The AWU does not accept that clause 22.2(h) requires clarification as no practical problems have been identified by its members and the CCF has not provided any evidence.

130. If a definition is required, a simpler and fairer form of words would be:

> ***Unusually dirty work*** *means a duty or duties not regularly performed by an employee that results in the employee being exposed to dirtier conditions than they would encounter if performing their regular duties.*

13. TOIL

Claim

131. The MBA[33] and HIA[34] both seek the insertion of the model time off in lieu of overtime provision (TOIL) developed by the Award Flexibility Full Bench[35] during the 4-yearly review proceedings.

AWU response

132. The employer parties have not demonstrated it is *necessary* to insert TOIL conditions into the On-site Award.

[33] See MBA submission dated 2 December 2016 at paragraph 4

[34] See HIA submission dated 2 December 2016 at paragraph 3

[35] *4 yearly review of modern awards – Award Flexibility* [2016] FWCFB 4258

133. If a TOIL term is to be inserted, an employee should be entitled to accrue time off at the relevant overtime rates – i.e. 1.5 hours or 2 hours accrued for one hour of overtime worked. This will reduce the risk of employees being pressured to take TOIL instead of being paid at overtime rates.

14. ANNUAL LEAVE LOADING

Claim

134. The HIA seek to amend clause 38.2(b) and delete clause 25.10(b) of the On-site Award to the effect that the fares and travel patterns allowance is not included in the calculation of annual leave loading: HIA submission dated 2 December 2016 at paragraph 9.

AWU response

135. The HIA has provided no evidence whatsoever to substantiate this claim.

136. The only justification identified by the HIA is that they didn't succeed with the same claim during the 2012 Transitional Review process and an alleged administrative burden on employers.

137. Given the sophistication of payroll systems which are readily available to employers today, this variation will, at best, save a very small amount of working time for the person/s processing annual leave payments.

138. A significant reduction to the minimum terms and conditions of employment for employees covered by the On-site Award cannot be *necessary* for this reason alone.

15. PAYMENT OF WAGES

Claim

139. This is another instance whereby the employer representatives seek differing variations in relation to a condition of employment.

140. The MBA[36] seek the adoption of a model term likely to emerge from other Full Bench proceedings, the CCF[37] seek the introduction of fortnightly pay cycles and the HIA[38] seek the introduction of fortnightly pay cycles with an option to agree to monthly pay cycles.

AWU response

141. The transient nature of the building and construction industry provides a compelling reason to not permit longer pay cycles.

142. It is important for wages to be finalised in a short period of time because longer periods may result in an employee having to try and resolve a dispute about their wages after they have ceased working on the relevant project or site. This creates logistical issues and also means an employee is in a very poor bargaining position because the employer may no longer need their labour.

16. ANNUAL LEAVE – CONTINUOUS SERVICE

Claim

143. The MBA seeks a variation to clause 38.1 of the On-site Award to refer users to the definition of continuous service contained in clause 3.1.

AWU response

[36] MBA submission dated 2 December 2016 at paragraph 16

[37] CCF submission dated 9 December 2016 at pages 39 to 42

[38] HIA submission dated 2 December 2016 at paragraph 7

144. The AWU does not oppose this amendment.