IN THE FAIR WORK COMMISSION

Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009

Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010

[MA000020]

Joinery and Building Trades Award 2010

[MA000029]

Mobile Crane Hiring Award 2010

[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

SUBMISSION IN REPLY OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) TO THE SUBMISSIONS IN SUPPORT OF VARIATIONS SOUGHT BY EMPLOYER ORGANISATIONS TO GROUP 4C CONSTRUCTION AWARDS

10th March, 2017

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act).

2. On 15th August 2016 the President, Justice Ross, issued a Statement[1] in which the President referred to the Report[2] of Senior Deputy President Watson on the various claims to vary the provisions in the Construction awards[3]. The Report identified that the common claims in the *Building and Construction General On-site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010* would be referred to a separately constituted Full Bench for determination. On 22nd August 2016 the President issued a Memorandum[4] establishing the Full Bench under AM2016/23 and identifying the claims to be dealt with by them.

3. The Full Bench established to deal with the Construction awards issued Directions[5] on 26th October 2016 for the claims identified in the Memorandum. The Directions required parties seeking variations to the Construction awards to file comprehensive written submissions and any witness statements or documentary material on which they sought to rely on, by 5.00pm on Friday 2nd December 2016. Any interested party wishing to adduce evidence and/or make submissions in reply, to any of the evidence and submissions filed, were to file such evidence and/or submissions in the Commission by 5.00pm on Friday 10th March 2017. This submission in reply is made in accordance with those directions.

4. We note that the AMWU[6] and AWU[7] have filed submissions in support of particular variations that they seek to be made to the *Building and Construction General Onsite Award 2010*. To the extent that the CFMEU (Construction and General Division) ("CFMEU C&G") has an interest in those matters we support their submissions.

5. The overwhelming majority of variations, other than those sought by the CFMEU C&G, are proposed by employer parties. This submission is therefore directed to responding to the respective employer organisation submissions made in support of those proposed variations.

6. Submissions in support of variations to the *Building and Construction General On-site Award 2010* sought by employer organisations were filed by the Australian Industry Group (**AIG**

[1] [2016] FWC 5694
[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014260andors-fbreport-050816.pdf
[3] See paragraph [13] of [2016] FWC 1191
[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014260andors-memo-220816-.pdf
[5] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-dirs-261016.pdf
[6] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-amwu-091216.pdf
[7] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-awu-compiled-021216.pdf

Submission[8]), the Civil Contractors Federation (**CCF Submission**[9]), the Housing Industry Association (**HIA Submission**[10]), and Master Builders Australia (**MBA Submission**[11]). In a number of instances the employer parties are seeking conflicting variations to the same clauses in the *Building and Construction General On-site Award 2010.* This submission in reply will therefore generally address the proposed variations on a clause by clause basis.

7. The exception to this is the Work Health and Safety (WHS) and allowance matters raised in the MBA submission filed on 16th December 2016[12] (**MBA Final Submission**). As this application traverses a number of award clauses it will be responded to as a separate item.

8. The only employer organisation proposing any changes to the *Joinery and Building Trades Award 2010* is the MBA. Two of the variations proposed are the same as those sought to be made to the *Building and Construction General On-site Award 2010*. This submission will therefore deal with those variations in a common reply. The remaining variations proposed will be dealt with separately.

9. There is one further point that the CFMEU C&G wishes to make by way of introduction. As noted in paragraph 6 above, a number of the variations proposed by the employer organisations conflict with one another. This has made the CFMEU's task of responding to these various changes proposed extremely difficult in the time available. Whilst the CFMEU C&G has made every effort to respond to the employers claims in this written submission, any inadvertent omission in dealing with an employer claim should not be taken as consent to the variation. Apart from the variation sought by the AIG, the CFMEU C&G generally opposes the variations sought by the employer organisations. Should any variation proposed by an employer organisation not be dealt with in this written submission then the CFMEU C&G would seek liberty from the Full Bench to make an oral or further written submission at the appropriate time.

The Nature of the Review

10. In the CFMEU C&G submission of the 9th December 2016[13], filed in support of the variations proposed by the CFMEU C&G, we addressed the nature of the Review and we rely on those submissions. The CFMEU C&G also submit that as there have now been a number of Full Bench decisions made as part of the Review, the summary set out in paragraph 12 of the 9th

[8] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-aig-021216.pdf
[9] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014260-sub-ccf-091216.pdf
[10] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-hia-021216-.pdf
[11] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-mba-121216.pdf
[12] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-mba-161216.pdf
[13] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-cfmeu-091216.pdf

December 2016 submission is uncontroversial and is the appropriate guide as to how the proposed variations should be considered by this Full Bench.

Work Health and Safety (WHS) and Allowance Matters

11. It is perhaps prudent to respond to the MBA claim in regard to WHS and allowance matters first as this could be perceived as a threshold matter, in that if the MBA claim were successful some of the other variations sought to allowances and other provisions would be unnecessary.

12. The MBA claim is summarised in paragraphs 2.3 to 2.6 of its 16th December 2016 submission (**MBA Final Submission**). It appears that the MBA claim is being made on a similar each-way bet approach advanced for other claims made by other employer organisations, i.e. this is our primary claim but if we lose we have an alternative claim and if we lose again we have another alternative claim. This approach reflects the absence of merit of its primary claim.

13. The primary claim can be summarised as follows:

    - If an allowance or award clause deals with a matter that would otherwise be covered by relevant WHS laws, it should be deleted from the On-Site Award.
    - Allowances or award clauses that are outmoded, irrelevant or no longer applicable should be deleted.
    - Remaining allowances should then be:
        - rationalised so as to group allowances under the category of skill, disability and expense related; and
        - for those allowances grouped under the category of disability related allowances, a further grouping should be made so as to identify those which are composite and those which are cumulative.

14. Starting with the first part of the primary claim, i.e. that allowances or award clauses that deal with a matter that would otherwise be covered by relevant WHS laws should be deleted, the CFMEU C&G submit that this claim should be rejected. The basis for this submission is that the MBA is misguided in its approach to the award, and fails to understand or recognise that the provisions were not inserted into the award to deal with WHS matters per se, but were inserted to provide for the payment of allowances or rest breaks where certain disabilities were experienced.

15. Attached at Appendix A to this submission is a witness statement of Dr. Gerard Ayers, which clearly demonstrates the different roles of awards and WHS laws.

16. The MBA submission is that the 2012 Award Review did not apply s.138 of the FW Act to the Award. That is not a correct characterisation of the Full Bench decision at [2012] FWAFB 5600 which stated (at [33] in the words omitted from the quote at 3.16 of the MBA Final Submission):

> *"We are satisfied that s.138 is relevant to the Review. The section deals with the content of modern awards and for the reasons given at paragraph [25] of our decision it is a factor to be considered in any variation to a modern award arising from the Review"*

17. Moreover, the current Full Bench should act on the presumption that the Full Bench that made the Modern Award did so on the basis that it considered that all the provisions of the Award complied with s.138 of the FW Act. This includes the clauses now sought to be deleted by the MBA.

18. It is evident that the Full Bench during the Award Modernisation Process specifically considered those clauses, albeit that no organisation was able to argue in any persuasive way that they should be rationalised. The Full Bench in [2009] AIRCFB 345 said (at [88]):

> *"**[88]** We have deleted cl.20.6 from the exposure draft. That provision was based on rates payable under the Building and Construction Award but applied only to forepersons in Tasmania and bridge and wharf carpenters in New South Wales. Transitional arrangements may be required in respect to these State based payments. Otherwise, we have retained the allowances provisions in the exposure draft. They reflect current award provisions. We have referred above to our preference for a rationalisation of such allowances, as expressed at paragraphs [20] and [21] of our statement of 23 January 2009. Notwithstanding, efforts by the MBA to address this issue, most recently in its eleventh submission (dated March 2009), we have not received sufficient material and input from interested parties to allow us to attempt to rationalise allowances at this stage. Such an exercise should, however, be given some priority in any future review of the modern award."*
>
> (Footnotes omitted)

19. The clauses that the MBA seek to now delete or change were accepted by the Full Bench in the 2012 Award Review in *Master Builders Australia Limited* ([2012] FWAFB 10080) as matters that may be included in modern awards (see paragraphs [62] to [74]). This acceptance was not predicated on the basis that these clauses deal with WHS matters but rather that they deal with subject matters set out in ss 139 and 142 of the FW Act.

20. As set out in the MBA Final Submission at 3.11, the Full Bench at [54] found that it is only if a provision is inconsistent with WHS laws that it has no legal affect. However, the Full Bench went on to state at [55]:

> *"Although it is unnecessary, we note for completeness, we are not persuaded that any of the provisions identified by the MBA in the On-site Award or other modern awards reduces an entitlement under the relevant State and Territory legislation saved by s.27."*

21. As discussed further below, there is no reason to depart from this finding by the Full Bench. Given, that none of the clauses that are the subject of the MBA Final Submission reduce an entitlement under WHS legislation, it is erroneous for that submission to baldly assert at 3.23, 4.7, 5.21 and 5.24 that rejection of its claims would have the effect of preserving terms that have no legal effect.

22. The MBA Final Submission claims at 5.1 that circumstances have changed since the modern award commenced and refer to the model WHS system and the establishment of Safe Work Australia[14]. There are no significant or relevant changed circumstances.

23. Whilst the adoption of the model OH&S laws has some impact on award conditions in that any provision in an award that is inconsistent has no effect, there is clearly no prohibition on an award dealing with WHS matters. The essential nature of OH&S laws based on the Robens model has not changed at all. Therefore the claim of "pertinent changes" to such obligations, as stated by the MBA in 5.3, is both misleading and inaccurate.

24. Further, it should be noted that the aim of having uniform legislation throughout Australia has not been achieved. In particular Victoria and WA have not adopted the model. Moreover, even within those states and territories that have adopted the model, there are differences in approach. This has rendered the aim of national uniformity impractical to achieve.

25. Further, in relation to the establishment of Safe Work Australia, this occurred in 2009 before the commencement of the modern award. In any event, that body is a policy maker, not a regulator (a point recognised by the MBA[15]).

26. These developments provide no reason for the wholesale removal of allowances from the *Building and Construction General On-site Award 2010* to the detriment of employees covered by that award.

[14] MBA Final Submission at 5.6 to 5.14
[15] MBA Final Submission at paragraph 5.11

27. For the reasons set out in the statement of Mr. Ayers at paragraphs 10 to 17 as to the compatibility pf the WHS/OHS legislation with the award provisions, the MBA Final Submission at 5.21 are misleading. The Award provisions do not prevent continual improvement in health and safety.

28. For the reasons set out in the statement of Mr. Ayers at paragraph 18 the claims in the MBA Final Submission at 5.24 to 5.27 that there are inconsistencies between the award requirements and the obligations under the WHS laws should be rejected. The only specific example it raises is clause 22.2(e)(ii)[16]. Clause 22.2(e)(ii) is part of the clause dealing with work on a swing scaffold and has two parts to it. The first part is a prohibition on apprentices with less than two years' experience using a swing scaffold or bosun's chair, and the second part provides for an allowance that is to be paid to solid plasterers working off a swing scaffold. The MBA claim that the first part causes a conflict with WHS laws as it could be read to imply that an apprentice with two years' experience "*has sufficient skills and experience to use such items notwithstanding that this might not be the case*"[17]. This is clearly incorrect. The clause does not say when an apprentice can use a swing scaffold or bosun's chair, it only says when they cannot use one. Further there is nothing in the clause that says that it removes any obligations that an employer may have under WHS laws. This point was specifically recognised by the Full Bench in *Master Builders Australia Limited*[18].

29. The MBA Final Submission claims at 5.29 that many clauses in the award overlap with requirements that already exist under WHS laws. Again it only refers to one example being clause33.1(c) which is part of the hours of work clause, and which requires the employer to provide sufficient facilities for washing and to give employees 5 minutes before finishing time to wash and put away gear.

30. As set out in the Statement of Mr Ayers at paragraph 19, the MBA Final Submission claim at 5.30 of overlap in relation to clause 33(1)(c) should be rejected because the five-minute washing time is no more than acknowledgement of a person's right to "clean-up" before meals and/or going home after their work shift is finished. The WHS legislation does not specify or allow any set or agreed time – it only provides for the "facilities" to eventually be utilized to "wash-up" – the 'allowable/agreeable' time to do that is open to 'interpretation'.

31. The MBA Final Submission claims at 5.31 that the clause 33.1(c) sets requirements that overlap, and broadly duplicate regulation 41 of the WHS Regulations. This is incorrect. Regulation 41 provides as follows:

[16] Ibid., at 5.25
[17] Ibid., at 5.27
[18] 2012 FWAFB 10080 at paragraphs [72] and [73]

"***41 Duty to provide and maintain adequate and accessible facilities***

(1) A person conducting a business or undertaking at a workplace must ensure, so far as is reasonably practicable, the provision of adequate facilities for workers, including toilets, drinking water, washing facilities and eating facilities.

Maximum penalty:

In the case of an individual—$6 000.
In the case of a body corporate—$30 000.

(2) The person conducting a business or undertaking at a workplace must ensure, so far as is reasonably practicable, that the facilities provided under subregulation (1) are maintained so as to be:

(a) in good working order; and

(b) clean, safe and accessible.

Maximum penalty:

In the case of an individual—$6 000.
In the case of a body corporate—$30 000.

(3) For the purposes of this regulation, a person conducting a business or undertaking must have regard to all relevant matters, including the following:

(a) the nature of the work being carried out at the workplace;
(b) the nature of the hazards at the workplace;
(c) the size, location and nature of the workplace;
(d) the number and composition of the workers at the workplace."[19]

32. Regulation 41 only requires the provision of washing facilities so far as is reasonably practical, whereas the award has an absolute requirement. More importantly the award clause provides for employees being allowed 5 minutes of paid time to wash and put away gear, which in reality is the main purpose of the clause and why it is part of the hours of work

[19] http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/616/Model-WHS-Regulations-28Nov2016.docx

clause. Regulation 41 does not deal with this issue. The provision washing facilities is an incidental and machinery provision to allow the washing to occur.

33. The second leg of the MBA primary claim is that the award contains references to practices, processes, items or types of work that are outmoded, irrelevant or no longer occur[20]. Again the MBA Final Submission only refers to one example and claims that clause 20.1(d)(iii) is obsolete as designated tuberculosis treatment facilities no longer exist in Australia.

34. The CFMEU C&G accepts that designated tuberculosis homes or hospitals (or hospitals for consumptives[21] as they were more commonly known as) no longer operate in Australia, however clause 20.1(d)(iii) is mainly concerned with employees being reimbursed for x-rays to check their lungs against any infections or disease. The clause is not limited to employees who worked in tuberculosis homes or hospitals, but also applies to employees employed on refractory brickwork[22]. There is still significant amounts of refractory work carried out in Australia and a number of companies specialise in this work (e.g. AGC[23], Beroa Australia [24](recently renamed Dominion Industry), Veolia[25], etc.). The materials that the workers come into contact with still pose serious risks.[26] We therefore submit that clause 20.1(d)(iii) should be retained and varied to provide as follows:

> "*An Employer must reimburse an employee engaged in refractory brickwork for an x-ray (if required by an employee) once every six months. Such x-rays may be taken during working hours and count as time worked*."

35. The MBA Final Submission claims at 5.36 that some award provisions create requirements on employers to do specific things that do not contribute to, and may in fact detract from, the need to ensure workplaces are safe. Again it only gives one example and refers to clause 22.2(d)(ii). Clause 22.2(d) provides as follows:

> *"(d) Confined space*
>
> *(i) An employee required to work in a confined space must be paid an additional 4.0% of the hourly standard rate per hour or part thereof.*

[20] MBA Final submission at 5.32 to 5.35
[21] https://www.findandconnect.gov.au/guide/nsw/NE01214
[22] It should be noted that there were separate clauses in the NBCIA 1990 (clause 31(5) and (6)) however the clauses were consolidated to one provision in the NBCIA 2000.
[23] http://www.agc-ausgroup.com/our-business/agc.html
[24] http://www.beroa.com.au/
[25] http://www.veolia.com/anz/our-services/services/heavy-industry/refractory-management
[26] See http://www.seas.columbia.edu/earth/wtert/sofos/nawtec/nawtec11/nawtec11-1683.pdf

(ii) Confined space means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation."

36. The MBA Final Submission at 5.40 claims that the definition of confined space in clause 22.2(d)(ii) of the award allows workers to undertake work in a confined space contrary to obligations under the WHS regulations that do not allow an employee to work in a confined space without sufficient ventilation. As the statement of Mr Ayers at paragraph 21 demonstrates this is not only incorrect but an extreme and absurd interpretation of the award. The award definition is intended to identify the work places where the confined space allowance in 20.2(d)(ii) is to apply. The definition by itself does not require an employee to work in a place without sufficient ventilation, nor does it limit the safety measures to be used when an employee works in a confined space.

37. As the statement of Mr Ayers at paragraph 22 demonstrates, another misconceived claim of the MBA Final Submission is that related to clause 20.3(a). It says at 5.42 to 5.43 that this clause deals with PPE (Personal Protective Equipment) and overlaps and potentially conflicts with WHS laws. Clause 20.3 deals with compensation for clothes and tools and nowhere in the clause is there any specific mention of PPE. Clause 20.3(a) does not relate to practices or methods used by an employee to control a risk that may not be appropriate, but simply deals with how employees are to be compensated for any accidental damage to an employee's property (i.e. clothing, spectacles, hearing aids or tools) that occurs at work.

38. The consequences that the MBA Final Submission complains of in paragraphs 5.50 to 5.60 are based on an incorrect interpretation of the award provisions.

39. In section 6 of the MBA Final Submission headed "Other Items", the MBA raise concerns with clause 33.1(e) Hours – underground work, and clause 33.1(d) Work in compressed air. In regard to clause 33.1(e)(iii), the CFMEU C&G agrees that the clause is badly worded and does not reflect how it should operate but we do not support its deletion. The provision regarding underground work was put forward by the CFMEU C&G in its proposed Construction and Related Industries Award 2010 during the award modernisation proceedings[27]. The clause was based on the then existing clause 21.7 of the *Australian Workers' Union Construction-on-site and Civil Engineering (A.C.T.) Award 1999*[28] which provided as follows:

"*21.7 Hours – Underground work*

[27] See clause 24.8 in http://www.airc.gov.au/awardmod/databases/building/Draft/CFMEU_correspondence_190109_building.pdf
[28] https://www.fwc.gov.au/documents/consolidated_awards/ap/ap765604/asframe.html

21.7.1 Underground means in any trench, shaft, drive or tunnel more than twenty feet below the surface of the ground or any drive or tunnel over fifteen feet in length or where the drive or tunnel is timbered irrespective of the depth, or any live sewer more than eight feet below the surface of the ground. Provided also that nothing in this clause will entitle a person working in a trench by pot and shot method or otherwise at a depth less than twenty feet below the surface of the ground to be paid as a miner.

21.7.2 The hours of work of employees working underground and all dependent work above the ground will begin at the whistle and end at the surface. The hours of work for underground work will be 38 per week worked in accord with the provisions of 21.1, 21.2 and 21.3. Each day's work will include half an hour crib break and that if two shifts are worked they will be worked between the hours of 6 a.m. and midnight.

21.7.2(a) Except in the following cases miners driving tunnels with a superficial area not exceeding forty feet and for miners sinking shafts over fifty feet in depth and persons packing and/or scabbling in dead ends and/or boodler working therewith, thirty hours, exclusive of crib time, will constitute a week's work."

40. In the exposure draft[29] released in January 2009 the wording was very similar to that identified above, i.e. clause 35.1(e)(iii) provided as follows:

> *"(iii) Except in the following cases—miners driving tunnels with a superficial area not exceeding 40 feet and for miners sinking shafts over 50 feet in depth and persons packing and/or scabbling in dead ends and/or boodler working therewith—30 hours, exclusive of crib time, will constitute a week's work*."

41. The wording in the modern award that was finally made on 3rd April 2009[30] was subsequently changed to read as:

> *"(iii) A week's work will be 30 hours per week, exclusive of crib time, except in the following cases:*
>
> *• miners driving tunnels with a superficial area not exceeding 40 feet;*
> *• miners sinking shafts over 50 feet in depth; and*
> *• persons packing and/or scabbling in dead ends and/or boodler working*."

42. The AIRC Award Modernisation Full Bench clearly intended to include clause 35.1(e)(iii) in the modern award to provide for reduced working hours in narrow tunnels and deep shafts.

[29] http://www.airc.gov.au/awardmod/databases/building/Exposure/building_construction_exposure.pdf
[30] http://www.airc.gov.au/awardmod/databases/building/Modern/building.pdf

The current wording however is ambiguous in its meaning and we submit that wording should be varied to reflect that from the exposure draft.

43. In regard to clause 33.1(d), essentially the complaint of the MBA is that the current wording refers to an outdated Australian Standard. The union and employer parties have already all recognised this fact. As the intent of the provision is to ensure that the working hours and conditions for employees working in compressed air meet the relevant Australian Standard[31] , including the maximum number of hours am employee may work in compressed air, it is appropriate to include it in the award. The protections provided to employees covered by the award by including the reference to the standard should not be removed without a proper investigation and evidence. As none has been provided by the MBA the provision should be retained but with altered wording so that it reads as follows:

> *"(d) Work in compressed air*
>
> *The working hours and conditions of employees working in compressed air will be those as from time to time prescribed by the relevant Australian Standard for work in compressed air relating to work in tunnels, shafts and caissons*."

44. As to the MBA concern as to the "unreasonable burden" upon employers of purchasing the standard the CFMEU C&G points out that the cost would be insignificant compared to the cost of providing the compressed air equipment and relevant facilities (e.g. a single full face respirator mask costs in the vicinity of $450[32]).

45. The MBA Final Submission makes further comment on allowances dealing with employees laying heavy blocks (clause 22.2(o))[33], and employees exposed to powdered lime dust (clause 22.4(b))[34]. It claims that if the WHS obligations were appropriately discharged the payment of the allowances would not arise; therefore the allowances should be deleted.[35]

46. In regard to laying heavy blocks, there is nothing in the clause that states that it overrides WHS obligations nor that it requires an employee to lift a heavy block over 18kg without a mechanical aid. All the clause stipulates is the monetary value to be paid where heavy blocks of different weights are used.

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[31] http://infostore.saiglobal.com/store/PreviewDoc.aspx?saleItemID=387661
[32] http://www.bigsafety.com.au/promask-combi-full-face-respirator.html?gclid=CPfbtoXmu9ECFYKUvAodHeoAWQ
[33] MBA Final submission at 7.5 to 7.9
[34] Ibid., at 7.10 to 7.13
[35] Ibid., at 7.4

47. The CFMEU C&G concedes that the wording in clause 22.4(b) is clumsy, but we do not support the deletion of the allowance. The wording is a result of the rewriting of awards during the award simplification era, and the restrictions under s.513 of the Workplace Relations Act 1996 that awards only contain allowable award matters.[36] The CFMEU C&G submit that the allowance should be retained.

48. The third leg of the MBA's primary claim has two parts. The first is that any remaining allowances should be rationalised so as to group allowances under the category of skill, disability and expense related. This part of the MBA's claim is not necessarily opposed as the parties with an interest in the award have already made progress on grouping allowances, albeit on a "without prejudice" basis pending the determinations to be made in these proceedings which may impact on allowances. Therefore the CFMEU C&G submits that as this more of a drafting and technical matter there is no need for the Full Bench to arbitrate this aspect of the MBA's claim and it can be dealt with by conciliation following the determination of the substantive matters.

49. The second part of the third leg of the MBA's primary claim is that the remaining disability allowances should be further grouped on the basis of whether the allowances are composite or cumulative. This part of the MBA's claim is opposed. The CFMEU C&G notes that the MBA originally put forward this claim in the 2012 Award Review, but that it was subsequently withdrawn[37]. In the current Review proceedings the MBA have made no submissions in support, nor have they explained what they mean by "composite".

50. The secondary claim[38] advanced by the MBA in regard to allowances is that if the Commission does not delete the allowance or award clauses that they allege deal with matters covered by WHS laws, then such allowances or award clauses should be amended to remove references to WHS matters. Again the MBA only provide one example and refer to clause 22.2(d) Confined space. The MBA propose that the definition in 22.2(d)(ii) be deleted.

51. The CFMEU C&G submits that the secondary claim advanced by the MBA should be rejected. In the example given the clause is mainly concerned with the payment of the allowance to an employee required to work in a confined space. The definition in 22.2(d)(ii) is needed to provide both employers and employees with an understanding as to when the allowance is payable, consistent with s.134(1)(g) of the FW Act. The definition has provided clarity for both parties and the CFMEU C&G are unaware of any disputation over the

[36] See s.513(1)(h) which set out the types of monetary allowances that could be included in awards under the Workplace Relations Act 1996
[37] See [2013] FWC 4576 at [13]
[38] MBA Final Submission at 8.1

application of this clause in the last 20 years. Removing the definition however will more than likely have the opposite effect.

52. The third claim[39] advanced by the MBA is that if the Commission does not accept the MBA's primary or secondary claim then the Commission should replace any references to WHS matters with generic references. The only example given of a generic reference is a clause dealing with Personal Protective Equipment (PPE). The problem with this proposal is that it will lead to disputation over whether an item of clothing or piece of equipment currently identified in the award is required PPE, e.g. clause 20.1(b) refers to overalls for plasterers and clause 20.1 (b)(vi) refers to three sets of appropriate clothing for mess personnel, are these PPE or only clothing required by the award? Leaving the specific provisions in the award ensures that the award meets the modern award objective, particularly in regard to ensuring an easy to understand and stable modern award (s.134(1)(g)). The CFMEU C&G submit that the third claim advanced by the MBA in relation WHS and allowance matters should be rejected.

Redundancy

53. The CCF[40], MBA[41] and HIA[42] have proposed changes to Clause 17 – Industry Specific Redundancy Scheme (Redundancy Clause). The employer organisations have proposed a number of different variations ranging from the deletion of the entire clause to varying definitions and entitlements under the clause. The CFMEU C&G opposes these applications.

54. The Full Bench recently considered in [2017] FWCFB 584 an industry-specific redundancy scheme in the Black Coal Mining Award. The following comments are relevant to this review:

> *"[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 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*

[39] Ibid., at 9.1
[40] See CCF Submission at pages 3 to 21
[41] See MBA Submission at pages 9 to 13
[42] See HIA Submission at pages 18 to 29

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.

[61] We are satisfied that it remains appropriate for the Modern Award to continue to contain an industry-specific redundancy scheme broadly along the lines of that contained in Clause 14. This is largely because of the long history of the scheme, and its acceptance by employers and employees in the industry over many years.

[62] We are also satisfied that there are certain distinctive features of the black coal mining industry that support the retention of the industry-specific redundancy scheme."

55. The current applications are surprising given the amount of attention the Redundancy Clause was given during:

    (i) The Part 10A award modernisation process that was the subject of the Full Bench decisions in [2009] AIRCFB 50 at [41] and [2009] AIRCFB 345 at [75] to [82].

    (ii) The application by the HIA to vary the BCGOA that was the subject of the decision by Watson SDP in [2013] FWC 4576 at [197] to [205].

56. At the heart of the proposed variations is a change to the definition of redundancy on the basis that the current definition is inconsistent with the overall aims and objectives of the FW Act and the TCR Case.

57. The Redundancy Clause was dealt with extensively during the Part 10A award modernisation process. In the decision releasing the exposure draft of the modern award, the Full Bench in [2009] AIRCFB 50 at [41] stated:

    "[41] The redundancy provisions in the exposure drafts also require further detailed input in light of the current award provisions. A pre-2004 redundancy scale applying to small business employers appears in some awards and NAPSAs in the industry. Most, but not all, awards contain the provision peculiar to the building and

construction industry, which defines redundancy more broadly than the definition arising from Commission test cases and reflected in the NES. The provision applies a slightly different redundancy benefit scale in respect of the first four years of service but does not reflect the current standard for larger employers arising from the 2004 Full Bench decision. The building industry provision also permits an employer to offset its obligations under the redundancy provision by making contributions to a redundancy pay scheme. Our exposure drafts attempt to apply the NES, maintain pre-2004 small business provisions and retain the option of offsetting obligations by contributions to funds. Further input from interested parties is desirable."

(footnotes omitted)

58. Leading up to the consultations on the exposure drafts many parties made submissions on the redundancy provisions to be included in the modern award and made additional submissions during and after the actual consultations.[43]

59. Both the MBA (16th March 2009) and CFMEU (20th March 2009) alerted the Full Bench to the proposed variation to the definition of the industry specific redundancy scheme, in clause

[43] See the following submissions:
CCF -31st October 2008 at p.4
http://www.airc.gov.au/awardmod/databases/building/Submissions/CCF_submission_building.doc
HIA - October 2008 at pp.32-35
http://www.airc.gov.au/awardmod/databases/building/Submissions/HIA_submission_building.pdf
AIG – 31st October 2008 at pp17-20
http://www.airc.gov.au/awardmod/databases/building/Submissions/Aigroup_submission_amended.pdf
CCF – 22nd January 2009 at pp.10-12
http://www.airc.gov.au/awardmod/databases/building/Submissions/CCF_sup_submission_building.doc
MBA -10th February 2009 at pp.9-11
http://www.airc.gov.au/awardmod/databases/building/Submissions/MBA_submission_building_ED.pdf
CFMEU – 13th February 2009 at pp.20-28
http://www.airc.gov.au/awardmod/databases/building/Submissions/CFMEU_stage_2_ED.pdf
ABI – 13th February 2009 at pp.4-5
http://www.airc.gov.au/awardmod/databases/building/Submissions/ABL_build_con_submission_ed.pdf
AIG – 13th February 2009 at pp.20-29
http://www.airc.gov.au/awardmod/databases/building/Submissions/AiG_allstage2_submission_ED.pdf
AWU – 18th February 2009 at pp.3-4
http://www.airc.gov.au/awardmod/databases/building/Submissions/AWU_building_ED.doc
HIA - 19th February 2009 pp.5-7
http://www.airc.gov.au/awardmod/databases/building/Submissions/HIA_building_ED.doc
MBAV - 3rd March 2009
http://www.airc.gov.au/awardmod/databases/building/Submissions/MBA_build_ED.pdf
CFMEU - 11th March 2009 pp.7-12
http://www.airc.gov.au/awardmod/databases/building/Submissions/CFMEU_allstage2_sup.pdf
MBA – 16th March 2009 pp.1-2
http://www.airc.gov.au/awardmod/databases/building/Submissions/MBA_building11.doc
AIG - 18th March 2009 pp.314
http://www.airc.gov.au/awardmod/databases/building/Submissions/AIG_supp_multi.pdf
CFMEU - 20th March 2009 at pp.3-4
http://www.airc.gov.au/awardmod/databases/building/Submissions/CFMEU_bulding_ED.pdf

12 of the Fair Work Bill, from '*redundancy arrangements in a modern award that are described in the award as and industry specific redundancy scheme*' to '*redundancy or termination payment arrangements in a modern award…etc*'.

60. The variation was described in the Supplementary Explanatory Memorandum to the Fair Work Bill 2008[44] as follows:

> "*Industry-specific redundancy schemes*
>
> *66. Item I amends the definition of industry-specific redundancy scheme in clause 12 of the Bill. This amendment makes clear that the full range of industry specific redundancy schemes can be included in modern awards."*

61. This evinces a clear legislative intention that industry specific redundancy schemes which provide for termination payment arrangements were apt to be included in modern awards. The legislature can be taken to have had in mind the termination payment arrangements that had applied in the building and construction industry which were the most notable arrangements that provided payments for terminations that did not fall within the usual definition of redundancy.

62. When the decision was handed down on the Stage 2 awards the Full Bench in [2009] AIRCFB 345 at [78] to [80] stated:

> *[78] The redundancy benefits in the NES had their origin in the Termination, Change and Redundancy Case, (TCR Case) modified in the Redundancy Case 2004. However, award provisions for redundancy in the building and construction industry took a different path, reflecting the particular circumstances of employment in that industry. That arbitral history commenced with a decision in 1989 of a Full Bench,] which applied the TCR Case with modifications to suit the employment terms and conditions applying in the industry. Special provision was included for the accrual of redundancy benefits because of the high labour mobility in the industry. Before an order could be issued, however, some employer parties to the relevant awards obtained an order nisi for prohibition in the High Court. The Full Bench orders, and the High Court proceedings, were overtaken by a 1990 decision which determined what was to become the final form of the redundancy provisions for the building and construction industry. That decision was based on an in-principle agreement between*

[44] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4016_ems_dd180eb6-386c-45eeb5bd-8d4a6a2e5942/upload_pdf/327273sem.pdf;fileType%3Dapplication%2Fpdf

organisations respondent to the awards. Two appeals against this decision were dismissed.

[79] In June 1998, another Full Bench of the Commission considered the redundancy scheme within building and construction industry awards, inserting the provisions in the Building and Construction Industry (Northern Territory) Award 1996, against the opposition of employers. The Full Bench stated:

> *"We are satisfied that the variation of the Award in the terms set out in Exhibit B13 would bring that award into conformity with comparable federal awards that apply generally in the building and construction industry throughout Australia. Those provisions, and …the corresponding State awards, reflect the outcome of a relatively tortuous process of arbitration and negotiation. That process resulted in the development of what was described by several Full Benches as "one general statement of benefits to apply to redundancy in the building and construction industry… ….*
>
> *We are satisfied that it is appropriate, and consistent with the merits of the case, that the award should be varied to reflect what we accept to be effectively a national minimum award or safety net standard condition applicable to the building and construction industry."*

[80] Whilst, as noted in our 23 January 2009 statement, the current award prescription does not reflect the standard for larger employers arising from the Redundancy Case 2004 decision, when regard is had to the slightly more beneficial scale of benefits in earlier years, the broader application of the benefit and the pattern of limited periods of continuous service within the industry to which the building and construction redundancy provisions were directed we are also satisfied that when considered in totality, the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES. In relation to the pattern of service in the industry, we have relied on to the data supplied by Incolink, BERT and CoINVEST contained in the CFMEU submission of 11 March 2009." (footnotes omitted)

63. The above passage from the April 2009 Decision identifies that the Award Modernisation Full Bench was fully aware of the TCR Case and the 2004 Redundancy Case, and the reasons why the construction industry provisions were different.

64. It can be seen in relation to the pattern of service in the construction industry the Full Bench relied on data supplied by Incolink, BERT and COINVEST contained in the CFMEU submission of 11th March 2009. That submission provided as follows:

> "*3.21 The final issue we address in regard to redundancy is the request to provide any statistics on the length of employment of construction workers. The union has sought information from the various redundancy schemes and portable long service leave schemes that operate in the industry as we believe that they would provide a more accurate snapshot of the industry than the more general ABS figures5 that are based on the total employment in the industry which would include own account workers (i.e. sole traders or sub-contractors), and office, managerial and professional workers.*
>
> *3.21 According to the latest figures from the Incolink redundancy fund in Victoria, 42 391, or 70.7% of the 59 959 active employee members, have worked for their current employer for less than 4 years.*
>
> *3.22 According to the BERT redundancy fund in Queensland less than 1.5% of payments to workers have been more than $10 000 (equivalent to 4 or more years service) since 2004. Only 9.2% have been over $5000 (equivalent to 2 or more years employment), whilst 64.2% have been less than $2000 (equivalent to less than 10 months employment). These figure are based on total payments to 42 345 workers.*
>
> *3.23 According to CoINVEST, who operate the construction industry portable long service leave scheme in Victoria, their records since 1999 show the following employment patterns:*

		Years employment											
Trade	**Total**	**<1**	**> 1**	**> 2**	**> 3**	**> 4**	**> 5**	**> 6**	**> 7**	**> 8**	**> 9**	**>10**
Bricklayer	8617	4536	1440	830	512	253	201	138	123	86	91	407
Carpenter	63541	28842	11775	6301	5643	2866	1668	1102	804	721	562	3257
Landscape Gardener	1174	662	196	139	72	39	56	1	3	2		4
Painter	15569	8230	2434	1227	999	618	408	279	224	180	156	814
Parquetry Floor Layer	131	82	16	21	4	1	6		1			
Plasterer	24548	15924	3534	1576	1071	736	389	303	206	165	122	522
Shopfitter	7214	3389	1085	678	504	367	244	165	150	113	101	418
Signwriter	662	260	103	60	55	24	18	20	8	15	10	89
Slater or Roof Tiler	3975	1693	699	423	316	174	134	96	56	62	51	271
Stonemason (On-Site)	525	313	83	33	34	16	17	9	3	3	4	10

These figures demonstrate that only 15 068 or 12.2% of worker engagements are for periods of over 5 years."[45]

65. The HIA attempted to revisit the Redundancy Clause in the 2012 Award Review. No other employers sought to change the Redundancy Clause at that time. The HIA application was unequivocally rejected by Watson SDP in [2013] FWC 4576 at [202] to [205]:

> *[202] The HIA, in supporting its variations argues the issues from first principles, advancing arguments put and considered by the Award Modernisation Full Bench in the making of the Building On-site Award, rather than in reliance on the matters within Item 6, Part 2 of Schedule 5 of the Transitional Provisions Act and without regard to the approach to the 2012 Review set out in the 29 June 2012 Award Modernisation Full Bench decision, which considered preliminary questions as to the approach to be taken in the 2012 Review.*
>
> *[203] The decision of the Award Modernisation Full Bench in respect of the terms of the industry specific redundancy scheme, including its broader application arising from the definition of "redundancy", specifically considered the terms and history of the redundancy prescriptions within modern awards in the building and construction industry and deviations within it from the NES. Most significantly the Award Modernisation Full Bench considered and rejected the suggestion that the definition of "redundancy" should be modified to reflect the NES, the very argument agitated in the current proceedings by the HIA, without identifying any changed circumstances or any other cogent reason to support variation of the Building On-site Award.*
>
> *[204] The decision of the Award Modernisation Full Bench in respect of the small business exemption in the Building On-site Award is consistent with its general approach to the small business exemption within modern awards, reflected in its 19 December 2008 decision in relation to the making of Priority modern awards. The approach taken—that as a general rule the small business exemption will be maintained, except for pre-modern awards and industries in which there was no small business exemption prior to the Redundancy Case 2004—had regard to the full arbitral and legislative history of redundancy pay for employees of small business.*
>
> *[205] The HIA has done nothing more than to re-argue some of the issues raised and determined by the Award Modernisation Full Bench in including in the Building On-site Award the industry specific redundancy scheme, in the terms of clause 17. The HIA has put no cogent reasons for altering the terms of clause 17 of the Building On-*

[45] CFMEU - 11th March 2009, op cit., pp.11-12

site Award which were the product of extensive debate and a considered decision by the Award Modernisation.

(footnotes omitted)

66. Again in these proceedings, the applicants seeking to change the Redundancy Clause have raised no new argument.

67. The HIA argues that that the original modern award proceedings did not address appropriateness but only the question of whether there is an industry specific redundancy scheme.

68. This is a misrepresentation of the original modern award proceedings. As set out above, two decisions of the Full Bench addressed the question of appropriateness both separately and in conjunction with the question of whether there is an industry specific scheme. Indeed as Watson SDP said in again considering the question of appropriateness in the 2012 Award Review at [203],

> *[203] The decision of the Award Modernisation Full Bench in respect of the terms of the industry specific redundancy scheme, including its broader application arising from the definition of "redundancy", specifically considered the terms and history of the redundancy prescriptions within modern awards in the building and construction industry and deviations within it from the NES. Most significantly the Award Modernisation Full Bench considered and rejected the suggestion that the definition of "redundancy" should be modified to reflect the NES, the very argument agitated in the current proceedings by the HIA, without identifying any changed circumstances or any other cogent reason to support variation of the Building On-site Award.*

69. Likewise while a principal question in the original modern award proceedings in 2009 was whether there is an industry specific redundancy scheme, the submissions made by the CFMEU and employers in 2009 also addressed the question of appropriateness.

70. Moreover, the HIA submissions in the 2012 review addressed appropriateness, at least for the home building sector.

71. The Full Bench in the Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788 at [60(3)] stated:

> *The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into*

account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

72. The applications to change the Redundancy Clause are seeking a significant change. For the reasons set out above, these applications should be dismissed.

Time Off In Lieu of Overtime

73. Both the HIA[46] and MBA[47] submissions include claims for the insertion of the model Time Off In Lieu of Overtime (TOIL) provision[48] as determined in the Award Flexibility common matter proceedings (AM2014/300).

74. The very brief submission from the MBA wrongly suggests that the Commission has already made a decision in which they presumed that the model TOIL term should apply to all modern awards.[49] The history of the proceedings in the Award Flexibility case briefly summarised below shows this error.

75. The MBA Submission at 4.5 also claims that there are no features of the industry that would prevent the inclusion of the model TOIL term in the *Building and Construction General On-*

[46] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-hia-021216-.pdf
[47] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-mba-121216.pdf
[48] See attachment C in [2016] FWCFB 4258
[49] MBA submission, 2nd December 2016 at 4.4

site Award 2010 and the *Joinery and Building Trades Award 2010*. The CFMEU C&G disagrees, the project nature of work in the industry, short term contracts, daily hire employment all militate against the inclusion of the model TOIL term.

76. The MBA also make the absurd claim that somehow the absence of TOIL provisions in the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010* denies the building and construction industry workforce, totalling over 1 million people, the opportunity to access an option for greater flexibilities in their workplace[50]. Apart from the fact that the 1 million workforce includes clerical workers, plumbers, architects, engineers, self-employed contractors, etc,, workers who are not covered by either award, the awards do not prevent employers and employees agreeing to include a TOIL provision in an enterprise agreement provided that it passes the BOOT test.

77. Significantly, for these proceedings, the MBA has provided no probative evidence to support the variation that it seeks.

78. In regard to the HIA submission it advances three reasons as to why the Commission should adopt the model TOIL provision:

    - The arbitral history of TOIL provisions in the construction awards should not impose a complete bar on the adoption of a variation.
    - The HIA Member Survey indicates a desire for greater flexibility in relation to hours of work and overtime arrangements.
    - As was found in the Award Flexibility Decision the variation is necessary to meet the Modern Awards Objective.[51]

79. As noted above the CFMEU C&G submit that the Award Flexibility Full Bench made no determination to include a TOIL provision in the *Building and Construction General On-site Award 2010* or the *Joinery and Building Trades Award 2010,* a point recognised by the HIA[52]. The following is a brief summary of those proceedings.

80. Following directions issued by Justice Ross on 6th November 2014, the AIG filed an outline of issues on 13th November 2014[53] in which it identified a number of awards for which it sought the inclusion of a TOIL provision. The list of awards included the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010.*

[50] Ibid., at 4.8
[51] HIA Submission at 3.2.6
[52] HIA Submission at 3.2.4 and 3.2.5
[53] https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300and301-sub-aigroup-131114.pdf

81. The AIG filed a comprehensive submission in support on 18th March 2015[54]. On the same day the MBA sent correspondence to the Commission stating that it supported and adopted the AIG submission and would not be making further submissions.[55]

82. On 23rd April 2015 the CFMEU C&G filed a comprehensive submission in response[56] which set out its opposition to the proposed variations and the reasons why.

83. In correspondence dated 4th May 2015[57] the HIA informed the Commission that it had not made any submissions in the proceedings but indicated that it may seek the indulgence of the Commission to make brief oral submissions at the hearing set down for the following day. At the hearing on 5th May 2015[58] the MBA made brief submissions supporting the AIG (see PN391 to PN422 of transcript) and the HIA's only submission was that it supported the submissions of the AIG and MBA (see PN424).

84. Further written submissions were filed by the MBA (15th May 2015[59]), AIG (18th May 2015[60]) and the CFMEU C&G (22nd May 2015[61]) on the operation of s.144 of the FW Act.

85. On 16th July 2015 the Full Bench handed down their decision[62] in which they made the following comments in regard to the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*:

> ***"[296]*** *As we have mentioned, our provisional view is that the variation of the modern awards listed in Attachment F to incorporate the model term is necessary to ensure that each of these modern awards provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant) and would also be consistent with the object of the Act. We express a provisional view only at this stage because we are conscious that the scope and content of the variations we propose were not fully canvassed during the proceedings.*
>
> ***[297]*** *Three further modern awards make provision for overtime but have not been included in the list of awards in Attachment F. The three awards in question are the Building and Construction General On-Site Award 2010, the Joinery and Building Trades Award 2010 and the Seagoing Industry Award 2010. As outlined in the submission of the CFMEU (C&G), the two construction awards have a particular arbitral history.*
>
> ***[298]*** *Some 55 Federal and State awards were considered during the Part 10A process that led to the making of the Building and Construction General On-Site Award 2010 and of those 55 awards 37 did not contain a TOIL provision. Some 26*

[54] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-aig-180315.pdf
[55] https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300-corr-MBA--180315.pdf
[56] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-cfmeucg-230415.pdf
[57] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-aig-180315.pdf
[58] https://www.fwc.gov.au/documents/documents/transcripts/20150505_am2014300.htm
[59] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-mba-150515.pdf
[60] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-aig-180515.pdf
[61] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-sub-cfmeu-220515.pdf
[62] [2015] FWCFB 4466

Federal and State awards were considered in the process that led to the making of the Joinery and Building Trades Award 2010, and of those only 2 contained a TOIL provision. The CFMEU (C & G) submits that the main pre-reform awards on which the two modern awards were based were the National Building and Construction Industry Award and the National Joinery and Building Trades Products Award (we refer to these as the two pre-reform awards). Neither of the two pre-reform awards contained a TOIL provision and the arbitral history relating to attempts to insert TOIL provisions in those awards is dealt with in the CFMEU (C & G) submissions of 23 April 2015. We briefly summarise this history below.

[299] *In November 1997 the CFMEU filed applications to vary the two pre-reform awards to introduce family leave provisions based on the Family Leave Test Case decisions. The CFMEU and MBA submitted consent orders that only dealt with the personal leave provisions. The issues of TOIL and make up time were to be left to the subsequent award simplification proceedings. Ai Group's supported this consent position. Commissioner Lawson issued orders reflecting the consent position of the parties.*

[300] *The inclusion of a TOIL provision in the two pre-reform awards was subsequently raised in the award simplification proceedings. The TOIL issue was not pressed by either the MBA or Ai Group. The Civil Contractors Federation took a different view and sought the inclusion of a facilitative clause which included TOIL.*

[301] *On 23rd July 1999 Commissioner Merriman handed down his decision on award simplification for the National Building and Construction Industry Award 1990 and addressed the issue of facilitative provisions as follows:*

> *"[43] In conducting the review and in deciding whether a provision is appropriate, the Commission has taken into consideration not only the submissions of the parties, but given the wording of item 51(7)(a):*
>
> *'where appropriate it contains facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees) and how the award provisions are to apply'*
>
> *the Commission must heavily rely upon its experience of the award and its operation.*
>
> *The Commission has had significant experience in the operation of this award in the industry, having been assigned to the panel in 1980 and having sat on a range of matters including Full Benches which have dealt with major disputes in the industry over the last 19 years. In arriving at the decision as to the appropriateness of facilitative provisions in this award, the Commission has had regard to the type of employment, daily hire and weekly, the flexibility of the workforce as it is required to move from work site to work site, the short term nature of many employment contracts and the inter relationship of many different employers working on the same site."*

[302] *The award that was made from this decision, the National Building and Construction Industry Award 2000, did not include TOIL and make-up time provisions.*

[303] *In the decision that made the National Joinery and Building Trades Products Award 2002 it was noted that the award simplification review of the National Joinery*

and Building Trades Products Award 1993 was originally deferred to allow the review of the National Building and Construction Industry Award 1990 and that:

> *"[2] Lengthy discussions between the parties to this award ensued and an agreed position has now been reached as to the contents of a simplified version."*

[304] *The award that was made did not contain TOIL or make-up time provisions.*

[305] *In 2003 the MBA made an application to vary the National Building and Construction Industry Award 2000, which included the insertion of a TOIL provision. The MBA application was referred to a Full Bench which was dealing with 13 other applications. In a decision issued on 23 June 2004 the Full Bench stated:*

> *"**[26]** It seems to have been accepted by the MBA that the CFMEU is in substance correct in its submission that the remaining claims (other than the part-time claim and the casual claim) do not raise novel issues and might be dealt with within the principles already established by test case decisions. Nevertheless we see no cogent reason why those claims should be dismissed at the outset.*
>
> ***[27]** This brings us to the MBA's submission that its application should be joined or heard concurrently with the other applications. We have decided that in all of the circumstances it is more appropriate not to follow either of those courses. The better course is to adjourn the MBA application generally pending the determination of the main applications. There are several reasons for our decision.*
>
> ***[28]** While the part-time claim and the casual claim may be relevant to the area of work and family balance, they also involve issues which do not arise in the main applications. In relation to the part-time claim, the MBA application is concerned with the introduction of part-time work in the context of daily hire employment. In relation to the casual claim, the six-week limitation on casual employment has a particular history which will undoubtedly be relevant to the application. Partly for these reasons, and partly because of the history of the existing award provisions, we have no doubt that joinder or concurrent hearings would add substantially to the time required to hear and determine the main applications. Those applications are already scheduled for 19 days of hearing on evidence alone. Furthermore the program for filing of submissions is well advanced.*
>
> ***[29]** It is fair also to observe, as the CFMEU pointed out, that test case decisions have not always been implemented in the building and construction industry. Although we should not be taken as deciding the point, this lends some support to the view that there are particular aspects of the industry which require special consideration.*
>
> ***[30]** Furthermore, if the MBA application is heard after the main applications have been determined, the decision can be addressed effectively in the building and construction industry context at that time. In saying this we do not intend to limit the MBA's rights of intervention in the main applications. Its evidence and submissions in those applications may deal with the potential effects on the building and construction industry of the various claims*

advanced by the parties and, subject to the bounds of relevance, any other matter.

[31] *This leaves for consideration the remaining claims in the MBA application. On what we have heard we agree with the CFMEU that all of those claims are capable of being addressed by a single member of the Commission. It is a matter for the MBA whether it wishes the whole of the application to be dealt with by the Full Bench. On application by the MBA we are prepared to refer the claims other than the part-time claim and the casual claim, pursuant to s.107(9)(a), to a member to hear and determine."*

[306] *The MBA's TOIL claim was referred for further conciliation. It appears that no further action was taken in respect of this aspect of the MBA's application because of the impact of legislative changes at that time.*

[307] *Given the unusual arbitral history and the particular features of the industry covered by the two construction awards (including the operation of daily hire) we think the most expeditious course is to deal with any application to insert a TOIL provision in these awards during the award stage rather than in the settlement of any orders which may arise` from our further consideration of the provisional model term."*

86. On 28th August 2015 the HIA[63] wrote to the President seeking clarification as to the application of the decision to the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award* 2010. During the hearing on 4th September 2015 the following exchange took place between the HIA and the President:

"PN1515
MS ADLER: Your Honour, I might raise it up front. Our correspondence of 28 August is slightly separate, or we say a separate issue from what you have just addressed. So I don't know whether - - -

PN1516
JUSTICE ROSS: Just bear with me for a moment, Ms Adler. All right. Can I answer in summary terms and see if that - that issue can certainly be ventilated in a later hearing, we are not precluding it. It struck us during the proceedings that led to the earlier decision, you will recall the debate between yourself and Mr Maxwell about the seemingly endless arbitral history of some of these awards, and the comments that are made in the decision that you refer to were really by way of saying that as fascinating as that was we didn't think that we wanted to get involved in it particularly, but there should be an opportunity for the parties to ventilate those issues. That might take place in the award stage of that award, along with a range of other issues, or it could take place in a separate proceeding before us. It's just that on the face of it, it looked like it might take a while and we didn't want to tie everyone else up.

PN1517
A similar issue might arise if this remains the position in relation to the Pastoral Award and the Horticultural Award. The AWU and the NFF as I understand it have said, look there is a complexity to these issues in these awards and we would rather

[63] https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300-sub-HIA-280815.pdf

deal with the question of whether the model TOIL clause goes in to those awards in the award stage.

PN1518

So it's saying nothing about whether it should go in or it shouldn't go in. We have made no decision of that, we have just acknowledged that it seems to be a bit - the debate might be a bit messy, and I am not sure that we want to tie up this Bench particularly, and it might be better suited - there might be a range of substantive issues in those awards that have to be determined anyway by another Bench.

PN1519

MS ADLER: I guess our only sort of question in dealing with it that way was not to have to re-litigate the whole matter of time off in lieu of overtime.

PN1520

JUSTICE ROSS: No. As we said in the early stage we have dealt with the issues of principle, but we acknowledge that - that doesn't preclude the argument in a particular case in favour of a particular outcome. So let me give you an example. We have determined the issue of I think the ten or so awards that AI Group wanted to change the time for penalty or time for overtime to time for ordinary time, and we have said, no, we are going to leave those as they are. That doesn't preclude in any one of those awards in the award phase a party coming along and running a merit case that says, well that time for penalty provision is actually creating a barrier to parties agreeing and they can put an evidentiary case.

PN1521

The same for Mr Nguyen's organisation; he wants to extend the time for overtime, the higher rate, he wants to have that inserted in awards that either don't have a TOIL provision or that have a TOIL provision at ordinary time. Well, they can run an evidentiary case along - it's the analogue of the one that the employers might run - but might say, look, well we've had this time for time in the award forever and here is all this evidence from employees saying they're not seeking it because it's not an appropriate level of compensation. We are not forestalling that sort of individual evidence-based case.

PN1522

If you take the NFF's submission in the current matter, although we are not dealing with it today, they point to a history in the pastoral industry award, and they want to run a merit case that - they're not contesting the model term as such, they're saying it is not appropriate to insert the model term in their award for particular reasons. We always envisage that there would be that opportunity. So you would have that opportunity. No, it won't be re-litigating other than what I have indicated. It may be Mr Maxwell's organisation wants to run all these issues and it doesn't suit - for example in some of the annual leave stuff or make-up time or TOIL - let me give you perhaps a better example. TOIL may not be appropriate in some maritime seagoing awards where they're on the ship. Just as a matter of practicality how does it work there?

PN1523

The same might be said of some of the annual leave model terms. How does it operate when you're in a seagoing environment? You're on the vessel so many months on, so many months off. The same argument has been put by the interests in education. They say, well we have got blocks of time that people take leave. So there might be particular features.

PN1524

MS ADLER: So I can take it then that further directions issued around sorting out those matters would incorporate the construction-based awards?

PN1525

JUSTICE ROSS: Yes.

PN1526

MS ADLER: Thank you, your Honour.

PN1527

JUSTICE ROSS: I would encourage you to have a discussion with the CFMEU and if you have both got a preferred way talk to the MBA, if you have all got a preferred way of - we think this is the most efficient way of dealing with it then I think you can take it we will be sympathetic to that. So, yes, just have a think about it, but we can always call it on for mention and clarify anything before the next step.

PN1528

MS ADLER: Thank you, your Honour."

87. Following further correspondence from the HIA (8th October 2015[64]), MBA (9th October 2015[65]) and CFMEU C&G (14th October 2015[66]) the President issued a Statement[67] on 16th October 2015 in which it stated:

> ***"[3]*** *Correspondence has been received from the Housing Industry Association and Master Builders Australia seeking to vary the directions of 6 October 2015 to include the Building and Construction General On-Site Award 2010, the Joinery and Building Trades Award 2010 (the Construction awards) in the list of awards in which the model TOIL term was to be inserted. The correspondence makes reference to a discussion during the hearing on 4 September 2015 regarding the construction awards. We note that the reference in the course of that exchange to directions being issued related to the Group 4 process, not the current process involving the drafting of determinations for comment.*
>
> ***[4]*** *As stated in the July decision, due to their unique arbitral history, draft determinations inserting the model TOIL provision in these awards will not be prepared as part of the current process. The Construction awards are being reviewed in Group 4 and any debate around the insertion of the model TOIL term in these awards will take place during the award stage in AM2014/260 and AM2014/274.*
>
> ***[5]*** *Further, as mentioned in proceedings on 4 September 2015 we encourage the parties to discuss this and other issues affecting the construction awards."*

88. The above history of the Award Flexibility proceedings makes it abundantly clear that the question as to whether or not a TOIL provision is inserted into the *Building and Construction*

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[64] https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300-corr-HIA-081015.pdf
[65] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014300-corr-mba-091015.pdf
[66] https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300-corr-CFMEU-141015.pdf
[67]

General On-site Award 2010 and the *Joinery and Building Trades Award* 2010 is a matter to be determined by the Full Bench in these award stage proceedings, and that there was no presumption as alluded to by the MBA.

89. There are two other significant points arising from the Award Flexibility proceedings. The first is that neither the MBA or HIA made any comprehensive submissions during those proceedings in support of a TOIL provision. The second is that although the AIG were the main instigators in the Award Flexibility matter they have not sought the inclusion of a TOIL provision as part of the award stage proceedings.

90. The CFMEU C&G remains opposed to the inclusion of TOIL provisions in the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award* 2010. The submissions previously made on the arbitral history, as alluded to by the Award Flexibility Full Bench, are still relevant to these proceedings. The Preliminary Jurisdictional Decision is a clear authority on the relevance of the arbitral history.[68] Further, as already stated above, the CFMEU C&G submit that the project nature of work in the industry, short term contracts, daily hire employment all militate against the inclusion of the model TOIL term. These same factors were taken into account by C. Merriman when he rejected the CCF's application seeking a TOIL term during award simplification.

91. In regard to the reasons advanced by the HIA, the CFMEU C&G has already dealt with the relevance of the arbitral history.

92. The second reason advanced by the HIA is that the "*HIA Member Survey indicates a desire for greater flexibility in relation to hours of work and overtime arrangements*". The CFMEU C&G submit that this proposition is not supported by the HIA Member survey.

93. Before analysing the responses to the survey there are a number of general issues as to its reliability and usefulness that need to be raised. The evidence of the HIA (see the Statement of Kirsten Lewis at paragraph 12) is that the survey was sent to 23,810 HIA members. Of those 23,810 members, only 290 responded, i.e. only 1.2% of their members responded.

94. The employees of 36 of the 290 respondents were covered by awards other than the *Building and Construction General On-site Award 2010* or the *Joinery and Building Trades Award 2010*, and 39 respondents only identified the Joinery and Building Trades Award 2010 as applying to their employees. It is not clear which awards covered another 37 of the respondents as they indicated that either more than one award applied, or no award was identified.

[68] [2014] FWCFB 1788 at [60(3)]

95. A number of the introductory paragraphs to the questions are wrong, e.g. the paragraph on Agreement/Awards (after question 7) makes no mention of the National Employment Standards and the 2nd paragraph under Hours of Work is incorrect as clause 33.1(a)(vii) of the *Building and Construction General On-site Award 2010* allows for a non-RDO system to be worked.

96. A significant failure of the survey is that it did not ask more detailed questions on the employees of the employers, e.g.

    (i) how many of their employees were covered by each of the awards;
    (ii) what classifications their employees were employed under for each award (particularly how many of the employees were apprentices or trainees); or
    (iii) how many were full-time, part-time or casual.

97. The responses from a number of companies are contradictory, e.g.

    (i) 80178, a company with 100+ employees, supposedly covered by the *Building and Construction General On-site Award 2010* refers to contractors in response to question 16 and in response to the question on payment of wages (Q.24) states "*Senior, technical and management staff get paid monthly. Admin, Accounts, clerical staff get paid fortnightly. This is done based on their general ability to manage money*."
    (ii) 80389 says they are a builder with 6-15 employees, covered by more than one of the awards but in response to the payment of wages question states "*one less processing cycle, the are not hired under the onsite award as they are office staff*".
    (iii) 80270 says that they have casual employees but in response to the payment of wages question states that the employee works part-time.
    (iv) 80296 says that they are a builder covered by an EBA, with 1-5 employees, who are casual employees and yet who says in response to Q.22 states that "*we only employ contractors*".

98. The CFMEU C&G has a suspicion that for the majority of the companies that responded to the survey, who say they are covered by the *Building and Construction General On-site Award 2010*, their only employees covered by this award would be apprentices. Unfortunately there is no way to test this supposition as the questions we identified above were not asked, and no further information is provided on each of the companies to identify who they are and what they do.

99. Turning to the specific issue of TOIL, the percentages that the HIA refers to in paragraph 3.3.3 of its submission are misleading and incorrect. Less than 49% (142) of the respondents who say that they are covered by the *Building and Construction General On-site Award 2010*, *Joinery and Building Trades 2010* or more than one award, actually work overtime. Of these companies only 62 had a request from an employee for TOIL, but there is no indication as to what award covered the employee who made the request. Significantly 43 of the respondents whose employees work overtime made negative comments e.g.

"It would make human resources management more difficult"

"It would be difficult to track & fund as the billable hours are linked to a job."

"Big effect we need staff on the ground working"

"Our employees work overtime every day. It is already difficult to close 4 weeks per year."

"Not good, I'd rather pay the overtime than loose manpower."

"Would leave the business short at critical times as employers feel bad rejecting a leave form when the employee wnats the leave to occur souring the relationship. As employees are highly skilled having people to replace during busy times is problematic."

"COULD LOSE A LARGE PERCENTAGE OF THE WORK FORCE TOO OFTEN"

"one should be paid for work carried out. there should be no ongoing affect"

"Difficult to schedule work"

"Not suitable for small business"

"Scheduling of staff is difficult in the construction industry because it doesn't follow a 9-5 pattern. Jobs may become more demanding at times therefore not having all staff available can make things difficult. Work can fall behind in time and therefore the impact of time in leu would hit the bottom line. in short time in leu would be and from experience is difficult to manage."

"It would leave us short staffed and unable to complete jobs"

"It would be difficult to administer."

"Lost productivity"

"it could make it difficult for planning and work flow"

"Not acceptable in my business"

"It would be very disruptive when the employees decided to take that leave. I would prefer to pay them for the hours they do."

"Too painful to manage"

"Being a small business it is hard to manage the production with annual leave and personal leave, not alone adding another cost of administration for accrued overtime."

"Reduces the availability of manpower. Our employees prefer the monetary consideration."

"Disruptive and hard to manage with people wanting time off at inappropriate times and busy periods."

100. The CFMEU C&G submits that the HIA's survey clearly indicates that there is no desire for greater flexibility around working overtime, for those companies actually working overtime covered by the Construction awards.

101. The third reason advanced by the HIA is that the variation is necessary to meet the Modern Awards Objective. In support off this argument the HIA relies on the Award Flexibility Decision.

102. The CFMEU C&G notes that in the Award Flexibility Decision the Full Bench made the following comments,

> *"[256] Further, and contrary to those who oppose Ai Group's claim, we are satisfied that it is necessary to vary those modern awards which do not presently contain a TOIL provision to insert a model TOIL provision (subject to some exceptions we mention later). Such variations are necessary to ensure that the relevant modern awards meet the modern awards objective. We are satisfied that Ai Group has advanced a sufficient merits case in support of such variations, though we have provisionally reached a different conclusion as to the content of a proposed model TOIL clause.*
>
> *....*
>
> *[281] We express a provisional view only at this stage, because we are conscious that the scope and content of the variations we propose were not fully canvassed during*

the proceedings. We propose to provide interested parties with an opportunity to make further submissions – directed at both the model term and the proposition that all modern awards which provide for overtime be varied to insert the model term, subject to some exceptions to which we refer to later. A list of such awards is set out at Attachment F. The process for filing further submissions is dealt with in Chapter 6 of this decision. We will only reach a concluded view in respect of these issues after considering all of the further submissions filed.

....

[291] We are not persuaded that the award modernisation decisions referred to should be accorded 'less weight' than the Family Leave Test Case, as contended by Ai Group. As observed in the Preliminary Jurisdictional Issues decision of 17 March 2014, in the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

[294] For the reasons given we have decided to reject the following aspects of the claims before us on the basis that the variations sought are not necessary to achieve the modern awards objective:

(i) the AMWU's claim to vary the existing TOIL provisions in five modern awards (see paragraphs [145]–[182] above);

(ii) Ai Group's claim to vary 51 modern awards to insert a make-up time provision (see paragraphs [183]–[281] above); and

(iii) Ai Group's claim to vary the existing TOIL provision in 10 modern awards (see paragraphs [282]–[293]).

[295] The remaining aspect of Ai Group's claim – to insert a model TOIL clause into 36 modern awards – has been subsumed by our consideration of a model TOIL provision.

[296] As we have mentioned, our provisional view is that the variation of the modern awards listed in Attachment F to incorporate the model term is necessary to ensure that each of these modern awards provides a fair and relevant minimum safety net, taking into account the s.134 considerations (insofar as they are relevant) and would also be consistent with the object of the Act. We express a provisional view only at

this stage because we are conscious that the scope and content of the variations we propose were not fully canvassed during the proceedings.

[297] Three further modern awards make provision for overtime but have not been included in the list of awards in Attachment F. The three awards in question are the Building and Construction General On-Site Award 2010, the Joinery and Building Trades Award 2010 and the Seagoing Industry Award 2010. As outlined in the submission of the CFMEU (C&G), the two construction awards have a particular arbitral history.

…….

[307] Given the unusual arbitral history and the particular features of the industry covered by the two construction awards (including the operation of daily hire) we think the most expeditious course is to deal with any application to insert a TOIL provision in these awards during the award stage rather than in the settlement of any orders which may arise` from our further consideration of the provisional model term."[69] (Underlining added)

103. The above extracts support the CFMEU C&G's contention that the Award Flexibility Decision did not find that a variation to insert a TOIL provision, in the *Building and Construction General On-site Award 2010* or the *Joinery and Building Trades Award 2010*, was necessary to meet the modern awards objective.

104. The HIA addresses the modern awards objective in section 3.3 of its submission. Surprisingly the HIA fail to address s.134(1)(a). In the Award Flexibility Decision the Full Bench, in dealing with the AIG's application, found that,

"[*230] This consideration is neutral in our assessment of the Ai Group's claim. While a TOIL provision has the potential to address 'the needs of the low paid', by providing a means whereby a low paid employee can balance their work and family or social responsibilities, there is no evidence of a specific demand by low paid workers for a facilitative provision of the type proposed. Further, the submission put in relation to 'relative living standards' is misconceived and unpersuasive. The assessment of relative living standards requires a comparison of the living standards of other relevant groups (such as those covered by enterprise agreements). No attempt has been made to undertake such a comparison*."

[69] [2015] FWCFB 4466

105. In regard to the need to encourage collective bargaining the HIA do not directly address this issue preferring to rely on their claim that "*the residential construction industry ... does not heavily engage in collective bargaining*". That is not the issue; the issue is what impact the variation will have on the need to encourage collective bargaining. In the AIG application the Full bench found that,

> "*[234] We are not persuaded that granting Ai Group's TOIL claim will encourage enterprise bargaining*."

106. In regard to s.134(1)(c), the need to promote social inclusion, in the Award Flexibility case the AIG offered some evidence in support of their application. In these proceedings the HIA have put forward no probative evidence as to how the variation they propose, in the context of the building and construction industry, will promote social inclusion.

107. In regard to s.134(1)(d) the need to promote flexible modern work practices and the efficient performance of work the HIA rely on a number of quotes from the HIA survey. Significantly a number of the quotes are taken from companies that do not work overtime (e.g. 80368).

108. On the other hand the survey shows that a significant number of those companies that do work overtime, and whose employees are covered by the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*, do not believe that TOIL would not be productive and would not promote the efficient performance of work (see paragraph 95 above).

109. In regard to s.134(1)(da) the HIA say that this not a relevant consideration in relation to the proposed variation. The CFMEU C&G disagrees. In the context of the building and construction industry the HIA's own evidence from its survey indicates that inserting a TOIL provision in the awards would be detrimental to employees as some employers would use the provision to their own advantage rather than to the benefit of employees. The following comments are examples :

- 80186 - **It would be better financially as paying overtime is a massive hit to any profit of a small margin**
- 80191 - **That would make work outcomes more manageable**
- 80197 - **We prefer accrued time. It is hard to quote jobs allowing overtime in it.**
- 80215 - **I would prefer time in lieu instead on paying T1/2 or double time**

- 80236 - **It would probably be easier on my cash-flow. It would need to be capped though. Another option is to work overtime and the money accrued is put towards tools of the trade**.
- 80263 - **Save money on penalty rates**
- 80327 - **I could offer more overtime and it would be more cost effective for the Company.**
- 80394 **- I would prefer if time was accrued to take at a time when the business can plan around that time, such as employing a sub-contractor to fulfill that role temporarily.**
- 80426 - **This would be our preferred option. As a small business, the cost of wages can be the difference between a profitable job or not.**
- 80488 - **It only really works if we as an employer have control as to when time accrued can be taken - ie great if we can make it when quieter on work front. Not good if an employee is able to bank up big chunks of extra time to take off - again we do not have enough staff to enable us to do this.**
- 80530 - **Rather extra time off than extra dollars. Can find an extra pair of hands to help f someone is away - cant find extra dollars for overtime.**
- 80566 - **It would reduce the cost of my wages and would be quite beneficial as we do a lot of overtime.**
- 80622 - **"Overtime rates should be reduced. Us domestic builders are struggling to survive. So much so that many builders I speak to simply don't pay overtime, as it makes more sense to risk breaking the law.These sorts of things are not invented by people who live in the real world."**

110. In Regard to s.134(1)(e), the 'principle of equal remuneration for work of equal or comparable value', the HIA claim that this is not a relevant consideration. The CFMEU C&G does not agree. In the model clause sought by the HIA overtime that attracts penalty payments of time and a half or double time is replaced by time that would be paid at single time. From an employee perspective, this is not an equal swap. From an employer's perspective it is also not an equal swap or of equal value, as the value to the employer in having production targets met (which is the usual reason for requiring employees to work overtime) is of far greater value than releasing an employee from the requirement to work when times are slack .

111. In relation to s.134(1)(f) , 'the likely impact … on business, including on productivity, employment costs and the regulatory burden', the CFMEU C&G recognises that

a TOIL provision that provided any time off in lieu at ordinary time rates would obviously reduce one aspect of employment costs (i.e. labour costs). There is however no evidence that it would increase productivity and, according to the HIA's own members, it would increase the regulatory burden (see for example the responses from the employers at 80180, 80195, 80199, 80258, and 80276).

112. In relation to s.134(1)(g), 'the need to ensure a simple, easy to understand, stable and sustainable modern award system …', the HIA at 3.3.19 rely on paragraph [243] of the Award Flexibility decision. The CFMEU C&G submits that this reliance is misplaced, as the Full Bench was considering greater consistency between TOIL provisions and not between a TOIL provision and the absence of a TOIL provision. The need to ensure an easy to understand and stable award system, in the context of the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*, would be better addressed by not making any changes to the overtime provisions in these awards.

113. As to s.134(1)(h), 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy', The HIA at 3.3.21 rely on paragraph [245] of the Award Flexibility decision. The CFMEU C&G notes that the Full Bench said that flexible work arrangements, such as TOIL **may** encourage greater workforce participation which **may** also result in increased economic output and productivity. The Full Bench however did not say that it would. In the context of *the Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*, there is no evidence from the HIA to support such a finding. None of the employers have said that including a TOIL provision will lead to them increasing their number of employees, or that it would lead to an increase in their output. There is also a lack of any evidence from workers or the unemployed (or not employed), that including a TOIL provision in the awards will attract them to applying for jobs covered by the *Building and Construction General On-site Award 2010* or the *Joinery and Building Trades Award 2010*.

114. The CFMEU C&G submits that on any proper consideration of the modern awards objective there is no evidence to show that the inclusion of a TOIL provision would ensure that the awards in question provide a fair and relevant safety net. The HIA and MBA have also failed to show that a TOIL provision is necessary to achieve the modern awards objective as required by s.138 of the FW Act.

115. The CFMEU C&G therefore submits that based on the arbitral history of the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*, the lack of merit from the evidence of the HIA and MBA, and s.138 of the FW Act, the Full Bench should dismiss the applications to include a TOIL provision in the awards.

Junior Rates

116. The CCF and the MBA both seek the insertion of Junior Rates into the *Building and Construction General On-site Award 2010*. The CFMEU C&G submits that not only do the variations proposed lack merit, but more significantly both the CCF and MBA have not met the statutory requirement to justify the variations sought.

117. In the CCF Submission the proposed variation is set out in the draft determination contained on page 37 of its submission. It seeks the following junior rates:

> "*The minimum wages for an unapprenticed or non –trainee junior are:*
>
> | | *% of CW3 level* |
> |---|---|
> | *Between 16 and 17 years of age* | *42%* |
> | *Between 17 and 18 years of age* | *55%* |
> | *Between 18 and 19 years of age* | *75%* |
> | *Between 19 and 20 years of age* | *88%* |
> | *Over 20 years* | *100% of appropriate classification*" |

118. The CCF Submission claims that the predecessor to the *Building and Construction General On-site Award 2010* provided for junior rates and that junior rates were included in the building industry awards before that.[70]They also make the extraordinary claim that,

> "*Junior Rates were universally utilised in the civil construction industry prior to the making of modern awards*."[71]

119. The CFMEU C&G submits that these claims are misleading and factually inaccurate, and that a simple research of the issues would have identified the error in the CCF submission.

120. The junior wage rates in the *National Building and Construction Industry Award 1990* (the award that the CCF refers to) were confined to unapprenticed juniors in South Australia[72] (who were to be paid the same wage rates as apprentices i.e. 45%, 55% 75% and 90% of the trade rate) and juniors engaged in roof tile fixing in Western Australia[73]. The junior rates contained in the *Building Trades (Construction) Award 1987*, a state award from Western Australia, were also limited to juniors employed as roof tile fixers.[74]

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[70] CCF submission at page 22
[71] Ibid., at page 23.
[72] See clause 46, Part I in Print L2807 (https://www.fwc.gov.au/documents/awardsandorders/l2807r.doc)
[73] Ibid at clause 46 Part V
[74] https://www.fwc.gov.au/documents/consolidated_awards/an/an160034/asframe.html at clause 45

121. The history of junior rates in the building and construction industry was discussed during the AIRC Junior Rates Inquiry conducted between 1998 to 1999. In the 1999 Full Bench Report[75] it stated,

> "*2.2.33 Another industry discussed in several submissions was the building and construction industry. Conflicting information provided by the Master Builders Association of Western Australia (MBAWA) and the Construction, Forestry, Mining and Energy Union (CFMEU) has added to our difficulty in understanding the extent and usage of junior and trainee rate classifications in that industry. There seem to be three points of contention in the information received from the CFMEU and the MBAWA: the scope and usage of junior rates in the four major building and construction awards; the usage of the Construction Worker competency-based classifications first introduced in 1995 for implementation by agreement; and the success and types of traineeships in operation in the industry. In relation to the first of those points, the CFMEU's response to the Issues Paper contested an assertion that, in practice, the employment of juniors at junior rates was restricted to shop-fitting, stores and related support operations . The CFMEU pointed out that, in two major awards, the junior rate classification applies to work in all trade (subject to the scope of the awards) in South Australia; junior rates exist also for roof tiling in Western Australia. However, it seemed common ground that, even where available, Unapprenticed Junior rates are not much used in the building and construction industry.*
>
> *2.2.34 The building and construction industry has been a field for variegated federal and State award coverage. An array of State or federally registered unions have played important roles. Prolonged efforts were made throughout the 1980s to secure a relatively uniform standard of minimum conditions for the industry. There are now four major awards, the National Building and Construction Industry Award 1990 (the NBCI Award), the National Joinery and Building Trades Products Award 1993 (the NJBT Award), the Building and Construction Industry (ACT) Award 1991 and the Mobile Crane Hiring Award 1996. Only two have junior rates. Even in those awards however the application is limited. The NBCI Award Unapprenticed Junior classification applies in South Australia (prescribing the same rates and progression by years of service as apprentices); and the Junior Worker classification applies in the roof tiling industry in Western Australia only (prescribing age progression rates based on the year of service progression of the apprentices' rates). The NJBT Award*

[75] Print R5300

Unapprenticed Junior classification applies only in South Australia, prescribing apprentices' rates.

2.2.35 Those relatively isolated junior rate classifications were carried over from awards that were superseded by the making of the NBCI Award. Those awards covered building trades as well as the labour, non-trades construction and fabrication parts of the industry. We examined the Builders' Labourers Federation and the Australian Workers' Union (AWU) federal awards to check for the incidence of junior rates. The only award to contain an Unapprenticed Junior rate classification was the National Building Trades Construction Award 1975. The Unapprenticed Junior classification for South Australia in the NBCI Award can be traced to that 1975 Award, and to a 1967 skilled trades award it had superseded, the Carpenters and Joiners Award 1967.

2.2.36 Thus the arbitral reasoning and principles with which we are already familiar from the review of the Metal Trades Award explain the relative absence of junior rates in the building and construction industry. In 1986, the Amalgamated Society of Carpenters and Joiners of Australia applied to vary the Carpenters and Joiners Award, 1967. The variation sought to give the correct designation of the State Act which governs the training of apprentices in South Australia and to delete the Unapprenticed Junior classification applying in South Australia . Bennett C stated that:

> *"If the Union is successful in its application to have deleted from the Award the provisions for unapprenticed juniors then either those juniors would be dismissed or they will receive the adult rate of pay. The Union has used as its main argument the fact that **the South Australian Act now prevents the employment of unapprenticed juniors in the work of declared trades, and it is a fact that carpentry and joinery are declared**." (Our emphasis).*

The Commissioner declined the application to delete the junior labour provision because:

> *"In a time of high unemployment among young persons and in the absence of any detailed specific information regarding the number of unapprenticed juniors employed pursuant to this Award, I am not prepared to delete the provision regarding this type of labour."*

We were not able to locate a reason for, or any account of, the history of junior roof tilers in Western Australia.

2.2.37 In contrast, the non-trades Builders' Labourer or Construction Hand stream of employment in building and construction industry appears, from the outset, to have been conceived as a kind of able bodied trades assistant paid at full rate. No junior rate was provided by the awards. The principle appears to have been that, whether the work was performed by "lads" or by adults, the award classification should not be used to deter employers or juniors from making use of the apprenticeship system which offered a way to a skill status not available to labourers and assistants. Thus, the first two federal awards made for builders' labourers contained no discounted rate for "lads" and juniors . The reason for the omission is apparent from Higgins J's reasoning in making the first award. It implied that "lads" would be among those employed under the flat rate for all of 1s. 4½ d. per hour he determined for the labourer's classification:

> *"At first sight, the demand for a rate of 1s. 4½d. per hour for labourers seemed to me, as it must seem to others, to be excessive and unreasonable in view of the rates prescribed for skilled tradesmen. For a week of 48 hours this rate would be 11s. per day or £3 6s. per week; and many skilled workmen have to be satisfied with such wages, or even less.* ***I have to keep steadily in view the recognised practice of treating men of special training or gifts as entitled to higher wages than other workers; and I must do nothing to encourage lads in the idea that they will be as well off in life if they do not apply themselves to the attainment of special skill in industrial work, as if they do so****. But the rate asked is only an hourly rate; and the work is casual - not settled and regular, as in most cases before me hitherto. A labourer, if paid 1s. 4½d. an hour will not earn £3 6s. per week, or nearly so much. ..." (Our emphasis).*

To similar effect, Public Service Arbitrator Westhoven in 1937 said about State railway construction work for juniors:

> *"The youth of 19 or 20 strong enough to be, and who is, employed on ordinary construction work is usually paid as an adult."*

However, his remarks concerned an award that included provision for a "Juvenile" classification under which "Nippers" were employed.

2.2.38 The absence of a junior rate for builders' labourer classifications connoted an entitlement for juniors employed under it to be paid the standard minimum. That construction would appear to be long established. Pitman makes reference to Stevens v Bolzon although he appears to have conceived that case to be a leading work value arbitration. That 1969 case, before the Industrial Registrar in South Australia, concerned an employee aged 19. The Registrar construed the relevant award and held that the employee should be paid the adult rate, noting in passing, that if the employer had known this he would not have employed the employee. The report notes:

> *"The awards of the Builders' Labourers Conciliation Committee do not provide special rates for juniors, but merely rates for all builders labourers, irrespective of their age. It followed, the Registrar said, that he must award the unskilled labourers rate to the claimant even though he might consider that this rate was too high for his work."*
>
> (Underlining added)

122. The Full Bench went onto say in regard to the utility of junior rates in the building and construction industry,

> *6.3.14 The building and construction industry does not yet structure employment around daily and weekly customer peak periods in the same way as the retail and hospitality sectors. Of course some seasonality and use of daily hire or fixed term arrangements is characteristic of the industry. Instances include the limitation of engagements to the time taken to complete a construction contract. Most employment in the industry, including fixed term contract employment is on a full-time basis. We accept the CFMEU's comment that the use of daily hire employment means that the full-time characteristic must be qualified. Employment can be structured around weekly or monthly peak periods of demand. As at May 1998, 92% of employed teenagers in the industry were employed on a full-time basis . However, the definition of full-time for that purpose covers any employee who in the reference week worked 35 hours or more in all jobs. An expanded application of junior rates in the building and construction industry could result in expanded opportunities for youth employment, perhaps at the expense of some adult employment. However we think it likely that the days of "nippers" of the kind acknowledged in paragraph 2.2.37 have long since passed. A substantial proportion of such positions could be expected to be full-time in the restricted sense we have used. A critical area of youth labour market concern is the absence of full-time work particularly for young people who most need*

it, the potentially marginalised school-leavers. The history of industry recognition of physically mature juniors as equivalent in work value terms to adults, and entitled to be paid as such, is well established, and an important consideration. It causes the debate about Unapprenticed Junior classifications for the building and construction industry to be very much about why, how, and to what extent there should be a retreat from that position. The rate adopted in the NTW classification, used for some traineeships and apparently apprenticeships, is another aspect of the historical linkage to that valuation of the work of some junior employees. The extent to which the need for experience and acquisition of competency should cause any of the classification options for entry level work to be displaced or modified will involve a closer examination of the function and inter-relation of each of them. Primarily that task, or the exploration of alternative options, must be a matter for the industrial parties to awards and agreements. We have had regard to that consideration, to the nature of the work, and to the effective removal of age discriminatory provisions from the award classification structures generally. Our assessment is that the low `utility of the Unapprenticed Junior classification in the building and construction industry should be acknowledged. The classification is isolated in coverage and almost defunct in practical operation. In our assessment, instead of reviving it, but before replacing it, identified problems of maintaining a reasonable youth share of available employment through the training contract classifications should be considered and addressed in relationship to other options for entry level employment of juniors suited to the work."[76] (Underlining added)

123. The extracts identified above demonstrate that junior wage rates were only ever available under construction awards in South Australia and Western Australia, and were limited to work covered by the trades classifications. Significantly there were no junior rates for the work performed by builder's labourers.

124. In regard to the other awards applying in the civil construction industry, during the award modernisation proceedings the AIRC Registry provided comparative schedules of provisions in relevant awards. One of these tables identified the existence of junior wage rates in federal civil construction awards. The table is attached at Appendix B, which shows that there were no junior wage rates in the civil construction industry awards identified (except for clerical workers covered by the Construction Industry Sector - Minimum Wage Order - Victoria 1997).

[76] Ibid.,

125. As there were no junior rates in federal awards covering civil construction, no junior rates for builder's labourers, and limited junior rates for some building trade work in South Australia and Western Australia, the claim that junior rates were universally utilised in the civil construction industry prior to the making of modern awards cannot be true. It is therefore not surprising that the CCF provide no probative evidence to support this deceitful claim.

126. Whether or not the modern award should contain junior wage rates was a live issue during the award modernisation proceedings. The HIA sought the inclusion of junior rates[77], as did the MBA[78]. During the consultations the CFMEU addressed the issue[79] . The modern *Building and Construction General On-site Award 2010*[80] made by the AIRC Full Bench did not include junior rates.

127. During the consultations on transitional arrangements that followed no party sought the retention of the junior rates. Nor did the MBA include the issue of junior rates in its application to vary the modern award to "*address ambiguities or errors in the modern award*"[81] before the modern award commenced.

128. In the current Review the CCF seek to rely on a survey of its members to support the insertion of Junior Rates. The CFMEU C&G submits that the survey should be rejected as it fails any test of falling within the realm of probative evidence. Circulating an email asking if employers support a particular proposition is nothing more than push polling and does not fall into the category of reliable survey evidence. As only 16.4% of its members responded to the email it could be argued that nearly 84% of CFF members are either indifferent or do not support the position put forward in the email.

129. More importantly, the survey should be given no weight as it is based on a number of false propositions. Putting aside the most obvious mistakes (i.e. the *National Building and Construction Industry Award 2000* was the main predecessor award, and the unapprenticed junior rates in South Australia were higher than the rates proposed by the CCF), junior rates were not eliminated for employees of civil contractors (the overwhelming majority never had that option), nor is there any reliable evidence that the lack of junior wage rates has

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[77] HIA - October 2008 at p.37-38
http://www.airc.gov.au/awardmod/databases/building/Submissions/HIA_submission_building.pdf
HIA - 19th February 2009
http://www.airc.gov.au/awardmod/databases/building/Submissions/HIA_building_ED.doc
[78] MBA -10th February 2009 at pp.8,11-12
http://www.airc.gov.au/awardmod/databases/building/Submissions/MBA_submission_building_ED.pdf

[79] http://www.airc.gov.au/awardmod/databases/building/Transcripts/250209AM200813_amended.pdf at PN1841
[80] http://www.airc.gov.au/awardmod/databases/building/Modern/building.pdf
[81] 2009aircfb989 at paragraph [2]

contributed to skill shortages or the very low number of apprenticeship and traineeships undertaken in the civil construction industry.

130. The facts speak for themselves. According to the ABS the construction industry has the highest number of 15-19 year olds employed on a full time basis:

Mid-quarter month	Age	Industry division of main job: ANZSIC (2006) Rev.2.0	Employed full-time ('000)	Employed part-time ('000)
Nov-2016	15-19 years	Agriculture, Forestry and Fishing	4.97416045	5.8019824
Nov-2016	15-19 years	Mining	2.01983434	0
Nov-2016	15-19 years	Manufacturing	14.49465228	19.32833765
Nov-2016	15-19 years	Electricity, Gas, Water and Waste Services	0.71060877	0.29195674
Nov-2016	15-19 years	Construction	32.80567218	13.11564487
Nov-2016	15-19 years	Wholesale Trade	3.31724555	3.18542322
Nov-2016	15-19 years	Retail Trade	17.66798873	160.0710968
Nov-2016	15-19 years	Accommodation and Food Services	13.37585795	195.261316
Nov-2016	15-19 years	Transport, Postal and Warehousing	1.71867299	7.95391329
Nov-2016	15-19 years	Information Media and Telecommunications	2.09394249	7.60726156
Nov-2016	15-19 years	Financial and Insurance Services	1.84297604	0
Nov-2016	15-19 years	Rental, Hiring and Real Estate Services	2.93906497	2.44234537
Nov-2016	15-19 years	Professional, Scientific and Technical Services	4.98087189	6.05386358
Nov-2016	15-19 years	Administrative and Support Services	2.60336404	9.34197796
Nov-2016	15-19 years	Public Administration and Safety	1.58212914	2.65196854
Nov-2016	15-19 years	Education and Training	2.9944262	19.9847413
Nov-2016	15-19 years	Health Care and Social Assistance	6.93033368	17.2312985
Nov-2016	15-19 years	Arts and Recreation	2.7213489	18.40044907

		Services		
Nov-2016	15-19 years	Other Services	14.53958128	8.95886048

Source: ABS Cat. 6291.0.55.003 - EQ12 - Employed persons by Age and Industry division of main job (ANZSIC), November 1984 onwards

131. The Construction Industry also has the highest number of 20-24 year olds employed on a full-time basis:

Mid-quarter month	Age	Industry division of main job: ANZSIC (2006) Rev.2.0	Employed full-time ('000)	Employed part-time ('000)
Nov-2016	20-24 years	Agriculture, Forestry and Fishing	17.78260147	6.45413413
Nov-2016	20-24 years	Mining	11.47693372	0.591542
Nov-2016	20-24 years	Manufacturing	58.5887226	12.14269555
Nov-2016	20-24 years	Electricity, Gas, Water and Waste Services	6.63317972	2.49316132
Nov-2016	20-24 years	Construction	109.8747171	15.25827967
Nov-2016	20-24 years	Wholesale Trade	18.99065491	8.79370049
Nov-2016	20-24 years	Retail Trade	74.27649952	155.2018003
Nov-2016	20-24 years	Accommodation and Food Services	56.72014058	114.6381019
Nov-2016	20-24 years	Transport, Postal and Warehousing	26.42447841	12.84049157
Nov-2016	20-24 years	Information Media and Telecommunications	13.23853649	4.74347597
Nov-2016	20-24 years	Financial and Insurance Services	17.68899701	5.8762213
Nov-2016	20-24 years	Rental, Hiring and Real Estate Services	15.33744931	5.04672301
Nov-2016	20-24 years	Professional, Scientific and Technical Services	59.2606845	19.66988126
Nov-2016	20-24 years	Administrative and Support Services	16.63803225	12.64070887
Nov-2016	20-24 years	Public Administration and Safety	24.08155431	6.01455644
Nov-2016	20-24 years	Education and Training	30.65191854	38.46499596

Nov-2016	20-24 years	Health Care and Social Assistance	59.46474958	47.17886325
Nov-2016	20-24 years	Arts and Recreation Services	12.30971344	14.12174903
Nov-2016	20-24 years	Other Services	35.3537295	21.17341749

Source: ABS Cat. 6291.0.55.003 - EQ12 - Employed persons by Age and Industry division of main job (ANZSIC), November 1984 onwards

132. According to the most recent ABS figures there are more apprentices and trainees in the construction industry than any other industry:

Apprentices and trainees: Selected characteristics, Persons aged 15-64 years			
	Estimates ('000)		
Industry of current job	**2014**	**2015**	**2016**
Manufacturing	22.7	22.9	17.8
Construction	61.5	72.7	76.8
Wholesale and retail trade	11.1	23.7	9.3
Accommodation and food services	9.8	11.7	8.4
Other services	44.8	41.2	38.9
other	30.6	27.14	28.5

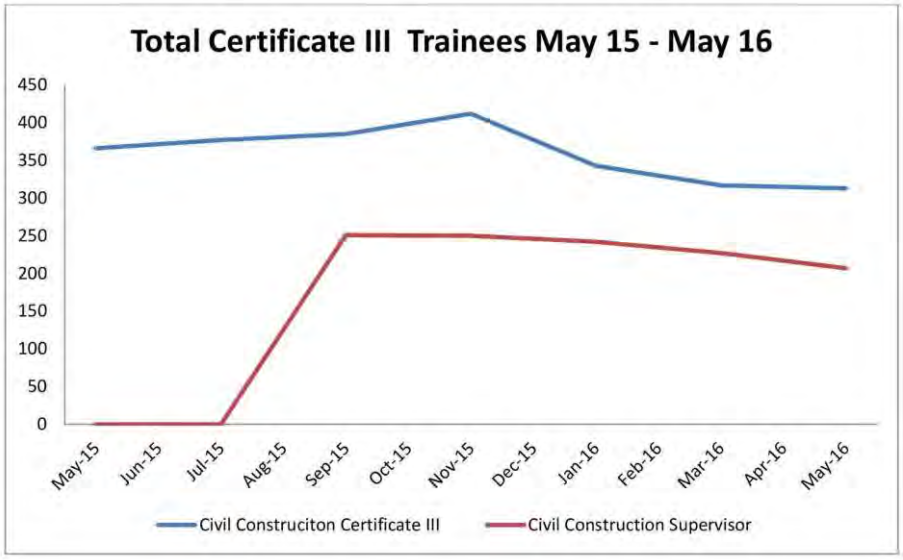
Source: ABS Cat. 62270DO001_201605 Education and work, Australia, May 2016 (table 20)

133. In regard to the civil construction sector accurate figures on the number of trainees are difficult to find (it should be noted that the traineeship qualifications for civil construction are contained in the Resources and Infrastructure Industry Training Package, whereas the relevant apprenticeship qualifications are generally covered by the Construction, Plumbing and Services Training Package).

134. According to a July 2016 article on the Nudge (formerly The Roads Foundation - a for purpose charity that focuses on getting young people into jobs and training opportunities in various industries throughout WA) website[82]:

[82] http://nudge.ngo/

"*Back in May things weren't looking good. There was a 13% drop in Certificate III trainee numbers over the year from May to May and a huge 25% drop from the peak in November. The training for Civil Construction Supervisors data only begins in September of last year so its drop was a more gradual 10%.*



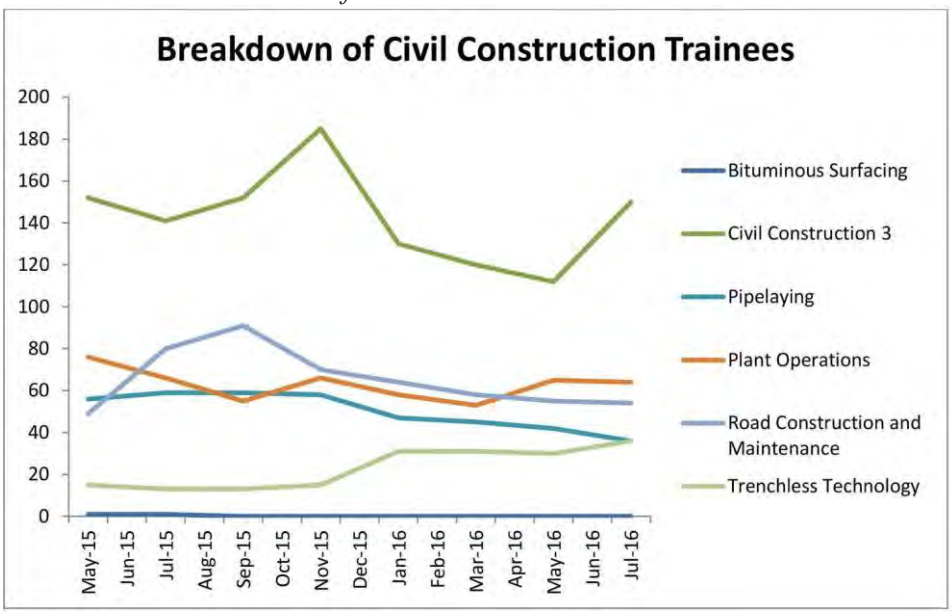
I sat down and started to write a blog post called "Where have all the trainees gone?" I'm sure it was going to be filled with tough questions lamenting the cyclical nature of the civil industry and the self-destructive impact it has on the workforce and young people.

But I paused.

Maybe I should wait for the next snapshot. I knew it would come out soon and I thought things would get worse and I could make my call to action stronger. I've seen the prices coming on tenders. I've spoken with contractors and local governments doing it tough and struggling to keep their existing skilled staff.

The last thing I expected was to see was a big upturn in the number of entry level trainees.

This increase in Certificate III trainees is almost entirely driven by a 34% increase in the general civil construction certificate III.



There are always going to be a multitude of factors that contribute to a change such as this, but one major one must be the commencement of projects with the new Government Building Training Policy in effect.

With a government mandated goal training rate of 11.5% and a civil industry training rate that I've heard estimated at 2% to 8% something always had to budge. The fact that supervisors in training decreased by 17% in the last reporting cycle (May-June) would support the view that in the short term it looks as if companies have responded to the training requirement by putting on entry level workers.

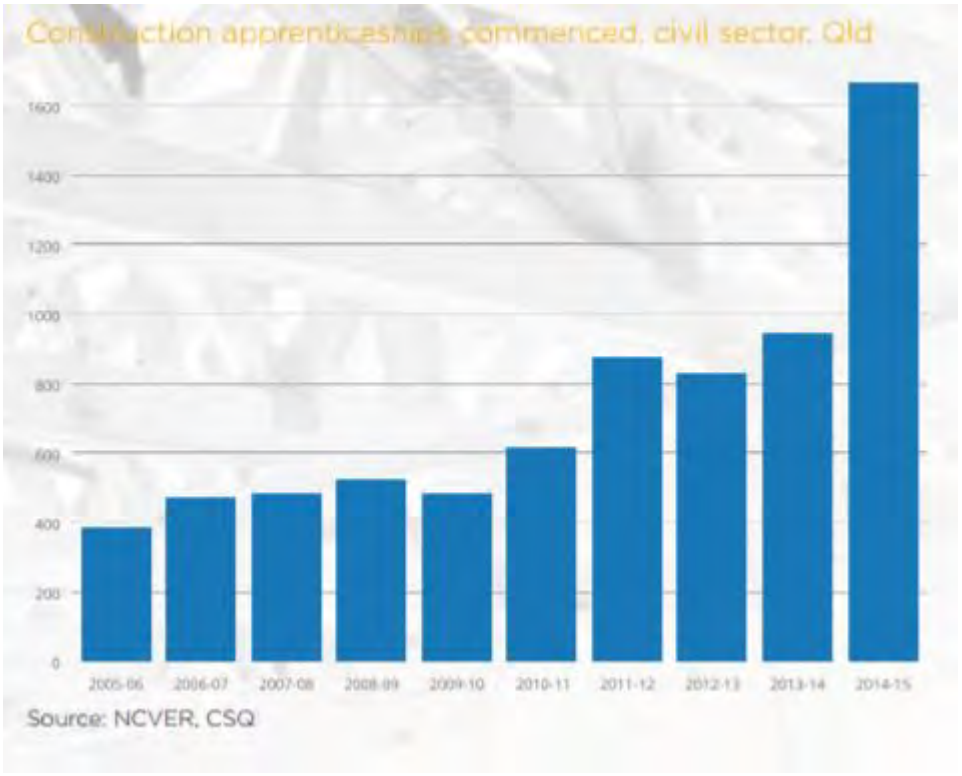
Now whatever headaches arise in the medium term once this cycle of trainees are skilled and no longer contributing to a company's training rate is a legitimate concern, but surely this is a positive sign. In a market where prices are squeezed low and the natural response is to utilise the highly skilled people available we are seeing a balance. A balance that means there won't be a downturn generation skill gap the next time the market is firing."[83]

135. According to the Construction Skills Queensland *2016 Apprentice Annual* report,

"A significant shift has occurred in the distribution of apprentices throughout Queensland's construction industry. The residential sector has historically been the mainstay for apprentices, but the civil sector has taken on a larger share of apprentices in recent years. ……..

[83] http://nudge.ngo/is-the-government-building-training-policy-working/

The data is potentially saying something quite significant about the civil sector's expansion into the apprentice system. The absolute number of apprentices in civil construction (not just the share) is growing strongly. Remarkably, the growth has not slowed since the mining boom. This suggests a more fundamental shift may be underway that is reorienting the focus of construction apprenticeships in Queensland.



[84]

136. The real evidence demonstrates that the absence of junior rates is having no impact on the employment of young people nor the take-up of apprentices and trainees in the construction industry.

137. The overwhelming majority of the CCF submission is nothing more than empty rhetoric without the support of any empirical or probative evidence to support the submission.

138. The MBA submission is surprising for its brevity and lack of reasoning in support of the changes that it seeks. The MBA submission at 7.4 claims that the current award provisions act as a disincentive to both employers and employees. As identified in

[84] http://csq.org.au/csq/media/Common/Knowledge%20Centre/Knowledge%20Centre%20Publications/CSQ-Apprentice-Annual-2016.pdf , p.11 (NB the term apprentices used in the report includes apprentices and trainees –see Defining the 'construction apprentice')

paragraphs 123 to 125 above there is a very high incidence of young people being employed full-time in the construction industry, higher than any other industry, therefore the MBA argument does not stand up to scrutiny.

139. The MBA then claim at 7.8 that junior wage rates would allow young people to gain actual workplace experience in the building and construction sector and provide greater employment opportunities that will increase the chance of those individuals deciding to stay in the sector and pursue a formal trade qualification. Like the CCF, the MBA fail to refer to or provide any empirical or probative evidence to support its submission.

140. Contrary to the picture painted by the CCF and MBA there are already avenues that allow young people to experience the building and construction industry before commencing a full time apprenticeship or traineeship. VET in school and workplace experience programs operate in most States and Territories[85] that give young people an opportunity to sample the construction industry. School based apprenticeships and traineeships and pre-apprenticeship programs are another avenue open to young people and employers. Evidence as to how these operate are provided in the witness statement of Liam O'Hearn (attached at Appendix C). In NSW school based apprenticeships for the building trades undertake 144 days of work-based training over two years while at school.[86]

141. The proposal by the CCF and MBA to introduce junior wage rates flies in the face of the consensus view of Governments, industry and unions, not only in Australia but also internationally, that the best way forward for economic prosperity is to have a well-trained and skilled workforce developed through quality secondary education and vocational training and skill development. In its Report on *A Skilled Workforce for Strong, Sustainable and Balanced Economic Growth*, the ILO said:

> *"The cornerstones of a policy framework for developing a suitably skilled workforce are: broad availability of good-quality education as a foundation for future training; a close matching of skills supply to the needs of enterprises and labour markets; enabling workers and enterprises to adjust to changes in technology and markets; and anticipating and preparing for the skills needs of the future. When applied successfully, this approach nurtures a virtuous circle in which more and better education and training fuels innovation, investment, economic diversification and competitiveness, as well as social and occupational mobility – and thus the creation of more but also more productive and more rewarding jobs. Good-quality primary and secondary education, complemented by relevant vocational training*

[85] https://www.det.nsw.edu.au/vetinschools/documents/work_learn/2016/DEC_EmployerGuide2016-digital.pdf
[86] http://www.sbatinnsw.info/apprenticeships.php

and skills development opportunities, prepare future generations for their productive lives, endowing them with the core skills that enable them to continue learning.

Young women and men looking for their first jobs are better prepared for a smooth transition from school to work when they are given adequate vocational education and training opportunities, including in-work apprenticeships and on-the-job experience. Working women and men periodically need opportunities to update their skills and learn new ones. Lifelong learning for lifelong employability captures the guiding policy principle here."[87]

142. Introducing junior wage rates, with no link to training, is counterproductive to this strategy. As identified in the witness statements of Liam O'Hearn (Appendix C) and Robert Cameron (attached at Appendix D) it will undermine apprenticeships and traineeships and lead to the displacement of older, semi-skilled workers with an army of cheap young labour paid at wage rates that exploit their youth without paying them the proper value of the work that they perform.

143. As noted in the Junior Rates Inquiry,

"*2.7.3 The function of minimum award wages is to be a safety net of fair minimum wages. It is not to ensure that all individual employees are paid wages that precisely reflect their individual value to their employer. However, minimum award wages in Australia are structured as work valued classifications of a hierarchy of work skill and status differentials. The personal classification of juniors according to a simple age progression may deny a junior equal remuneration to that of an adult performing work of equal value*."

144. The junior wage rates proposed by the both the CCF and the MBA are significantly less than the new entrant rate of 85% of the trade rate provided in the modern award. In dollar terms the lowest rate proposed by the CCF is equivalent to $8.96 per hour (42% of the CW3 and 40% of the industry allowance) and the lowest rate proposed by the MBA is even lower at $7.20 per hour (36.8% of a CW1(a)). These rates are even considerably less than the rate paid to a first year apprentice carpenter of $11.97 per hour.

[87] https://www.oecd.org/g20/summits/toronto/G20-Skills-Strategy.pdf p.1-2

145. The new entrant rate of 85% of the trade rate was set in 1995 by then Deputy President Watson of the Australian Industrial Relations Commission. In the decision of 16th January 1995[88], his Honour stated,

> "*The Classification Structure*
> *The testing of the competing proposals now before the Commission necessarily occurs against the structural efficiency principle, the process award restructuring as reflected in the August 1989 National Wage Case decision and subsequent National Wage Case decisions and the decisions of the Building Industry Full Bench in Prints K3850 and K7300.*
>
> *The purpose of the structural efficiency principle, as described in the August 1988 National Wage Case decision:*
>
> *". . . is to facilitate the type of fundamental review essential to ensure that existing award structures are relevant to modern competitive requirements of industry and are in the best interests of both management and workers." [Print H4000, p.6]*
>
> *The August 1988 structural efficiency principle stated, in part:*
>
> *"The measures to be considered should include but not be limited to:*
> *. establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;*
>
> *. eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;*
>
> *. creating appropriate relativities between different categories of workers within the award and at enterprise level;*
>
> *. ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;*
>
> *. including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;" [Print H4000, p.11]*

[88] https://www.fwc.gov.au/documents/decisionssigned/html/l8499.htm

In its February 1989 Review decision, the Commission stated:

"The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation." [Print H0900, p.7]

To further the steps required to ensure stability between awards, the August 1989 National Wage Case decision determined levels of minimum classification rates and supplementary payments to apply to the trades person classification in the building and metal industries, a range of relativities for some other classifications in the metal, storage and transport industries and stated:

"Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed.

The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established." [Print H9100, p.12]

That requirement of consistency of base rates and supplementary payments for comparable classifications across awards features in the Full Bench decision in relation to the current matters.

In my view it is necessary to test whether the classification structures and definitions proposed reflect the way in which work is organised and undertaken in the industry and will be undertaken in the future. Put another way, do the structures proposed provide award structures which are relevant to "the modern competitive requirements of industry"? It is necessary in doing so to take cognisance of the fundamental change in the approach to work in the industry comprehended by new structures determined in accordance with the structural efficiency principle and to

focus on the new classifications and their definitions rather than the traditional narrow jobs performed in the industry in the past.

As noted in the Building Industry Full Bench decision in Print K7300 at page 9, the August 1989 National Wage Case decision has resulted in a fundamental recasting of classification structures, with new structures comprehending a broader range of duties, skills and responsibilities performed by employees under new classification structures.

The different nature of classification structures developed in the context of the structures developed in the context of the structural efficiency principle is apparent in the building industry, as disclosed by evidence in relation to the changed organisation of work undertaken by employees subject to new classification structures operating as a result of enterprise bargaining agreements. Such evidence was provided by Peter Bennett, Robert McGregor, Shane Hunt and Mico Kamenjarin. That evidence supports a movement away from narrow tasks, skills and responsibilities to a broader range of functions and skills within the building and construction process, in the context of broader, skill based classification structures of the kind now proposed by both the CFMEU and MBA. The appropriateness of broader, skill based classification structures was also supported by the MBA submission that it would be of more use to employers in the industry to have people working at its proposed classification level 2, performing the wider range of tasks comprehended by it, than at lower levels within that structure. [transcript, p.1827]"[89]

146. There was substantial evidence put before the AIRC to justify the wage rates,

"The further proceedings involved extensive witness evidence. Evidence was heard from the following persons:

David Baker Crane Crew, Fletcher Constructions
Peter Bennett General Foreman, Sydney Olympics Site
John Bryce Steel Fixer, TK Steelfixing
John Canning Contract Scaffolder/Rigger
Lindsay Fraser Assistant National Secretary, CFMEU
Salvatore Grande Leading Hand Steelfixer, Melbourne Casino

[89] Print L8499 at pp.14-16

Shane Hunt Rigger, Sydney Olympics Site
Mico Kamenjarin CW3, Baulderstone Hornibrook
Warren Kelly Wage Claims Officer, CFMEU
Edward Lapienis Contract Steelfixer
Tom McDonald National Secretary, BWIU (Retired)
Robert McGregor Steelfixer/CW3, Civil & Civic
Darryl Muir Concrete Crew, Melbourne Casino
Reg Pyle Demolition Worker, Aldridge Demolitions
Stan Sharkey National Secretary, CFMEU
Robert Stockton Crane Crew, Fastform MB P/L

The following inspections of work in the building and construction industry were undertaken:

Melbourne Inspections
27 April 1994
. Epworth Hospital, Richmond (Multiplex Constructions)
. Victoria Brewery Refurbishment, East Melbourne (Fina Constructions)
. Melbourne Casino Project (Hudson Conway)

31 May 1994
. Victorian University of Technology, Footscray (John Holland Constructions)
. Greensborough Shopping Centre Development (Civil & Civic)

Sydney Inspections
5 May 1994
. Novotel Darling Harbour (Multiplex Constructions)
. Glebe Island Bridge (Baulderstone Hornibrook)

6 May 1994
. Sydney Olympics 2000 site, Homebush (Civil & Civic)

Further inspections were undertaken on 20 July 1994, in relation to work performed under classification structures in the transport electrical and storing and packing industries:

Westgate Transport - Altona

Coles National Accounting Head Office - Greenwood Park, Burwood
Myer Distribution Centre - Moorabbin.

The Submissions
Whilst I have set out the barest summation of the submissions of the parties, I have had regard to the totality of submissions and evidence, including that put in the earlier stages of proceedings in these matters."[90]

147. In deciding on the rates to apply for the CW1 classification the Deputy President stated,

"*The CFMEU has argued for one further classification level with a substantive relativity of 92.4%, but a new entrant relativity of 88% for the first three months. The MBA has argued for three further classifications – at an 80% relativity, for a limited duration and limited work skills and responsibilities and of relativities of 87.4% and 92.4%.*

There is no serious disagreement as to the need for a classification reflecting an aggregation of skills and responsibilities at a level warranting a minimum rate at a 92.4% relativity to the tradesperson rate, although there are differences in relation to the particular classification definition.

In evaluating the classification structure and definitions appropriate at this level, it is necessary to make some evaluation of the work undertaken in the industry at this level and the nature of the classification structure required to meet the competitive needs of industry. The following considerations are relevant in that context:

- *the evidence now before me suggests that there is little requirement for or usage of the limited tasks and skills and responsibilities reflected in the entry level classification within the Metal Industry Award, at C14 at 78% or at the level proposed by the MBA. The evidence suggests no general requirement for limited tasks of manual material handling and cleaning.*
- *the evidence suggests that employees on entering the industry are expected to exercise a wider range of functions and skills within the first three months that are reflected in the Metal Industry Award C14 classification definition.*
- *the evidence suggests that tasks performed in the building and construction industry, at this level, require a greater level of skill and responsibilities to*

[90] Ibid, pp5-6

perform the same tasks in other industries because of the conditions of work . The term of "the conditions under which the particular work is normally performed" (at page 12 of the August 1989 National Wage Case) must, in the context of the structural efficiency principle, be interpreted as being conditions which affect the skill and responsibility associated with the work performed.

- *there is evidence of a very limited utilisation within the industry of the current builders' labourer 4 classification within the NBCIA. Further, the evidence of Mr Warren Kelly, the CFMEU Wages Claims officer, suggests that from its prosecution of award breaches, many employees classified at this level are in fact under classified in that they perform work comprehended at a higher current classification level. The terms of the current builders' labourer 4 definition "builders' labourers other than specified in classifications (1) to (3) hereof" together with evidence of limited lawful utilisation of the classification, suggest that employees in the industry including new entrants are generally required to perform work as defined in the labourers classifications (1), (2) and (3).*
- *The MBA submitted that:*

  "The building industry at the moment operates on a basically three level structure below trades. There are very few level four labourers in commercial building. They are used in the housing industry and in the country areas." [transcript, p.1818]

  The MBA also conceded that the level of work which can be done at the grade four labourer level is limited and that the classification is not common "and that three subtrades levels are the norm in the performance of skilled work in the industry". [transcript, p.1818]

- *The MBA submitted that it would be "of more use to employers to have people working at the 87% level, doing a wider range of tasks, for which . . . they have either completed that amount of training or they are being trained in doing it and they are practising by doing. Clearly, it would be of more advantage to employers to have people working on the 87% level as soon as possible". [transcript p.1827] In doing so, it confirmed the limited value to the industry of lower level classifications restricting work to a limited range of lower skilled work.*

Having considered the competing structures proposed at these lower skill levels and the submissions and evidence in support of them, I have reached a number of conclusions as follows.

1. There is little need in the building and construction industry for a classification level involving the limited and narrow skills reflected in the MBA's proposed CW0 classification at an 80% relativity (which in any case would warrant a higher relativity based on a requirement for the performance of work up to the level reflected in the Metal Industry Award C13 classification). I have reached this conclusion having regard to:

- *evidence in relation to the type of work expected of new entrants. The evidence of Mr Fraser, Mr Lapienis, Mr Canning and Mr Grande suggested:*
    - *new entrants were also immediately expected to be productive; if not their employment would be quickly terminated;*
    - *new entrants would gradually acquire skills through experience as they were required to carry out different tasks;*
    - *new entrants would be given tasks and expected to carry them out without direct supervision.*
- *my agreement with the MBA submission that in the context of the modern requirements of the industry it would be of greater advantage to employers to have employees performing work with skills and responsibilities at a higher level than is reflected in the MBA's CWO classification;*

2. I am satisfied from the evidence that the performance of even more limited functions in the context of the building and construction industry will require higher skills and responsibilities than when performed in the conditions applying in some other industries, having regard to the conditions under which work is done. Relevant factors in this context include: the limited supervision of employees at this level, the constantly changing work environment both within a particular project and between projects, the consequences of their work for worker and public health and safety, the requirement to respond to unknown situations, the physical conditions of work and the requirement to sequence work in the content of a changing environment. Evidence was provided by Mr Hunt and Mr Muir, both of whom had experience in both a construction industry and factory environment.

3. There should be a substantive classification level involving the skills and responsibilities and training reflected in the CFMEU's proposed CW1 level. That substantive level in my view justifies the relativity proposed of 92.4%, having regard to the skill and responsibility required of the Metal Industry Award C11 classification 92.4%, and in broad terms, the skills and responsibilities reflected in the storeworker grade 2 and transport worker grades 3 and 4, as contained in the National Warehousing and Distribution Interim Award 1993 respectively and the Transport Workers Award 1983 respectively. It is agreed between the CFMEU and the MBA that a classification level at this relativity is required by the industry. There is no dispute between the award parties the requirement for a classification at this skill level in the context of the building industry. In my view the definition proposed by the CFMEU appropriately reflects the skills and responsibilities and training, required at this level.

4. I have concluded that payment of the substantive classification rate, reflecting a 92.4% relativity, requires the meeting of the skill requirements reflected in the CFMEU definition, including the training requirements, rather than payment at this level prior to the meeting of those requirements. In my view payment at this level, only upon the attainment of and ability to utilise as required the substantive requirements of the classification is consistent with the approach reflected in the Metal Industry Award and is consistent with a skill based classifications structure which contains specific training requirements. Accordingly, I have concluded that the CFMEU definition should be amended to reflect payment of the minimum rate at the 92.4% relativity upon the meeting of the substantive requirements of the classification level through training or RPL processes.

5. I have concluded that skill levels and responsibilities below the substantive 92.4% level should be reflected through an entry mechanism attached to the CFMEU's proposed CW1 level (as modified in point 3 above), although not in the way reflected in exhibit ACTU 35, with the entry mechanism providing a means of a skill development in a progressive manner, progressing toward the levels required at the substantive 92.4% level. I have decided that the CFMEU CW1 classification level should be modified, in respect of point 3 above and in addition to provide the following outcome.

Construction Worker Level 1 Relativity to tradesperson

Upon commencement *85%*

After three months in the industry *88%*

After twelve months in the industry *90%*

Upon fulfilling the substantive requirements of CW1, including training requirements reflected in the structured training/RPL requirements, skills and duties and indicative tasks as defined in CW1 in exhibit ACTU 35 *92.4%*

In my view such an approach would reflect the pattern of skill development undertaken, informally in the past and intended to be undertaken more formally in the future, of progressive skill development of employees over time, with the range of tasks and functions performed and skills and responsibilities expanding with training - either formal or informal – and experience. Employees progressing toward the substantive requirements of the classification at a 92.4% relativity would be expected to undertake indicative tasks and duties within the scope of the skills possessed (as reflected by successful completion of training or RPL processes) whilst progressing toward the 92.4% level."[91]

148. The current new entrant rate of 85% was therefore established following a proper work value exercise, carried out in accordance with the evaluation of the work to be performed and the conditions under which work is performed as required by the award restructuring and structural efficiency principles established by the AIRC. The same considerations are required to be followed when varying wage rates in the modern award.

149. Under the FW Act there are specific requirements to be met in regard to varying modern award minimum wages during the 4 yearly review of modern awards, s.156 of the FW Act contains the following provisions:

"Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

[91] Ibid., pp. 22-25

(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. "

150. Neither the CCF or the MBA have provided **any evidence on work value reasons** to justify the wage rates that they propose. As this fundamental requirement has not been met the variations to insert junior wage rates, must on this basis alone be rejected (notwithstanding that the applications are without merit as demonstrated by paragraphs 119 to 144 above).

Fares and Travel Patterns Allowance

151. A number of employer organisations have proposed variations to clause 25 – Fares and Travel Patterns Allowance. The CFMEU C&G opposes all of the variations and submits that they should be rejected as the employer organisations have failed to provide a sufficient merit based argument to upset the principle recognised in the Preliminary Jurisdictional Decision that, "*The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made*."

152. The CCF submission[92] proposes that clause 25 be varied by including the following new subclause:

> "*25.10(a)(iii) the travel allowance prescribed in this clause will not be payable to employees not required to work on a building site as part of their normal duties.*"

153. The CCF provide no evidence to support the problem that they complain of. All its submission does is repeat clauses from pre-modern awards whose coverage was different to that of the modern award (i.e. they were respondency based).

154. It would appear from the CCF submission (at page 50-51) that its concern is in regard to fitters, mechanics and welders who perform maintenance and repair work on earthmoving plant, trucks and other equipment <u>off-site</u> at the employer's premises, sheds and workshops. The CCF concern however is misguided and it is misinterpreting the coverage of the award (it also misinterprets the basis on which the special allowance is paid but this is not relevant in light of what follows in this submission). If the employees do not, at any- time, spend time on a construction site then the award does not cover them. Clause 4.9 of the *Building and Construction General On-site Award 2010* is unambiguous in limiting coverage to work undertaken on-site. The employees in question would only be covered by the award if the work performed was carried out on-site (e.g. to repair a machine that has broken down on-

[92] CCF Submission at pp. 50-55

site), or where the employer's premises, sheds or workshop is established within the confines of a construction site (e.g. a plant yard established on a major road construction project). As the problem they complain of does not exist there is no need to vary the award.

155. The MBA submission raises a related issue at paragraphs 12.1 to 12.11. The MBA claim at 12.2 that what it seeks is a technical wording change to clause 25.2. The variation is opposed by the CFMEU C&G. The wording of the current clause 25.2 was determined by SDP Watson in matter AM2011/49. In the Decision ([2011] FWA 6966) to remove an ambiguity or error, his Honour noted that,

> *"[1] In correspondence dated 27 September 2011 the Construction, Forestry, Mining and Energy Union (CFMEU) and the Master Builders Australia Limited (MBA) asked Fair Work Australia to, on its own motion, vary clause 25.2 - Metropolitan radial areas - of the Building and Construction General On-site Award 2010 (the Award) to remove the comma after the words "construction sector" and before "who is required", so that the clause reads:*
>
> *"An employee, other than an employee in the metal and engineering construction sector who is required to commence or cease work at the employer's workshop, yard or depot other than on a construction site, must be paid an allowance of $16.50 per day for each day worked when employed on construction work, at a construction site located:*
>
> *(a) within a radius of 50 kilometres of the GPO in a capital city of a State or Territory; or*
>
> *(b) within a radius of 50 kilometres of the principal post office in a regional city or town in a State or Territory."*
>
> *[2] The comma following the word "sector" was deleted, administratively, on 31 March 2010 and reinstated, administratively, on 26 September 2011.*
>
> *[3] In response to the CFMEU and MBA correspondence, Fair Work Australia created variation matter AM2011/49, on its own motion, with the proposed variation posted on the Award Modernisation variation page to allow input from interested parties.*
>
> *[4] No organisation or person other than the CFMEU and the MBA expressed a view, either in written submissions or orally in consultations undertaken on 11 October 2011.*

[5] In its 27 September 2011 correspondence seeking that the Award be varied by Fair Work Australia, the CFMEU traced the history of clause 25.2 in the modernisation process and noted that the reinsertion of the comma, administratively, on 26 September 2011, significantly altered the entitlement to the fares and travel allowance under the Award. The MBA, in its 27 September 2011 correspondence, agreed with the CFMEU that Fair Work Australia should of its own motion remove the comma. It advised that the interpretation of the provision without this punctuation differs markedly from its historical application and the MBA have been advising members on its construction absent the comma.

[6] The MBA submitted that clause 25.2 is derived from clause 20.3.4 of the National Metal and Engineering On-Site Construction Award 2002, 2 which excluded those employees in the metal and engineering sector who began or ceased their day at a workshop. The insertion of the comma after the word "sector" in clause 25.2 means that the provision reverses its historical basis: now it only applies to those who begin or cease their day at a workshop and is never payable to workers in the metal and engineering sector. It was for this reason that MBA and the CFMEU advocated the removal of the comma after the word "sector", as it truncated and reversed the meaning of this exception.

[7] The MBA submitted that this altered effect of the clause led the CFMEU and the MBA to support the removal of the comma during the residual variations process, although they proposed different means of achieving the correct effect of clause 20.3.4 of the National Metal and Engineering On-Site Construction Award 2002 in that process.

[8] No other party made a submission on this issue.

[9] It is clear that the re-insertion of the comma in clause 25.2 does alter the effect of the provision, contrary to operation of the clause in the source pre-modern award - clause 20.3.4 of the National Metal and Engineering On-Site Construction Award 2002. The administrative change on 26 September 2011 reflected the approach of the Modernisation Full Bench to residual changes, by which it declined to make residual variations which were opposed. The residual variation in respect of clause 25.2 was taken to be opposed because of the disagreement as to the form the residual variation should take.

[10] However, it is now clear that there is a common position between the major parties - the CFMEU and the MBA - that the inclusion of the comma reverses the

intended effect of the exclusion within clause 25.2 and reverses the historical position reflected in clause 20.3.4 of the National Metal and Engineering On-Site Construction Award 2002. There is now agreement between the parties as to the form of the variation required - the removal of the comma following the word "sector".

[11] I am satisfied that the inclusion of the comma is in error, departing from the approach of the Modernisation Full Bench of incorporating the effect of pre-modern awards into Modern Awards unless there was good reason not to do so. Indeed the effect of the comma is to markedly alter the effect of the clause, contrary to the position in pre-modern awards and as applied in the construction industry. Further, the existing published modern award creates uncertainty as to the operation of clause 25.2, in the context of its historical operation.

[12] Accordingly, the Award will be varied to reflect the position of the CFMEU and the MBA to correct the error and to remove uncertainty. The variation will have effect from 1 January 2010, the date of the residual variation order 3 to overcome the unintended effect of the administrative variations."

156. The variation made by SDP Watson resolved the issue, raised by both the CFMEU and MBA in 2011, therefore no further variation is warranted.

157. The second variation proposed by the CCF to clause 25 is to delete clause 25.8(b).[93] No evidence is provided by the CCF to support the variation. The HIA raise a similar issue but its proposed variation is part of its claim to replace the whole clause.[94] The MBA submission at paragraphs 14.1 to 14.8 also seeks a variation to clause 25.8(b) by the insertion of the words "*and for no other private use*", but again no evidence is provided.

158. As noted by the HIA submission at 6.4.4 to 6.4.6, similar claims by the HIA and MBA were rejected by SDP Watson during the 2012 Award Review. In addition, a similar claim to that now made by the MBA was rejected in a Full Bench decision in *Master Builders Australia* [2009] AIRCFB 989. The Full Bench in that matter said,

"*Fares and travel patterns allowance – provision of transport*

[33] The MBA application seeks to add a new cl.25.8 (c):

[93] Ibid., at pp57-58
[94] HIA submission at paragraph 6.2.1

"In order to be eligible for the allowance prescribed in this clause, the vehicle provided by the employer must be used solely for purposes related to the employee's employment. Where the vehicle is also used for private use or some other benefit, the allowance will not be payable."

[34] The MBA submitted that cl.25.8 of the modern award should be amended to clarify that in order to be eligible for daily fares, the vehicle provided must be solely for purposes related to the employee's employment. Use of the word "sole" would clarify that the eligibility for daily fares must be contingent on the fact that there would be no private use or benefit from provision of the vehicle.

[35] The unions opposed the variation on the basis that it alters the effect of current award provisions.

[36] The variation sought is inconsistent with the terms of cl.38.6 of the NBCIA, upon which cl.25.8 is based. No circumstances have been raised which persuade us to give effect to this variation."

159. The CCF and HIA argue that employees who are issued with a company vehicle free of charge should be excluded from receiving the fares and travel allowance.[95] The MBA submission is slightly different in that it seeks that the provision of the private vehicle does not entitle the employee to use the vehicle for private use.[96]

160. There is substantial arbitral history over the fares and travel patterns allowance in the building and construction industry awards. As early as 1913 the Commonwealth Court of Conciliation and Arbitration awarded traveling allowances to building workers on the basis of the mobility requirements of the industry. In making the "*Archer Award*", Higgins J stated:

"*If workers are employed in a factory, the factory is fixed, and the workers generally can fix their homes in the neighbourhood. If men are employed on the wharves, they can generally reside near the wharves. But in the building trade the job has to be found, now here, now there – wherever houses are to be built; and the workers cannot shift their homes for every new job. Sometimes the job lasts for a few days, sometimes for a few weeks or months*." [97]

161. Until 1957 the concept of "excess" fares and traveling time was also an important factor. As Commissioner Webb stated in his decision to make the *Carpenters and Joiners Award 1962*:

[95] CCF Submission at page 57,
[96] MBA Submission at 14.2
[97] 7 CAR 228-229, per Higgins J

"*For many years the payment of this allowance has continued on the assumption that the building worker, because his work place is variable, must necessarily incur more time and more in fares than a worker whose work place is not variable. In this case this has not been positively proved or disproved*." [98]

162. From that point onwards, the idea of compensation for "excess fares" was formally abandoned, and mobility requirements were regarded as the most important factor.

163. By the 1960s, private vehicles had replaced public transport for many workers in the industry. In a 1967 decision concerning fares and traveling time allowances in the *Builders Labourers (Construction Site) Award* and the *Carpenters and Joiners Award*, Commissioner Matthews said:

"[The Commission] is satisfied that there are transport difficulties and problems arising from either changing worksites in the one employment or in the changing of employers through the ebb and flow of building contracts and the amount of work which particular employers have to offer from time to time. It is further satisfied that the mobility of the work force of particular employers and that of the industry generally is of advantage to employers and that the extensive car use by building workers adds to the advantages created for employers thereby."[99]

164. Commissioner Matthews used an averaging system to assess the quantum of allowances. He said:

"*The Commission emphasizes that its assessment of rates of allowances within the areas specifically mentioned are intended to cater, as average all-round allowances, for work sites situated anywhere within such radial areas. ... With the mobility of the work force stressed by the applicant Unions and the fact that sites will exist where any allowance would not appear justified, because of their favourable location to workers, the advantages and disadvantages of flat rates must be appreciated by the employees concerned, as it is by the Unions who made the claims on their behalf*." [100]

165. The idea of an averaged amount for travel within a particular area has been a continuing feature of the allowances, which have been adjusted annually for the relevant increase in the CPI index.[101]

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[98] 101 CAR 460
[99] 118 CAR 207
[100] 118 CAR 208
[101] See clause 20.4(b) of the Building and Construction General On-site Award 2010

166. In 1975 Justice Elizabeth Evatt issued a decision[102] to make a new national award for building tradespeople, which included NSW for the first time. Her Honour granted a claim for extra payments in addition to the flat rate when employees travelled to a job outside a 50 km radius of the employers "headquarters". The employers had argued for a flat rate without extra payments for travel outside an area or radius.[103] An application for leave to appeal against this decision was refused.[104]

167. In 1979 a Full Bench of the AIRC decided to rename the clause title in the *National Building Trades Construction Award*. The Full Bench stated:

> "*We believe that some of the problems in the minds of the opponents of the clause could be overcome if the clause were given a title more relevant to its purpose. It really does not deal with fares and traveling time. As was pointed out earlier, in 1957 there was a change in the concept of the then existing clause and Mr Commissioner Matthews in fact in his draft changed the title although it was subsequently put back into its present form.*"[105]

168. Previous cases had been marked by inconclusive arguments as to whether travel expenses incurred by building and construction workers were in "excess" of those incurred by workers generally. The Full Bench decided to rename the clause "*Compensation for travel patterns, mobility requirements of employees and the nature of employment in the construction work covered by this award*."

169. That title was retained until 2000 when the *National Building and Construction Industry Award 1990* was reviewed pursuant to Item 51 of Part 2 of Schedule 5 of the WROLA Act 1996. During that review the award parties agreed that it would be expedient to rename the clause in view of the list of "allowable award matters" which had been inserted into s.89A(2) of the Workplace Relations Act 1996. The clause was renamed "Fares and travel patterns allowance", which enabled it to be readily identified as an allowable award matter under s.89A(2) of the Act.

170. Nevertheless, the preamble to the renamed clause stated that the allowance was payable "*for travel patterns and costs peculiar to the industry which include mobility requirements on employees and the nature of employment on construction work*."[106] This wording has been retained albeit in a slightly modified form in the modern award as the last sentence in clause 25.1 states,

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[102] Print No. C7322
[103] ibid, page 10
[104] 168 CAR 89
[105] 229 CAR 634
[106] National Building and Construction Industry Award 2000, clause 38.1

"*The fares and travel patterns allowance recognises travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction work*."

171. From the above history It can be seen that the award fares and travel patterns allowance provisions are based on the following concepts:

- the nature of the industry requires that employees be mobile;
- the mobility requirements are generally of advantage to employers;
- the extensive use of private cars by employees adds to the employer's advantage;
- this warrants additional compensation to cover the time and cost associated with traveling between an employee's residence and a construction site;
- employees cannot be expected to move their place of residence whenever they accept employment on a new construction site;
- employees have the right, within reason, to seek work wherever they choose, and be compensated for traveling expenses;
- the allowances represent an averaged compensation for travel within a defined area.

172. The CFMEU C&G submits that the purpose of the allowance is clear. It compensates employees for variable travel costs and variable travel times in going to and from work at construction sites.

173. The HIA attempt to portray the fares and travel allowance under the *Building and Construction General On-site Award 2010* as something complex and difficult to understand. The CFMEU C&G submits that the opposite is the case, especially in comparison with the complexity of the fringe benefit tax that applies to company provided vehicles.[107] At the end of the day the employers complaint is that they do not like paying the allowance and are looking for any avenue not to pay it.

174. The operation of the award clause in regard to employees provided with transport is summarised as follows: if they are picked up from home and dropped off with someone else driving then they are not paid the allowance (clause 25.8(a)); if the employee is the driver of the vehicle transporting other workers then such worker is paid the fares and travel allowance and is paid for the time taken to provide transport for others (clause 25.1); if the employee is provided with transport i.e. a company vehicle, as part of their contract of employment and is required to drive such vehicle from their home to the construction site and return each day (e.g. because the vehicle contains company tools and equipment) the employee receives the fares and travel allowance (clause 25.8(b)).

[107] https://www.ato.gov.au/General/Fringe-benefits-tax-(FBT)/Types-of-fringe-benefits/Car-fringe-benefits/

175. As for the HIA survey that they rely on to show that employers provide vehicles, there is nothing in the survey that shows employees covered by the *Building and Construction General On-site Award 2010* are provided with vehicles. When the survey results are properly analysed they show that most employers do not provide vehicles and those that do either have on vehicle or provide one as requested.

176. The HIA' interpretation[108] of the 1981 Federal Court decision[109] is, not surprisingly, incorrect (as is the reference they use). The application to be determined in the 1981 case was summarised in paragraph 11 of the decision,

> "*The interpretation sought as set out in the application was that cl. 16.6 should be interpreted in the following manner: "that the provision of a vehicle referred to in par. 3 of the affidavit of T. B. Norris sworn 19th September, 1980, is not provision of transport within the meaning of the said clause where the employee is required to drive such a vehicle from his residence to his location of work and from the location of work to his residence." Alternatively that cl. 17 and cl. 19 should be interpreted in the following manner: "That where an employee is provided with a vehicle and is required to drive such a vehicle from his residence to the location of his work and from the location of work to his residence, as referred to in par. 4 of the affidavit of T. B. Norris sworn 19th September, 1980, the time spent driving such a vehicle is working time beyond the ordinary time within the meaning of the afore-mentioned cl. 17 - Hours, and cl. 19 - Overtime and Special Time.*" (at p361)

177. The Federal Court ultimately decided as follows:

> *24. Accordingly, in our opinion, cl. 16.6 should be interpreted as follows: "that the provision of a vehicle by the employer to an employee free of charge to the employee is provision of transport within the meaning of cl. 16.6 when the employee is required, pursuant to his contract of employment, to drive that vehicle from his home to his place of work and return on any one day." (at p365)*
>
> *25. Counsel for the association contended that the driving of a vehicle in such circumstances by an employee from his home to his place of work and return on any day pursuant to his contract of employment was not and could not constitute "work" under the award and thus the time taken in so driving was not to be counted as "working time" for the purposes of cl. 17 and cl. 19. He referred to the specified classification contained in cl. 10 of the award and contended that since there was no*

[108] HIA Submission at 6.4.15
[109] 54 FLR 358

classification specified as "driver", driving, even pursuant to a term of an employee's contract of employment, did not constitute work. It was, he contended, to be construed as travelling and not as work. (at p365)

26. The true answer is to be found by considering the terms of the contract of employment and the terms of the award providing for payment of wages. The interpretation is sought in circumstances where the employee is required, pursuant to his contract of employment, to drive the vehicle. During other hours of work he performs work admittedly that of a builder's labourer. This must mean that as part of his duties as an employee he is required to drive the vehicle from his home to his place of employment and return on any one day. Put another way, when the employee is driving the vehicle, he is performing a duty required of him by his employer; he is performing an obligation imposed upon him by his contract of employment. Such a man is in our view a builder's labourer within the meaning of the award. Clause 16.9 and cl. 33.8 clearly contemplate an employee performing the work of driving a vehicle as part of a mixture of his work as a builder's labourer and treats him when so driving as being a builder's labourer. The award, by cl. 10, imposes an obligation on the employer to pay wages calculated on a weekly base rate as specified in the clause, the amount depending upon the classification of the particular employee. The weekly rates are based upon the ordinary working time prescribed by cl. 17, augmented when necessary by overtime rates prescribed by cl. 19. In calculating ordinary working time, and where necessary overtime, there is to be included the time taken by the employee in driving a vehicle pursuant to his contract of employment. (at p366)

27. Accordingly, cl. 17 and cl. 19 should be interpreted as follows: "That where an employee is required, pursuant to his contract of employment, to drive a vehicle provided by his employer and free of charge to the employee from his home to his place of work and return on any one day, the time spent so driving that vehicle is working time within the meaning of cl. 17 and cl. 19." (at p366)

178. The importance of the 1981 Case is that it confirmed that if an employee was provided with a vehicle and was required to drive to and from home to the construction site then the time spent so driving was work time.

179. The potential consequence therefore, of the CCF and HIA applications in the current proceedings, is that if an employee is not compensated by the payment of the fares and travel patterns allowance (as currently required by clause 25.8(b)) then they are entitled to payment

as part of their hours of work (presumably at overtime rates). This would increase the costs to employers in the majority of cases.

180. The CFMEU C&G therefore submits that there is no merit to the proposed variations to clause 25.8(b) and they should all be rejected.

181. In regard to the issue of the payment of the fares and travel allowance on the RDO this has been part of the construction awards since the introduction of the 38 hour week in 1982. In an arbitrated decision a Full Bench of the AIRC approved a package of negotiated changes to the award which included the following:

> *"(2) Hours of Work*
>
> *A reduction to 38 hours per week from 24 May 1982, to be worked in a 20 day four week cycle of eight hours per day with the 20th day off on full pay including travel time. The rostered day off is to be the fourth Monday in ach cycle, with provision enabling work to be performed on the rostered day off under certain circumstances*."[110]

182. The HIA have provide no empirical or probative evidence to support a change to the award provision requiring the payment fares and travel patterns allowance on the RDO, therefore their claim should be rejected.

183. The other major changes sought by the employers to clause 25, concern the radial areas. The HIA submission at 6.3 seeks, as far as one can understand the variation, to delete the notion of radial areas and introduce a direct travel distance arrangement (i.e. work in excess of 50km's from an employee's usual place of residence) but only for employees who, when they commenced employment, lived less than 50km from the construction site on which they were initially engaged.[111] The MBA submission seeks to expand the radial areas from 50km to 75km. The CFMEU C&G opposes both variations.

184. The HIA rely on a witness statement of an HIA employee, Kristie Burt who has spoken to less than 4% of its member over the clause in question. This is hardly probative evidence justifying such a radical change that would if introduced lead to great confusion within the industry.

185. The clause proposed[112] seeks to change the calculation of distance from radial areas based on the city GPO or the employers establishment, to a direct distance calculation based

[110] Print E8647 at page 6
[111] HIA Submission at 6.3.3 and Appendix J
[112] Ibid at Appendix J

on the employees home address. It uses the term "distant work" for any construction site beyond 50 kms from an employee's home (which would conflict with the well understood notion of distant work currently used in clause 24 – Living away from home- distant work). The clause then seeks to discriminate between employee's by only paying additional time and allowances (over and above the fares and travel patterns allowance) for "distant work" to those employees who commenced employment within 50 km of the employee's home.

186. The proposed clause is illogical and not well thought out. For example:

- if the accommodation provided by an employer is not on a construction site (which it rarely ever is) but is adjacent to the construction site is the fares and travel patterns allowance still payable?
- If an employee changes their address one week after commencing work with an employer and moves to an address more than 50km from the construction site are they entitled to the additional payments?
- How is the 50km distance to be calculated? Is it the distance by road for those employees who use their own vehicle? Is it the distance by bus and train routes for those employees who use public transport?
- What construction site is to be used for the initial engagement in the case of apprentices/trainees engaged by a Group Training Company?
- If an employee was initially engaged to work on site A but actually started on site B which site is to used for the initial engagement?
- What is the administrative cost going to be to check the employees address at the time of engagement and the address of the initial site on which they were engaged (which may have occurred many years ago)?
- What site is to be used for casual employees?

187. The use of radial areas (calculated from the GPO or employers establishment) is well understood by the industry and has largely been a settled issue since the disputation that occurred between 1988-1990 over the fares and travel patterns allowance and radial areas that led to the decision of Commissioner Grimshaw on 21st August 1990[113].

188. The effect of the HIA proposed clause is that it would reduce existing entitlements of employees as:

- the fares and travel patterns allowance would not be paid on the RDO;

[113] Print J4000

- the fares and travel patterns allowance would not be paid to employees required to drive a vehicle form their home to work and return as part of their contract of employment;
- the fares and travel patterns allowance would not be included in the calculation of the annual leave loading;
- employees travelling outside radial areas and travelling between radial areas, whose initial site was more than 50kms from their home, would not receive the additional travel time and km allowance for using their own vehicle (e.g. an employee living on the central coast north of Sydney, whose initial site was Barangaroo (76.3 km via the M1), would receive no extra payment other than the standard $17.43 per day fares and travel patterns allowance if their next job was in Camden (124.1 km via M1 and A3) or Kiama (186.5 km via A6 and M1) .

189. The alleged confusion of less than 4% of the HIA's members in the ACT and southern NSW is no justification to reduce award entitlements.

190. A similar application to replace clauses 25.2 to 25.8 was brought by the HIA during the 2012 Award Review[114]. SDP Watson refused the HIA application stating:

> *"[234] 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 the submissions of interested parties, including, at the exposure draft stage, reflecting a formulation of travel and distant work provisions of the MBA.*
>
> *[235] The HIA brought no evidence of practical problems arising from clause 25, no evidence of changed or otherwise significant circumstances, nor any evidence to support substantive changes to the operation of the provision, through the variation it proposes by reference to the modern awards objective, or by establishing an anomaly or technical problem. No cogent reason has been advanced to vary clause 25 in the manner proposed by the HIA. This variation is refused*."[115]

191. The CFMEU C&G therefore submits that the HIA's proposed clause should be rejected.

[114] 2013 FWC 4576 at [228]
[115] Ibid.,

192. As to the MBA claim to increase the radial areas to 75 km[116] the ground relied upon by the MBA are preposterous. They submit that time taken to travel within or between radial areas has changed from that which was relevant when the provision was first applied. They seek to infer that the travel times have reduced and that this warrants an increase in the radial area.

193. Attached at appendix E is a witness statements from Brendan Holl who travels on a daily basis across metropolitan Sydney. His evidence is that travel times have increased over the past 10 years.

194. His evidence is supported by the research of the NRMA who say that

> "*Traffic congestion and transport costs are burdening commuters right across NSW, but it is the residents of Western Sydney who are suffering the most.*
>
> *More than 90 per cent of Western Sydney businesses said their vehicles were confronted with worse traffic on Sydney's roads over the past year, while students living in the region are facing increased expenditure because of the public transport ticketing system that was meant to save them money.*
>
> *An NRMA survey of 451 Business Motoring Members in Western Sydney found that 38 per cent of business vehicles spent an extra one to three hours sitting in traffic per day and almost one third had lost sales because they could not reach clients due to congestion*."[117]

195. According to a recent 2015 information sheet by the Bureau of Infrastructure, Transport and Regional Economics,

> "*Under scenarios of future urban road provision roughly continuing at average historical levels, expected traffic increases would typically lead to average delays on metropolitan road networks continuing to increase at a fairly comparable rate to VKT (around 2 per cent per annum out to 2030; also roughly similar to the historical average trend).*"[118]

196. There have also been numerous newspaper articles and reports on the increased traffic congestion is being experienced across the country, e.g.

[116] MBA Submission at 13.1 to 13.4
[117] https://www.mynrma.com.au/get-involved/advocacy/news/sydney-s-west-cops-congestion-and-costs-rises.htm
[118] https://bitre.gov.au/publications/2015/files/is_074.pdf

'*Peak hour in Sydney is getting worse and longer data shows'*; SMH March 2016; http://www.smh.com.au/nsw/peak-hour-in-sydney-is-getting-worse--and-longer-data-shows-20160310-gnftvd.html

'*Brisbane Traffic getting worse..but it's not all bad news'*, Courier Mail, March 2015 http://www.couriermail.com.au/news/queensland/brisbane-traffic-getting-worse-but-its-not-all-bad-news/news-story/aecd18790cadc9ee09900c573ea0e2ba

'*Melbourne's long hard road ahead: freeway traffic on course to double in 20 years'*, The Age, 19 February 2016; http://www.theage.com.au/victoria/melbournes-long-hard-road-ahead-freeway-traffic-on-course-to-double-in-20-years-20160219-gmyhv1.html

'*Adelaide's Most congested roads'*, SA Motor, Autumn 2016 http://www.raa.com.au/membership/read-samotor/2016/Autumn/adelaides-most-congested-roads

'*Demand on the road network has increased and traffic congestion is predicted to get worse'*, Office of the Auditor General, Western Australia, 26 March 2016 https://audit.wa.gov.au/reports-and-publications/reports/main-roads-projects-address-traffic-congestion/demand-road-network-increased-traffic-congestion

197. The CFMEU C&G would also point out that the predecessor modern awards contained different radial areas depending on the State that the employee was working in. Under the NBCIA 2000 the 50km radial area applied in Victoria, QLD and Western Australia[119]. A 30km radial area applied in Tasmania and South Australia,[120] and in NSW in the greater Sydney metropolitan region county boundaries were used for the counties of Cumberland, Northumberland and Camden, and a 50 km radius for Penrith, Newcastle or Campbelltown[121]. In country NSW a 50km radius applied.[122] In the Building and Construction Industry (ACT) Award 2002 a 30km radius applied[123] and in the Building and Construction Industry (Northern Territory) Award 2002 a 32km radius applied[124]. The national common standard of a 50km radius was set by the AIRC Award Modernisation Full Bench. It should

[119] Clause 38.1.1
[120] Clauses 38.1.2 and 38.1.3
[121] Clause 38.1.4
[122] Clause 38.3
[123] Clause 14.6.9(a)
[124] Clause 8.2.1

also be noted that the clause proposed in the exposure draft of the award by the AIRC, was based on a clause initially proposed by the MBA.[125]

198. The CFMEU C&G submits that the MBA have provided no empirical or probative evidence to justify such a significant change (i.e. a 50% increase in the radial area with no commensurate increase in the allowances), the proposal lacks merit, therefore the claim must be rejected.

Ordinary Hours of Work

199. The MBA Submission at paragraphs 17.1 to 19.5 seek to change the ordinary hours of work provisions in clause 33. The HIA submission at 8.2.1 to 8.2.4 also seek to vary the hours of work clause.

200. The MBA seek to change the wording in clause 33.1(a)(ii). The proposed variation is opposed by the CFMEU C&G as it is not necessary and the MBA have provided no evidence to support the variation.

201. The MBA seek to change the wording in clause 33.1(a)(iii). The proposed variation is opposed by the CFMEU C&G as it is not necessary and the MBA have provided no evidence to support the variation. There is nothing preventing an employer and a majority of employees to agree on banking RDO's through an enterprise agreement.

202. The MBA seek to change the wording in clause 33.1(a)(iv). The MBA have provided no evidence to support the variation. The proposed variation is opposed by the CFMEU C&G as it reduces an existing entitlement. Under the existing clause <u>if there is no agreement between the employer and the employee to substitute an RDO, and the employer still requires the employee to work on the RDO</u> then the employee is paid the accumulated entitlements for the RDO (i.e.7.6 ordinary hours) plus penalty rates based on Saturday penalties (i.e. time and a half for the first two hours then double time) for the hours worked. The provisions contained in the MBA's proposed clause reduce this entitlement. The proposed clause provides no flexibility for the employee as the employee is being directed to work on the day.

203. The HIA seeks to vary clause 33 – Ordinary hours of Work to allow for the averaging of hours of work; to allow RDO's to be rostered on different days for different employees; and to allow individual agreement on the banking of RDO's[126]. The proposed variation is opposed by the CFMEU C&G.

[125] See paragraph [43] of 2009 AIRCFB 50
[126] HIA Submission at 8.2.3

204. The hours or work provisions to be included in the modern award was a matter before the AIRC during the Part 10A Award modernisation proceedings. The AIG sought more flexible provisions[127], as did the HIA[128], ABI[129], AFEI[130], and MBA[131]. the CCIWA made a submission on 31st October 2008 calling for the averaging of the 38 hour week over an extended period, saying it was necessary for work carried out on a fly-in/fly-out basis.[132] The CFMEU opposed the employer submissions[133]. The AIRC Full Bench decided on the provision now contained in the *Building and Construction General On-site Award 2010*.

205. In the 2012 Award Review the CCIWA and the HIA again sought to change the hours of work provisions. In rejecting the CCIWA application SDP Watson said,

> "*The variation sought by CCIWA extends well beyond the issue of accommodating the off shift within roster arrangements, resulting in a reduction in payment in respect of Monday to Friday hours and a diminution of the safety net reflected in the current terms of the Building On-site Award. The diminution of the safety net, by reducing overtime payments otherwise payable for daily hours beyond eight per day (where RDOs accrue), would impact directly upon employees to whom the Building On-site Award applies and indirectly in relation to agreement making, in that the reduced application of overtime payments could occur without compensating benefits which would otherwise be required for agreement approval in order to meet the better off overall test."*[134]

206. In regard to the HIA application SDP Watson said,

> *"[259] The HIA submitted that there are working hour scenarios that cannot be accommodated by the current provisions within the Building On-site Award—providing hypothetical examples of rosters for work, week one being Monday to Thursday of 10 hours a day or Monday to Saturday working eight hours a day and week two being Monday to Thursday at seven hours a day. It submitted that such working arrangements can be accommodated within other related modern awards—in the Manufacturing Award, the Timber Industry Award and the Joinery Award.*
>
> *[260] The CFMEU, and the other unions, opposed the variation proposed by the HIA. The CFMEU submitted that the hours of work provisions that are proposed to be included in the*

[127] See AIG Submission of 13th February 2009 at paragraphs 118-119
[128] See PN1489 to 1492 of transcript of 24th February 2009
[129] See PN1580 of transcript of 25th February 2009 and written submission of 13th February 2009
[130] See http://www.airc.gov.au/awardmod/databases/building/Submissions/AFEI_build_con_submission_ed.pdf
[131] See http://www.airc.gov.au/awardmod/databases/building/Submissions/MBA_submission_building_ED.pdf
[132] http://www.airc.gov.au/awardmod/databases/building/Submissions/CCIWA_submission_building_2.pdf at paragraphs 27 to 32
[133] See PN1916 to 1927 of transcript of 25th February 2009
[134] 2013 FWC4576 at [115]

Building On-site Award were in issue before the AIRC Full Bench and the Part 10A award modernisation process, with the Ai Group, HIA, ABI, Australian Federation of Employers and Industry and MBA seeking more "flexible" provisions. It submitted that the matter now raised by the HIA was clearly a matter before the Award Modernisation Full Bench. Further, it submitted that the HIA brought no evidence in regard to the working of the hours suggested by the HIA notwithstanding the prevalence of enterprise agreements in the building and construction industry, which would support such arrangements if they applied in the industry. It submitted that there is no sufficient reason to vary a matter determined in the Part 10A award modernisation process.

[261] The HIA submission re-argued the basis of the hours provision in the Building On-site Award, a matter specifically considered by the Award Modernisation Full Bench when making the Building On-site Award. The HIA provided no evidence of changed circumstances, the effect of the current award provisions at a practical level or other cogent reasons to support the variation of the provision determined by the Award Modernisation Full Bench in light of similar arguments advanced before it during the Part 10A award modernisation process. No cogent reasons have been established to vary the hours provision in clause 33—Ordinary hours of work. This variation proposed by the HIA is refused."[135]

207. In the current application the only evidence relied on by the HIA is its survey of members and a reference to individual flexibility agreements (IFA's) made by its members. As previously mentioned there are significant problems with the reliability of the HIA survey. In regard to the issue of hours of work the overmhelming majority of the employers who responded either work an RDO system or a short Friday which are alloed under the current award.:

208. The suggestion in the HIA Submission at 8.4.5 that the use of an RDO system is mandatory under the award is incorrect and rejected. Employers and employees can make alternative arrangements by way of an IFA or reach majority agreement on a non-RDO system under clause 33.1(a)(vii). As the HIA submission shows its members already make use of these provisions.

209. The assertion at 8.4.15 of the HIA submission that the costs of making an IFA are significant is rejected. There is no evidence from the HIA to justify this assertion. We suspect that the real cost that it complains of is having to ensure that employees are not coerced and ensuring that employees are better off overall at the time the agreement is made.

[135] Ibid

210. As paragraph 8.4.17 of the HIA submission reveals, the costs the HIA members complain of is having to pay a higher rate of pay to incorporate working hours that would otherwise attract overtime penalty rates. Viewed through this prism the real intent of the variation sought by the HIA becomes clear, it seeks an averaging system so that employers can pay ordinary rates for working hours that under the current award attract penalty rates. What is sought is a reduction in employee entitlements that would reduce employee earnings. In other words, a reduction in the existing safety net of fair and relevant minimum terms and conditions established in the award modernisation proceedings. Such a significant change would require more substantial evidence than a suspect employer survey to justify making employees worse off. Significantly the HIA have provided no evidence as to the impact of the changes proposed on employees.

211. The CFMEU C&G therefore submits that the HIA proposed variations to clause 33 should be rejected.

Payment of Wages

212. The HIA submission at 7.2.1 seeks to vary the *Building and Construction General On-site Award 2010* to allow the payment of wages to be paid on a weekly, fortnightly or by mutual agreement on a monthly basis. The HIA generally relies on the comments from its member survey as evidence that such a change is warranted.[136] The CCF seeks to vary the *Building and Construction General On-site Award 2010* to allow for weekly or fortnightly pay.[137] The CCF provide no empirical or probative evidence to support its variation. The MBA seek the variation of the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010* to reflect the model term determined in AM2016/8.[138] The MBA Submission at 16.4 to 16.7 also seeks to delete the provision contained in clause 31.2 that allows employees who are paid by cheque time during working hours to cash the cheque. The MBA provide no empirical or probative evidence to support its variations. The CFMEU C&G opposes all of the proposed variations.

213. The HIA survey is hardly conclusive evidence. As previously mentioned there are serious defects to the survey including issues such as which awards actually cover the workers engaged by the employers and whether the workers they are describing are employees or contractors. The survey shows that weekly payment of wages is the norm and, to the extent that one can rely on the employers accurately reflecting the views of the workers, is preferred by employees. (e.g. see the responses for 80180, 80184, 80185, 80186, 80191, 80195, 80196, 60197, 80211, 80217, 80220 and 80224).

[136] HIA submission at 7.4.16
[137] CCF submission at pp. 39-41
[138] MBA Submission at paragraph 16.3

214. It would appear from the survey that the only workers paid monthly are by the employers identified at 80178 – who does not appear to employ any tradespeople or labourers; 80251 - which is a partnership with casual employees who would be in breach of the award; and 80434 - a manufacturer who would be in breach of the award.

215. What the CFMEU seek to retain is not a new concept, but rather one that has been the usual practice, especially in the building and construction industries, for well over 100 years of award regulation. They are provisions that have been recognised by previous tribunals as being fair and justified where such provisions were inserted into awards in exercise of conciliation and arbitration powers, and which to date have been recognised by the AIRC and this Commission as being part of a fair and relevant safety net of terms and conditions that met the modern awards objective.

216. In *Building and Construction General On-site Award 2010* ([2010] FWA 2894), Senior Deputy President Watson, in dealing with an application by Simpson Personnel Pty Ltd to vary the payment of wages provision in that award, considered the modern awards objective. Significantly, SDP Watson found that,

> *"[33] Section 134(1)(d) in my view relates to "flexible modern work practices and the efficient and productive performance of work" of employees covered by a modern award. The frequency of the payment of wages would not impact on the performance of work of building employees. To the extent that it impacts on the work of administrative staff, covered by another modern award, it will affect the volume of work, rather than the efficiency and productiveness associated with the work or work practices. Further I am not satisfied that the payment of wages will invoke consideration under s.134(1)(h) which is directed to the impact of modern awards on "the national economy"."*

217. The CFMEU C&G notes that SDP Watson then went on to consider s.134(1)(f) and found that the payment of wages and the frequency thereof would impact on employment costs and the regulatory burden, but he did so on the basis that,

> *"[34] .....A greater frequency of payment will increase administrative costs of employing labour and impose a greater regulatory burden, which should be avoided, particularly in circumstances where employees have been subject to less frequent payment under previously applicable award-based transitional instruments.*
>
> *[35] In relation to s.134(1)(f), if the applicant, and other employers, have paid wages fortnightly in compliance with relevant pre-modern awards or award-based*

transitional instruments, there is force in an argument that a requirement to now pay weekly would conflict with the modern awards objective in relation to employment costs and regulatory burden <u>in circumstances where relevant employees would suffer no detriment through continuation</u> of fortnightly payment". (Underlining added)

218. In the decision SDP Watson referred to the content of pre-modern award instruments and noted that "*the payment of wages provisions of those instruments are predominately in the terms of clause 31, in respect of both the frequency of payment and payment for periods in which employees are kept waiting for their wages*."[139]

219. He further observed that,

"[46] It should be noted that modern awards have been made with regard to pre modern awards and award-based transitional instruments previously governing the relevant industry. It follows that reliance on provisions in other awards, determined in the particular circumstances of the relevant industry, are of limited assistance. In this regard, the provision for and high incidence of daily hire employment within the building and construction industry provided a context in which the payment of wages provisions in pre-existing instruments and the 2010 Modern Award were determined. In this context, it may be noted that the Stage 2 award modernisation Full Bench invited interested parties to address it on the continuing role of the unusual daily hire mode of employment in the building and construction industry. Those parties who addressed the issue strongly supported the retention of the daily hire mode of employment within the industry, given it remained a form of employment traditionally used in the industry and in light of the project-based nature of the work."

220. SDP Watson then went on to say that,

"*I am not satisfied that making a determination varying the 2010 Modern Award generally, as sought by the applicant or its supporters, is necessary to achieve the modern awards objective. I am, however satisfied that a variation permitting employers, who were availing themselves of a longer frequency of payment permitted by a relevant award or award-based transitional instrument applying to them immediately before the making of the 2010 Modern Award, to continue to do so is necessary to achieve the modern awards objective.*"[140]

221. In regard to the MBA application, The CFMEU C&G does not support the model term. The model term amounts to the loss by employees of their entitlement to be paid on

[139] Ibid at [38]
[140] Ibid at [50]

termination. Under the *Building and Construction General On-site Award 2010*, all monies due to the employee must be paid at the time of termination or, where this is not practicable, the employer has 2 working days to send the monies due by registered post or transfer the monies due into the employee's account if they are paid by EFT (clause 31.4). The provisional default fund would extend the period to within 7 days after the employee's last day of employment.

222. The CFMEU C&G is extremely concerned by the potential impact on employees if such provisions are altered in a manner adverse to employees. Whilst we accept that the Commission has already decided that there is a need to balance the competing requirements of the modern awards objective and that not all of the objectives will apply in the consideration of a particular matter, we do not believe that this allows the Commission to ignore the effects or impacts on employees. The Commission is obligated to consider fairness having regard to both sides of the employment relationship.

223. To say that employees have an expectation to be paid out their entitlements immediately on termination, especially where termination is at the initiative of the employer should not require explanation or evidence. There is over 100 years of award regulation particularly in the building and construction industry where this practice has been acceptance as the norm. There has been no evidence led, or claims made by employer organisations that this is not the case. There is no evidence at all that employers desire or require this to change.

224. To the extent that the Commission requires evidence from parties opposing a change in award conditions (rather than those supporting a change in award provisions), we would alert the Commission to the recent report "The Stressed Financial Landscape Data Analysis – October 4 2015"[141] by Digital Finance Analytics and Monash University Centre for Commercial Law and Regulatory Studies. The report is based on a base sample of 26,000 Australian households. According to this report:

- Financially distressed households include those unable to find $2000 in an emergency within 7 days. (p.8)
- The 2015 data survey indicates that 1.8 million households (just over 20 per cent of all households) are now financially distressed. (p.8)
- Loss of employment is identified by 15.6% of households who register as financially stressed as a reason for their difficulty. (p.10)

[141] http://financialrights.org.au/wp-content/uploads/2015/10/The-Stressed-Financial-Landscape-Data-Analysis-DFA2.pdf

- Financially distressed households (i.e. those who generally have no savings or assets to draw upon) (p.12) make up 59%, and financially stressed households 41%, of households who use payday lending services. (p.14)

- The most common reason for taking out a payday loan is for emergency cash for household expenses, which includes children's needs, clothing, medical bills, food, healthcare needs, school trips and fares/travel costs (p.18)

- The construction and maintenance industry sector accounted for 12.6% of payday borrowers in 2015. (p.22)

- Over 90% of payday borrowers had an annual income of under $50,000. (p.23)

225. The CFMEU C&G is not claiming that all workers who are terminated will fall within the financially stressed or financially distressed categories. Clearly, employees on very high wages and those with substantial assets and savings would not. But as termination of employment is a significant causal factor, many low paid employees on minimum award wages, especially those at the trade level and below, would potentially fall into these categories.

226. The Commission, through the Expert Panel in the Annual Wage Review 2015-16 decision, has recognised that,

> *"[369] Whilst no specific conclusion is available, the information as a whole suggests that a sizeable proportion—probably a majority—of employees who are award reliant are also low paid by reference to the two-thirds of median weekly earnings benchmark*."[142]

227. It is undisputed that the modern awards objective requires the Commission to ensure that modern awards provide a fair and relevant minimum safety net and that one of the factors that the Commission is to take into account is relative living standards and the needs of the low paid. The CFMEU C&G submits that changing the requirement for the payment of wages on termination, particularly increasing the time period within which payments are to be made can have adverse effects for some workers who are low paid, particularly those on who are financially stressed and/or on the border of financially distressed.

228. The CFMEU therefore submits that there is no merit to the changes proposed by the employer organisations and they should be refused.

[142] [2016] FWCFB 3500

National Training Wage

229. The AIG Submission at paragraphs 3 to 6 seeks to vary clause 28.3(a) by changing the table headings from "Skill level A" and "Skill Level B" to "Wage Level A" and "Wage Level B" to reflect the way in which the wage rates are described in the National Training Wage Schedule. The CFMEU supports this variation.

230. The MBA Submission at 15.1 to 15.3 appears to seek the deletion of clause 28. The only justification it seeks to rely on is the proceedings in AM2016/17. The MBA provides no other evidence. The CFMEU C&G opposes the variation sought by the MBA and points out that AM2016/17 has nothing to do with the deletion off the National Training Wage clause in the *Building and Construction General On-site Award 2010* and the wage rates contained therein. AM2016/17 is concerned with whether or not each modern awards contains the common National training Wage Schedule, or whether the schedule is included in the Miscellaneous Award and other modern awards provide a link to this schedule.[143]

231. As the MBA have provided no empirical or probative evidence to justify the removal of clause 28 the MBA application should be rejected.

Tool Allowance

232. The HIA submission at 5.2 seeks to vary the Tool and Employee Protection Allowance clause to:

> "*Place a positive obligation on the employee to provide and maintain tools and protective equipment in order to receive the allowance; and*
>
> *Expressly state that the allowance will not be paid to an employee if the employer provides all tools and protective boots*."

233. The HIA's principal opposition to the current provision is that an employer is required to pay the tool and employee protection allowances even in circumstances in which the employer has provided the tools.[144] The only evidence that the HIA rely on is its member survey.[145]

234. In regard to the provision of protective boots the award already provides that if the employer provides the boots there is no need for an employer to pay for the cost of the boots.

[143] See [2017] FWCFB 1095
[144] HIA Submission at 5.4.10
[145] Ibid at 5.5.7

The CFMEU C&G cannot understand why the plain English wording of the award is so difficult to understand. Clause 20.1(b) is clear and unambiguous:

> *(b) The above allowance does not include the provision of the following tools or protective equipment. Where the following tools or protective equipment are provided by the employee then the employee must be reimbursed for the cost of such tools or protective equipment by the employer, <u>or alternatively</u>* <u>the employer may elect to provide such tools or protective equipment.</u>

235. The provision of boots is contained in clause 20.1(b)(viii), therefore if the employer provides the boots no allowance is payable.

236. As for the provision of tools the first thing to correct is the HIA assertion that the tool allowance is payable to all employees. Clause 20.1(a) makes it clear that the tool allowance is only payable to tradespeople. In regard to the HIA survey it is hardly conclusive evidence as to the extent to which employers in the industry provide tools nor does it address whether the tools provided are adequate to perform the work required.

237. A number of the employer responses are ambiguous or indeed show that employers providing tools is not the norm (e.g. see responses for 80180, 80224, 80246, 80377, 80380, 80394, 80399, 80412, and 80464).

238. Significantly for these proceeding is the fact that the HIA made a similar application during the 2012 Award Review. In rejecting the HIA application SDP Watson said,

> "11. HIA application to vary clause 20.1(a)—tool allowance
>
> *[213] Clause 20.1(a) provides a tool allowance which must be paid for all purposes of the Building On-site Award, at different levels depending on the classification of the employee. Clause 20.1(b) provides for the reimbursement of the expense to employees where they provide particular tools. Clause 20.1(a) is expressed in similar terms to that of clause 24.3.1 of the NBCIA.*
>
> *[214] The HIA submitted that the current drafting of clause 20.1(a) of the Building On-site Award places an undue financial burden on businesses in the industry. It agreed that where an employee provides and maintains their tools and protective boots an employee should be entitled to compensation in the form of an allowance but submitted that where the expense is not incurred—in circumstances where an employer provides the tools or the employee fails to bring the tools to work or maintain the tools so they are safe and suitable for use—the employee should have no entitlement to compensation. The HIA submitted that the*

variation simply desires to clarify that the allowance is payable when the expense is actually incurred.

[215] The HIA proposed that clause 20.1(a) be varied to read:

"A tool allowance must be paid for all purposes of the award in accordance with the following table, except where the employer provides the employee with all tools and protective boots necessary to carry out the work or if the employee fails to bring tools to work or to maintain tools so that they are safe and suitable for use."

[216] The HIA variation was supported by other employer organisations and opposed by the unions. In opposing the variation, the CFMEU submitted that the tool allowance is not payable for the provision of tools but for the maintenance of the tool kit that the employee provides. The payment of the tool allowance is nothing new under the construction awards and has been payable as part of the all purpose rate for on-site tradespeople since the first pre-modern awards/instruments were ever made and that the HIA brought no evidence of the tools that are provided by the employers and whether those tools they provide are fit for the job.

[217] I am not persuaded that the HIA has established cogent reasons for the variation. Clause 20.1(a) was included in the Building On-site Award in terms reflecting the NBCIA provision which has a longstanding history. The HIA has sought to justify its variation by way of a "'fresh assessment' unencumbered by previous Tribunal authority" without little regard to the approach to the 2012 Review set out in the 29 June 2012 decision of the Award Modernisation Full Bench. The HIA has not established cogent reasons for departing from the provision incorporated into the Building On-site Award having regard to the submissions put to it and the provisions within pre-modern instruments."[146]

239. The HIA have failed to provide empirical or probative evidence sufficient to warrant such a significant variation to the award. The CFMEU C&G therefore submits that the HIA proposed variation should be rejected.

Dirty Work

240. The CCF Submission at pages 43 to 45 seeks to justify a variation to clause 22.2(h) which provides an allowance to be paid to employees engaged in unusually dirty work. Essentially the CCF compliant is that the award does not contain any definition of "dirty work" or "unusually dirty work". The CCF does not point to any dispute over the interpretation of this clause or changed circumstance to warrant a variation to this clause, The

[146] 2013 FWC4576

CFMEU C&G opposes the variation and submits that the CCF has provided no empirical or probative evidence to justify a variation to the award.

Mobile Crane Adjustment formula

241. The MBA submission at 8.1 to 8.5 seeks a variation to clause 19.5 which deals with the mobile crane adjustment formula. The CFMEU C&G opposes the variation and submits that the MBA has provided no empirical or probative evidence to justify a variation to the award.

Piece Rates

242. The MBA submission at 9.1 to 9.8 seeks to justify the deletion of the words "*be made without coercion or duress*". The wording of the piece rates clause was determined by the Award Modernisation AIRC Full Bench and the wording is consistent with other piece work clauses contained in other modern awards. The wording is also consistent with the model award flexibility clause.[147] The CFMEU C&G opposes the variation and submits that the MBA has provided no empirical or probative evidence to justify a variation to the award.

Living Away from home – Distant Work

243. The MBA Submission at 10.1 to 11.2 deals with the variations that it seeks to the Living Away from Home - Distant Work clause. The first part of the claim seeks to clarify the definition of "board and lodging". [148] A similar claim is made in regard to the *Joinery and Building Trades Award 2010*.[149] The CCF also seek a variation to clause 24.3 to insert values of meal allowances to be paid where accommodation only is provided,[150] although it does not suggest any values for these allowances.

244. The CFMEU C&G has proposed a substantial rewrite of the Living Away from Home - Distant Work clause,[151] and it relies on those submissions and evidence to support more comprehensive award terms than those suggested by the MBA and CCF.

245. The second part of the MBA claim seeks to clarify the operation of clause 24.7(d). The clarification suggested by the MBA is not needed. The wording of clause 24.7(d) is clear and unambiguous. If an employee resides on site, or resides adjacent to the site and is provided with transport, then no fares and travel allowance is payable. Suffice it to say, The

[147] See clause 7.2 of the Building and Construction General On-site award 2010
[148] MBA Submission at 10.2
[149] Ibid., at 26.1 and 26.2
[150] CCF Submission at page 48
[151] See the CFMEU C&G Submission in Support of December 2016

CFMEU C&G opposes the variation and submits that the MBA has provided no empirical or probative evidence to justify a variation to the award.

Shift Work

246. The MBA submission at 20.1 to 20.4 seeks to justify a change to clause 30.4 – Shiftwork. The MBA relies on its submission made during the 2012 Award Review to support the variation it seeks.

247. In the 2012 Award Review the CFMEU opposed the change on the basis that it was unnecessary. In the alternative we proposed that a more simple solution would be to extend the starting time for the night shift, i.e. "**night shift** means a shift commencing at or after 3.00 pm and before 4.30 am".

248. In a Further Supplementary Decision[152] SDP Watson rejected the MBA's proposed variation stating;

> ***"Conclusion concerning an "anomaly created by the decision of 15 July 2013" in respect of clause 34.1(a)***
>
> *[30] There is no anomaly arising from the variation made in the context of the 2012 Review. That variation simply reformulated the shifts arrangements for shiftworkers in the general building and construction and metal and engineering sectors which were incorporated into the On-Site Award from the NBCIA expressed as finishing times to express them as commencement times. The shifts which previously could end during the period 11.00 p.m. to 4.30 a.m., reformulated to starting times, are shifts commencing between 3.00 p.m. and 8.30 p.m. and are accommodated within the reformulated shiftwork definition. The effect of the relevant variation was simply to alter the identification of shifts from the finishing time to the commencement time. The application to vary on the basis of an anomaly must be rejected.*
>
> *[31] The absence of shift arrangements in respect of shifts commencing between 11.00 p.m. and 4.30 a.m. within shift arrangements is common to clause 34.1 as it appears in the On-site Award when made in 2010 and after the variation arising from the 15 July 2013 decision. It did not arise from the variation and is not an anomaly created by the decision or consequent determination.*
>
> *[32] However, the gap in shift arrangements in respect of a shift starting at 11.00 p.m. and before 4.30 a.m. does require consideration in the context of providing for a*

[152] [2013] FWC 7478

full range of shift arrangements outside what are regarded as "normal hours" and is required, potentially, to give effect to the modern awards objective. Notwithstanding the previous NBCIA history, the absence of shift arrangements in respect of a shift starting at 11.00 p.m. and before 4.30 a.m. in respect of the general building and construction and metal and engineering sectors requires consideration in the context of the modern awards objective. If warranted to give effect to the modern awards objective, the variation proposed, which provides for an early morning shift, with a 50% shift loading (at the same level as for the afternoon and night shift) should be given effect to provide a full range of shift arrangements, appropriately remunerated, within the On-site Award.

[33] The absence of shift arrangements in respect of a shift ceasing between 7.00 a.m. and 12.30 p.m. (or starting at 11.00 p.m. and before 4.30 a.m.) within the NBCIA may have reflected the absence of any practical demand for such shift arrangements. There is no evidence currently before me supporting a practical demand for the additional shift arrangement in the general building and construction and metal and engineering sectors. If there is such a need, evidence to that effect should be brought. In the absence of such evidence in support of the variation, either in the initial submissions of the MBA in the 2012 Review or in respect of its 16 August 2013 letter, I am not satisfied that the variation is required to give effect to the modern awards objective. If such evidence exists, the issue and variation proposed could be ventilated further in the four year review (s.156 of the Act). Such further consideration could have regard to the CFMEU submission concerning the extension of the hours within the night shift definition to cover the additional hours in question. If there is such evidence, and it supports a more urgent variation to give effect to the modern awards objective, an application could be brought pursuant to s.157 of the Act at an earlier time."

249. The CFMEU C&G stands by its position put in the 2012 Award Review. Should this Full bench decide that a variation is necessary then the CFMEU C&G submits that the variation to the starting times of the night shift would be a more economical way of varying the award without adding unnecessary additional terms and definitions.

Overtime

250. The MBA submission at 21.1 to 21.4 seeks to vary clause 36.7 of the *Building and Construction General On-site Award 2010* to include a reference to apprentices. It would appear from the MBA submission that it also seeks the deletion of clause 15.3(b) and (c) although no specific variation is mentioned. No evidence to support the variation is provided.

The CFMEU C&G opposes the variation(s) sought. They add nothing to the interpretation of the award and could mislead employers and apprentices as to what special provisions apply to apprentices in regard to overtime and shiftwork if 15.3(b) and (c) are removed.

Annual Leave

251. The MBA submission at 22.1 to 22.5 seeks a variation to clause 38.1(a) to add reference to the definition of continuous service in clause 3.1 of the award. The CFMEU C&G does not believe that the variation is necessary but makes no other submission on this issue.

Annual leave Loading

252. The HIA submission at 9.2 seeks to vary clause 38.2(b) to remove the fares and travel pattern allowance for the calculation of the annual leave loading. The CFMEU C&G opposes the variation proposed by the HIA as it would reduce the safety net applying to employees paid under the award and currently receiving the fares and travel patterns allowance by $15.25 per week of annual leave taken (i.e. ($17.43 x 5) x17.5%), and by a greater amount for employees covered by enterprise agreements that rely on the award for the calculation of the leave loading.

253. As noted in the HIA submission at 9.3.2 a similar proposed variation by the HIA was made during the 2012 Award Review[153]. The majority of the Full Bench (Senior Deputy President Acton and Deputy President Gooley) rejected the HIA's application stating,

> *"[114] We will vary clause 38.2(b) of the modern award by deleting the phrase "rates, loadings and allowances prescribed by" and replacing it with the phrase "following rates, loadings and allowances if such rates, loadings and allowances would have been received by the employee for working ordinary time hours had the employee not been on annual leave" and by deleting the phrase "(if applicable)" after the words "Leading hands".*
>
> *[115] We are not persuaded the modern award is not achieving the modern awards objective or otherwise not operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process because of the breadth of matters it prescribes. We, therefore, decline the other variations sought by the HIA and MBA to clause 38.2(b)." (Underlining added)*

[153] [2013] FWCFB 6266 at [110]

254. The HIA have provided no probative evidence to support a departure from the decision made in the 2012 Award Review, therefore the CFMEU C&G submits that the proposed variation should be rejected.

Coverage

255. The CCF Submission at pages 60 to 67 seeks to vary the coverage of the *Building and Construction General On-site Award 2010*. The CFMEU C&G opposes the proposed variation.

256. The CCF submission makes false assertions about the coverage of predecessor awards taken into consideration when the modern award was made. It fails to recognise that the modern award was not restricted to the coverage of the previous *National Building and Construction Industry Award 200*0 but also encompassed the coverage of civil construction industry awards, as the Award Modernisation Full bench stated,

> *"[68] Notwithstanding the continued pursuit, by some interested parties in the post-exposure draft consultations, of separate modern awards for the general building and construction, engineering construction and civil construction sectors, we have decided to proceed with a single award covering each of the sectors in respect of on-site work. We have renamed the award the Building, Engineering and Civil Construction Industry General On-site Award 2010 (BECC Modern Award). In our view, the award terms and conditions currently applying and the nature of the work favour a single modern award, albeit with some limited differential conditions between the sectors."*[154]

257. Other than attempting to compare conditions between awards the CCF provide no probative evidence to justify a change in the coverage of the *Building and Construction General On-site Award 2010*.

258. More importantly and of some concern is the failure of the CCF to alert the Full Bench to the decision of SDP Watson in the 2012 Award Review where a similar application was made by ABI (AM2012/154). In the decision handed down on 15th July 2013, SDP Watson rejected the ABI application stating,

> *"The Premixed Concrete Award[i] and the Asphalt Award*
>
> [121] *ABI submitted that its proposed variation, to add the Premixed Concrete Award and the Asphalt Award to the list of exclusions in clause 4.2 of the Building*

[154] 2009 AIRCFB 345

On-site Award is directed towards removing confusion created by the overlapping coverage of the Building On-site Award.

[122] *It submitted that uncertainty arises in the case of the Asphalt Award from overlap in the definition of "civil construction" in the Building On-site Award and the definition of the "asphalt industry" in the Asphalt Award, both of which include "road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt".*

[123] *ABI relied on the evidence of Mr N Perumal, Commercial Manager for CTEC Pty Ltd (CTEC), that there was uncertainty as to whether certain work was covered by the Building On-site Award or the Asphalt Award, which made it difficult for CTEC to ensure that contractors applied industrial arrangements compliant with the National Code of Practice for the construction industry and the associated implementation guidelines. He also gave evidence that "[i]t would be beneficial if the coverage of each award was clarified as proposed by the amendments made by ABI to remove ambiguity and confusion as to each award's coverage".*

[124] *ABI submitted that the Premixed Concrete Award excludes employees covered by the Building On-site Award but the Building On-site Award does not contain a reciprocal provision. It submitted that the lack of a reciprocal provision can create an overlap for employers, confusion and uncertainty as to the correct award coverage for employees.*

[125] *ABI submitted that the modern awards objective includes the need to ensure a simple easy to understand award that avoids unnecessary overlap and that providing an express exclusion of the Premixed Concrete and the Asphalt Awards would aid in clarification for employers when determining award coverage.*

[126] *The Ai Group supported the ABI applications.*

[127] *The CFMEU opposed the variations proposed by ABI to extend the exclusions in clause 4.2. The AWU opposed the variation, submitting that rather than*

reduce potential confusion, the ABI proposal would alter the status quo in terms of relationship between each of those two modern awards.

[128] *In relation to the Asphalt Award, the CFMEU and the AWU noted that the Award Modernisation Full Bench had specifically considered the relationship between the Asphalt Award and the Building On-site Award when making the Building On-site Award and in making the Asphalt Award in Stage 3. In the Stage 3 decision, the Award Modernisation Full Bench said:*

"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."

[129] *Clause 4.2 of the Building On-site Award was formulated by the Award Modernisation Full Bench, following specific consideration of coverage as between the Building On-site Award and the Asphalt Award. The distinction between the two modern awards in respect of roadmaking is clear from the decision of the Award Modernisation Full Bench.*

The only evidence of any practical issues arising in relation to that coverage was the evidence of Mr Perumal. It is insufficient to warrant a variation on the basis of the considerations arising out of Item 6 of Part 2 of Schedule 5 of the Transitional Provisions Act. No cogent reason has been established for departing from the current considered provision determined by the Award Modernisation Full Bench. In any case, it is not apparent on the evidence how the addition of the Asphalt Award to the exclusions in clause 4.2 of the Building On-site Award would assist CTEC in applying the distinction between the work reflected in the observations of the Award Modernisation Full Bench in its Stage 3 decision."[155]

[155] 2013FWC 4576

259. The CFMEU C&G therefore submits that the CCF proposed variation should be rejected.

Joinery and Building Trades Award 2010 Matters

260. The MBA Submission at 25.2 and 25.3 seeks to vary the Joinery and Building Trades Award 2010 by inserting a new definition of joinery work which would have the effect of extending the coverage of the award to work performed onsite. The CFMEU C&G opposes the variation and submits that the MBA has provided no empirical or probative evidence to justify a variation to the award.

261. Clause 4.1(d) of the Joinery and Building Trades Award 2010 specifically excludes "*employers and employees covered by the Building and Construction General On-site Award 2010*". During the 2012 Award Review proceedings for the Joinery and Building Trades Award a Full Bench rejected a similar application regarding glass and glazing work, deciding that,

> ***"(i) Coverage***
>
> ***[73]*** *We are not persuaded we should make the variations sought to the definition of "glass and glazing work" in the JBT Award or to the meaning of "Manufacturing and Associated Industries and Occupations" in the Manufacturing Award.*
>
> ***[74]*** *The extent of the JBT Award's coverage of "glass and glazing work" was decided by a Full Bench of the AIRC on 30 December 2009. In the course of that decision, the Full Bench also decided to vary the coverage of the Manufacturing Award to exclude employers or employees engaged in glass and glazing work covered by the JBT Award. The exclusion deals with any overlap in the coverage of the JBT Award and the Manufacturing Award that would otherwise exist because of the JBT's coverage of "glass and glazing work" as defined in the JBT Award.*
>
> ***[75]*** *On 11 June 2010, FWA declined to vary the reference to "domestic on site situations" in the definition of "glass and glazing work" in clause 3.1 of the JBT Award so that it referred to "domestic or on site situations". FWA was not persuaded the variation would clarify the coverage of the JBT Award and considered the variation was likely to create confusion, ambiguity and uncertainty about the coverage of the JBT Award.*
>
> ***[76]*** *Contrary to their submissions, the applicants for the variations in the matters before us and those supporting them have not established that the variations to the JBT Award and the Manufacturing Award arising from the Full Bench decision of 30 December 2009 have made the respective coverage of the awards difficult to understand and created confusion and uncertainty about the coverage of each award. Nor have they established that the existing coverage of the awards has or is likely to*

create demarcation disputes. We concur with the FWA decision of 11 June 2010 that varying the definition of "glass and glazing work" in clause 3.1 of the JBT Award so that it refers to "domestic or on site situations" is likely to create confusion, ambiguity and uncertainty about the coverage of the JBT Award, particularly when such varied coverage is compared to the coverage of the Building Award in respect of certain employers and employees."[156]

262. As the MBA have failed to provide any empirical or probative evidence in support and that in the 2012 Award Review a Full Bench dismissed a similar application, the CFMEU C&G submits that the MBA proposed variation to the definition should be rejected.

263. The only other variation proposed by the MBA for the Joinery and Building Trades Award that has not already been dealt with is the proposed variation to clause 31. The MBA submission at 28.2 does nothing more than explain what the variation would do. The CFMEU C&G opposes the proposed variation and submits that as the MBA has provided no empirical or probative evidence to justify a variation to the award the variation should be rejected.

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[156] [2013] FWCFB 3751

Appendix A – Witness Statement of Dr. Gerald Ayers

IN THE FAIR WORK COMMISSION
Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010
[MA000020]

Joinery and Building Trades Award 2010
[MA000029]

Mobile Crane Hiring Award 2010
[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

Witness Statement of Dr. Gerard Ayers

I Gerard Ayers of [redacted], Victoria, state the following:

1. I am currently employed as the Occupational Health and Safety and Environment (OHS & E) Manager for the CFMEU Construction& General Division Victorian/Tasmanian Branch. I have held this position for the past 8.5 years. Prior to this I was employed as an OHS Advisor for the CFMEU C&G Division Vic/Tas Branch.

2. I have been employed in the building and construction industry for over 25 years. I started out as a builder's labourer and have previously worked as an OHS Advisor for the CFMEU Construction and General Division, NSW Branch.

Qualifications

3. My qualifications in the field of occupational health and safety are the following:

    - PhD (OHS) (University of Ballarat)
    - Master of Applied Science(OHS) (University of Ballarat)
    - Graduate Diploma of Occupational Hazard Management (University of Ballarat)
    - Associate Diploma in Applied Science (OHS)

4. The thesis for my doctorate was on the topic of "Consultation and Organisational Maturity in the Victorian Construction Industry".

Issues

5. I have been asked to address the following questions based on my expertise and experience:

    (i) Whether the national model WHS system takes a different legislative approach to that taken in pre-existing state and territories legislation.
    (ii) The extent to which the National WHS Model has been adopted.
    (iii) The compatibility of the current Building and Construction General On-site o Award 2010 (**Award**) provisions with WHS legislation, particularly having regard to the more prescriptive approach in the Award and the need for continual improvement in health and safety.
    (iv) Whether WHS legislation and the Award provisions are consistent.
    (v) Whether there is overlap between Clause 33(1(c) of the Award and WHS legislation.
    (vi) Whether the definition of "confined space" in Clause 22.2(d)(ii) detracts from workplace health and safety, particularly having regard to Regulation 5 of the WHS Regulations.
    (vii) Whether Clause 20.3(a) overlaps with or conflicts with the approach in WHS laws.
    (viii) Whether any of the Award provisions are out of touch with WHS Legislative requirements or do not reflect current industry practice, having regard to Annexure A of the Statement of David Solomon filed in these proceedings.

Legislative approach in National WHS Model and pre-existing state and territories legislation.

6. Australian States and Territories have been under an OHS "performance based" and fundamentally a "self-regulatory" approach, as recommended under the UK Robens Report (1972), since the 1980's (e.g. NSW 1983; W.A 1984; Vic 1985; S.A 1986; ACT 1989). The general duties of care and obligations under all these different state and territory OHS/WHS legislative frameworks, to provide all employees (and the public) with high levels of workplace health and safety, were enshrined in all such legislation.

7. The National Harmonization WHS laws, via the WHS Model Act and associated WHS model Regulations, were adopted in many states and territories in 2012. The general duties and obligations under the National WHS Model, were taken from and owe their existence to the many different state and territory OHS legislative frameworks first adopted in the 1980's. Such obligations and responsibilities have remained relatively unchanged under the national harmonization model.

Extent of Adoption of National WHS Model

8. The delivery of a National uniform WHS system may have been the aim of the National WHS Model, however neither Victoria nor W.A. have adopted this model. Appendix A is a

document taken from the Safe Work Australia website that sets out the jurisdictional progress on the model Work Health and Safety laws.

9. Furthermore, the different state and territory WHS/OHS legislators have different approaches and philosophies on enforcement and application of their WHS/OHS laws. This also includes including different jurisdictional interpretations over legislative penalties for breaches of the WHS/OHS laws (save for the maximum amounts). This means that such a National and uniform WHS system or approach may never truly come to fruition or be truly realized or reflected in the legislation across the nation.

Compatibility of the Award provisions with WHS legislation

10. I am of the opinion that the Award provisions and the WHS legislation complement each other. They are not mutually exclusive and in many cases, should be applied in parallel to improve the work environment and the systems that employees work under.

11. In my opinion the Award is primarily concerned with "employment conditions" – including wages, payments of allowances for disabilities/discomfort under certain conditions of work, hours or work, rest breaks and the like. In some circumstances, it does indeed overlap and enter into the realm or sphere of workplace health and safety (e.g. hours of work/rest breaks have long been acknowledged with the hazards and risk of fatigue). The Award provides that particular provisions need to be adhered to and implemented under particular circumstances. It provides certainty, consistency and uniformity in an industry often characterized as unpredictable, contradictory and irregular.

12. The WHS Legislative Framework is specifically and explicitly limited to work health and safety issues, and often does not provide the descriptive specificity and/or detail encapsulated under the Award. This is because OHS/WHS legislation is founded upon performance-based principles using a risk-based philosophy as its core doctrine. This allows different risks to be managed differently – often resulting in different control measures being applied to the same hazards with no uniformity or consistency. This results in different levels of health and safety being provided to workers (e.g. when working at height – the use of scaffolds, or elevated work platforms, or harnesses [PPE] can all be utilized. The final solution/decision/control measure is dependent upon the "risk assessment" outcomes and the interpretation and application of the "as far as is reasonably practicable" definition under the WHS legislation).

13. However, if a better, safer, and/or more efficient methodology, process or even materials can be used or applied, the Award does not, nor in my experience, has it ever restricted or prevented such advancements from occurring.

14. In my experience dealing with the Award provisions and the various state and territory OHS/WHS legislative frameworks, they have existed harmoniously. They have operated in parallel and have happily co-existed with each other with the OHS/WHS legislation relying on performance-based approaches and the Award providing consistency and certainty where required.

15. While employers may well need to be familiar with different Codes of Practice under the WHS legislative framework, they are not obligated to apply or follow them if they believe they have an equivalent or indeed a "better/safer" system in place to achieve the same WHS/OHS outcomes.

16. The Award in no way prevents continual improvement, or impinges or restricts, in any way, safer methodologies or innovative/newer equipment or technology to do the job – e.g. Clause 22.2(o) of the Award does not stipulate or mandate the use of heavy blocks; only that an allowance must be paid if they are used. If lighter or standard blocks are used there is no requirement to pay the allowance. Nor does it prevent or hinder in any way, architects, clients, builders, sub-contractors and the like, if they so agree, to use alternate products or materials, provided of course that those products or materials meet the design standards and stipulations, and the process to use/install them, is safe.

17. In my experience the performance-based, innovative and creative continual improvement in health and safety is in no way affected, restricted or impinged upon by any Award provision. It is only if certain/particular work processes and materials are stipulated to be used in any design brief and construction process, then those processes, materials and/or systems, if referred to in the Award, must then comply with certain/stated provisions under the Award. If, for example, technology overtakes the requirement for individuals to use heavy blocks – then that particular Award provision does not apply.

Consistency of WHS laws and Award Provisions

18. Award provisions only apply in particular circumstances. If the circumstances or the criterions for the provisions of award conditions are not met – then the award provision does not apply. There is no inconsistency with the WHS obligations. WHS obligations are fundamentally general in application and performance-based in outcomes. While Award requirements are indeed descriptive and informative, the reality is that they only apply under prescribed procedures and processes.

Clause 33(1(c) of the Award and WHS legislation.

19. The five-minute washing time in Clause 33(1)(c) of the Award is no more than acknowledgment of a person's right to "clean-up" before meals and/or going home after their work shift is finished. The WHS Act does not specify or allow any set or agreed time – it only provides for the "facilities" to eventually be utilized to "wash-up" – the 'allowable/agreeable' time to do that is open to 'interpretation'.

Definition of "confined space" in Clause 22.2(d)(ii)

20. The full definition of a confined space as set out in WHS Regulations definitions (Section 5) is as follows:

> Confined space means an enclosed or partially enclosed space that:
>
> Is not designed or intended primarily to be occupied by a person: and
> Is, or is designed or intended to be, at normal atmospheric pressure while any person is in the space; and
> Is or is likely to be a risk to health and safety from:
>
> An atmosphere that does not have a safe oxygen level; OR
> Contaminants, including airborne gases, vapours and dusts, that may cause injury from fire or explosion; OR
> Harmful concentrations of any airborne contaminates; OR
> Engulfment,

But does not include a mine-shaft or the workings of a mine.

21. The Award clause talks about "sufficient ventilation"– the WHS definition above does not. Ventilation is a different construct and has a different definition and application than that of "contaminates" and "levels of oxygen". If anything, the Award compliments rather than detracts from the WHS definition. Applying the WHS definition on its own, may allow a worker to work without sufficient ventilation, which again is not the same as sufficient "levels of oxygen" or an atmosphere contaminated or affected by "contaminants".

Clause 20.3(a)

22. Clause 20.3(a) of the Award refers to among other things, clothes, hearing aids, spectacles, and tools. These items are not and never have been deemed Personal Protective Equipment (PPE) under either the Award or indeed the WHS framework. Hearing aids are not hearing protectors; spectacles are not safety glasses. The award has never defined or even allowed such items to be used/applied as PPE. The clause does not overlap nor does it conflict with the WHS provisions.

Annexure A to the Statement of David Solomon

23. Annexure A to the Statement of David Solomon appears to misrepresent or at the very least, misunderstand how the Award is applied, but also how the performance based WHS legislative framework is written, structured and implemented in the construction industry. Some examples are provided below.

24. Item 1 of Annexure A refers to clause 8 – Consultation of the Award. I am informed that a consultation clause over changes to rosters of hours of work is required under the Fair Work Act. The award clause covers more than the limited matters requiring consultation under the WHS legislation. Also the WHS legislation is less prescriptive as to how the consultation is to occur.

25. Item 2 refers to clause 9 – Dispute Resolution of the Award. I am informed that this is also required under the Fair Work Act. The table in annexure A then refers to provisions from the WHS legislation. But there is nothing in the Dispute Resolution clause of the Award that is inconsistent with the WHS legislation. Moreover, clause 9.6 of the award specifically provides that any direction to perform work is subject to the applicable occupational health and safety legislation.

26. Another example is item 15 which refers to clause 21.10 – First aid allowance of the Award. The table in annexure A then refers to provisions from Division 2 of Part 2 – Primary duty of care of the WHS legislation. In this case the WHS legislation refers to the general duty of the employer to "ensure, so far as is reasonably practicable, the health and safety" of workers at work. The WHS regulations require a person conducting a business or undertaking to provide an adequate number of workers who are trained to administer first aid at the workplace, or that workers have access to an adequate number of other persons who have been trained to administer first aid. But the WHS legislation and regulations make no mention of the allowances to be paid to employees who perform this work, nor does it refer to a hierarchy of allowances based on the level of first aid qualification held, nor what the allowance is paid in compensation for.

Signed: ____

Date: ____________________________

Appendix A - Jurisdictional progress on the model Work Health and Safety laws

(Source: http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/jurisdictional-progress-whs-laws#table1)

The model Work Health and Safety (WHS) laws have been implemented in all jurisdictions other than Victoria and Western Australia. Western Australia is currently consulting on options for implementing elements of the model.

The table below summarises key variations from the model WHS laws implemented by jurisdictions. It does not cover administrative differences between jurisdictions (for example, names of courts or tribunals, or interaction with local laws), simple differences in drafting or any matters that fall within the 'jurisdictional notes'.

Jurisdiction	Legislation	Date implemented	Variations
Commonwealth	Work Health and Safety Act 2011 (Cth)	1 January 2012	21 March 2016 amendments not yet implemented. No other material variations. **Note**: The Commonwealth jurisdiction is different from the others. The laws need to deal with potential overlap with state/territory WHS laws. In general the Commonwealth WHS laws: • apply to businesses and undertakings of the Commonwealth, Commonwealth public authorities and non-Commonwealth licensees—including if the work is carried out overseas • require Commonwealth duty holders to consult, co-operate and co-ordinate activities with other state/territory-based businesses that have a duty under a corresponding state/territory-based WHS law, and • make special provision to deal with national security, defence and Australian Federal Police operations. For more information on features unique to the Commonwealth jurisdiction see *Consultation Paper—Commonwealth Work Health and Safety Bill 2011*.
Commonwealth	Work Health and Safety Regulations 2011 (Cth)	1 January 2012	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. No other material variations.
Australian Capital Territory (ACT)	Work Health and Safety Act 2011 (ACT)	1 January 2012	21 March 2016 amendments not yet implemented. Other key variations: • Enables the Minister to approve codes of practice for the management, control or removal of asbestos or asbestos containing material (section 274(2)).

Jurisdiction	Legislation	Date implemented	Variations
Australian Capital Territory (ACT)	Work Health and Safety Regulation 2011 (ACT)	1 January 2012	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. Other key variations: • Omits model Chapters on hazardous chemicals and Major Hazard Facilities (MHFs), instead preserving arrangements under the *Dangerous Substances Act 2004* (ACT) and *Dangerous Substances (General) Regulation 2004* (ACT). • Additional infringeable offences in the construction chapter—in response to the *Getting Home Safely* inquiry.
New South Wales (NSW)	Work Health and Safety Act 2011 (NSW)	1 January 2012 Laws relating to officers' due diligence duties took effect in June 2011	**Note:** The laws in NSW deal with co-regulatory arrangements as there are two regulators for WHS – one for mining and another for all other workplaces. 21 March 2016 amendments not yet implemented. Other key variations: • The Secretary of an industrial organisation of employees can bring proceedings for Category 1 or Category 2 offences if the regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings (section 230(3)). • Easing requirements for information sharing between the general WHS regulator and the regulator under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW) (section 271A).
New South Wales (NSW)	Work Health and Safety Regulation 2011 (NSW)	1 January 2012	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. Other key variations: • Enhanced security requirements for MHFs—including requirements for MHF operators to consult with, and have regard to the advice of NSW Police (regulation 558A).
Northern Territory (NT)	Work Health and Safety (National Uniform Legislation) Act 2016 (NT)	1 January 2012	21 March 2016 amendments not yet implemented. No other material variations.
Northern Territory (NT	Work Health and Safety (National Uniform Legislation) Regulations (NT)	1 January 2012	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. Other key variations: • Increased the trigger point for construction projects to $500,000 (regulation 834). The threshold is

Jurisdiction	Legislation	Date implemented	Variations
			$250,000 under regulation 292 of the model WHS Regulations.
Queensland (Qld)	Work Health and Safety Act 2011 (Qld)	1 January 2012	21 March 2016 amendments not yet implemented. Other key variations include: • Omits the pre-requisite for tripartite consultation before a code of practice can be made, varied or revoked for purposes of the Act (section 274). • Before entering a workplace for the purposes of consulting and advising workers, a WHS entry permit holder must give notice to the person in management or control of the workplace as well as the relevant PCBU (section 122(1)(b)).

Queensland (Qld)	Work Health and Safety Regulation 2011 (Qld)	1 January 2012	28 November 2016 amendments not yet implemented.
			21 March 2016 amendments not yet implemented.
			Other key variations:
			• Enables the regulator to keep a public register of high risk work licences and accreditations to conduct assessments for high risk work (regulation 141A).
			• Omits audiometric testing regulations.
			• Omits Part 4.7 (Electricity), instead making provision under the *Electrical Safety Act 2002 (Qld)* and *Electrical Safety Regulation 2013* (Qld).
			• Requires additional information in safe work method statements dealing with risks of falls over 2 metres if the only control measures implemented are the provision of personal protective equipment (PPE) or administrative controls (regulation 299(4)).
			• Prescribes additional risk controls for construction work involving:
			  ○ risk of falls and falling objects (regulations 306B to 306J and 315B to 315M)
			  ○ using ladders and platforms (regulations 306K to 306O), and
			  ○ erecting and dismantling scaffolding (regulations 306P and 306Q).
			• Prescribes requirements of principal contractors to maintain amenities (e.g. toilets, meal areas, drinking water and washing facilities) for 'construction work' (regulation 315A, Schedule 5A).
			• Requires asbestos registers to be kept for buildings constructed before 31 December 1989 rather than 31 December 2003 as prescribed by the model WHS Regulations (regulations 425 and 447).
			• Modifies the Class B asbestos removal licence requirements by:
			  ○ providing that asbestos removal work carried out by more than one person is supervised by a nominated asbestos removal supervisor (regulations 459(b), 529(b))
			  ○ omitting requirements to formally nominate a supervisor to oversee the removal (regulations 494, 466(4)(b), 507(1), 518, 520(1)(b), (2)), and

Jurisdiction	Legislation	Date implemented	Variations
			○ enabling any person with a relevant certification to apply for a class B asbestos removal licence (regulations 494, 499, 518). • Provides for inspectors to issue an improvement notice or prohibition notice to the licenced asbestos removalist if a clearance certificate has been issued, but the site is not free of visible asbestos contamination. This notice requires that the licenced asbestos removalist take steps necessary to ensure the asbestos removal area, and the area immediately surrounding it, are free from visible asbestos contamination (regulation 474A).
South Australia (SA)	Work Health and Safety Act 2012 (SA)	1 January 2013	21 March 2016 amendments not yet implemented. Other key variations: • Provides the duty to manage health and safety risks only applies to the extent the person has capacity to influence and control the matter (section 17(2)). • Prescribes who a HSR can request assistance from, that is—another worker at the workplace, a person involved in the management of the relevant business or undertaking or a consultant who has been approved by one of the specified persons or bodies (section 68(4)). • Increases HSRs' training entitlement to 3 and 2 days' training during the second and third year in the role respectively compared to the up to 1-day refresher course permitted under the model WHS Regulations. If re-elected, all training entitlements can be re-taken as if they had no training at all (section 72(9)). • Requires WHS entry permit holders to give consideration to whether it is reasonably practicable to notify the regulator of proposed entry (section 117(3). • If not accompanied by an inspector at the time of entry, a WHS entry permit holder exercising a power of entry must furnish a report on the outcome of their inquiries to the regulator and the regulator must give consideration to what action should be taken on account of any suspected contravention outlined in the report (section 117(6)). • Provides that the right of a WHS entry permit holder to require copies of a document that is directly related to a suspected contravention is subject to direction by an inspector (sections 118(2)(a), 120(6)). • Retains the privilege against self-incrimination for any individual when an inspector enters a workplace (section 172). • Requires that the Consultative Council consult with the Small Business Commissioner before a code of practice that may affect small business is recommended for approval, variation or revocation (section 274(3)). • An approved code of practice or the variation of a code of practice is subject to disallowance by the

Jurisdiction	Legislation	Date implemented	Variations
			South Australian Parliament (section 274(8)).
South Australia (SA)	Work Health and Safety Regulations 2012 (SA)	1 January 2013	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. Other key variations include: • Notice and reporting requirements are prescribed in relation to WHS entry permit holders' entry under section 117 of the WHS Act (regulation 28). • Safe work method statements are required to address risks of a person falling more than 3 metres (not the 2 metres specified in the model WHS Regulations) (regulation 291(a)). • Extending air monitoring requirements for Class A asbestos removal work to Class B asbestos removal as well, until 1 January 2017 (regulation 726). • Regulation 348 in the model WHS Regulations, requiring the regulator to be notified if manifest quantities of hazardous chemicals are to be exceeded, has not been adopted.
Tasmania (Tas)	Work Health and Safety Act 2012 (Tas)	1 January 2013	21 March 2016 amendments not yet implemented. No other material variations.
Tasmania (Tas)	Work Health and Safety Regulations 2012 (Tas)	1 January 2013	28 November 2016 amendments not yet implemented. 21 March 2016 amendments not yet implemented. No other material variations.
Western Australia (WA)	Work Health and Safety Bill 2014 (WA)		The *Work Health and Safety Bill 2014* (WA) (the Green Bill), was released for public comment in early 2015. The Green Bill contains the core provisions of the model WHS Act, with some amendments. It also excludes a number of the model provisions. This Bill is being considered by the WA government. For further information, please visit the Worksafe WA website at www.commerce.wa.gov.au/WorkSafe.
Western Australia (WA)	Occupational Health and Safety Regulations 1996 (WA)		WA is considering options to implement elements of the model WHS Regulations. A public consultation process is currently underway to enable all participants in WA workplaces to have input into the new legal framework. For further information, please visit the WorkSafe WA website at www.commerce.wa.gov.au/WorkSafe.
Victoria (Vic)	Occupational Health and Safety Act 2004 (Vic)	The Victorian Government announced it	The Victorian Government has confirmed that it will not be implementing the model WHS laws in their current form. WorkSafe Victoria continues to enforce Victoria's existing occupational health and safety (OHS) legislation. This means that Victoria's workplaces need to refer to Victoria's codes and guidance materials for

Jurisdiction	Legislation	Date implemented	Variations
		would delay harmonisation. For further information visit WorkSafe Victoria.	information about how to comply with Victoria's OHS legislation. For further information, please visit the WorkSafe Victoria website at www.worksafe.vic.gov.au/

Appendix B - Extract from AIRC document on Junior Rates in civil Construction Awards[157]

Building, metal and civil construction industries - Civil Construction Sector Comparison - Federal Awards - Junior Rates

AM s.576J(1)(a)	AP815828CRV - Fed **Australian Workers' Union Construction and Maintenance Award 2002**	AP765604CRA - Fed Australian Workers' Union Construction-on-Site and Civil Engineering (A.C.T.) Award 1999	AP816828CRV - Fed National Metal and Engineering on-site Construction Industry Award 2002	AP798273 - Fed South Australian Civil Contracting Industry Award 1999	AP803190 - Fed Western Australian Civil Contracting Award 1998	AP816842CRV - Fed Mobile Crane Hiring Award 2002	AP774313 - Fed Construction Industry Sector - Minimum Wage Order - Victoria 1997			
	No junior rates	No junior rates	No junior rates	No junior rates	No junior rates	No junior rates	cl 5.3			
							Juniors who would have been covered by the Clerical & Admin Employees Award as at 1 Mar '93	**Juniors who would have been covered by the Clerical & Admin Employees Award as at 1 Mar '93 *after 12mths employment***	**Juniors who would have been covered by the Clerical & Admin Employees Award as at 1 Mar '93 *performing work within classification Level 7***	**Juniors who would have been covered by an expired state award as at 1 Mar '93 which provided junior rates**
Juniors							**% of Level 4**	**% of Level 5**	**% of Level 7**	**% of Level 3**
Under 16							48.3	46.7	44.5	50.0
16yrs							53.7	51.8	49.4	50.0
17yrs							64.3	62.2	59.3	60.0

[157] www.airc.gov.au/Awardmod/research/civil_construction/Wages_Junior_FED.xls

18yrs		75.1	72.7	69.2	70.0
19yrs		85.8	83.0	79.1	80.0
20yrs		96.5	93.4	89.0	90.0

Appendix C – Witness Statement of Liam O'Hearn

IN THE FAIR WORK COMMISSION

Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010
[MA000020]
Joinery and Building Trades Award 2010
[MA000029]
Mobile Crane Hiring Award 2010
[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

Witness Statement of Mr Liam O'Hearn

I Liam O'Hearn of [redacted], Victoria, state the following:

1. I am currently employed as an Organiser/Apprenticeship Officer with the Victorian/Tasmanian Branch of the CFMEU Construction and General Branch. I commenced with the Union in November 2008 as an Organiser with a geographical area and moved in to my current position in around June of 2009.

My background

2. Prior to commencing my work with the Union I'd had worked in the building and construction industry since leaving school. I worked as a plumber offsider/labourer and I worked on stumping for new houses (laying the preparatory frame work for new houses to be built on stumps not concrete slabs) before I started my carpentry apprenticeship in 1990 through the Building Industry Groups Scheme. I finished my apprenticeship and became a qualified carpenter in 1994. I worked for a number of employers in the domestic/cottage and commercial industries. Some of the companies I worked for included John Holland, Wycombe Constructions, Walter Constructions and Contract Control.

3. From around 2000 I became a workplace leader on most job sites I worked on. I was proud to represent workers on the site as an elected Union Delegate and often both the Union Delegate and health and safety representative. I spent around 8 years as carpenter and elected workplace leader before I commenced work for the Union.

4. I am passionate about the industry and wanting to make a difference. I want to see workers have rights on the job, have a safe job and a job that provides fair pay and conditions. I have always been passionate about the future of the industry about the industry lifting standards improving skills. My interest developed during my involvement with my Union on Melbourne Commonwealth Games construction projects where I was proud to play a part in promoting the employment of apprentices and seeking to ensure apprenticeship ratio's were maintained on jobs. It is a tough industry. The economic pressure can be brutal and from my experience of the industry it is not easy to try and lift standards.

5. In my role as Organiser/Apprenticeships Officer I have a broad range of responsibilities. I work with our Organisers and across the building and construction industry in regard to the employment of apprentices and the development of skills and career paths in the industry. In my role I perform a range of duties which include;

    - Working with organisers and industry to keep apprenticeship ratio's high and ensure work sites are focused on looking after and developing their apprentices.

    - Sitting on the Vocational Accreditation Qualification Authority steering committees for their 4 yearly review to assess the trade qualification programs across the building and construction in industry in Victoria.

    - I run a schools program that I and the Branch developed where I attend schools in Victoria during their industry weeks and talk about the building and construction industry. At schools with vocational programs I take school student out to construction sites and show them the industry and talk about what a great career it can be for young people. Schools on this vocational program provide student with a 10 week work experience placement where young people can be exposed to the industry. It is a great way to introduce young people to the industry and to help ensure the industry has great young people entering it to ensure our future.

    - I'm on my Branch's drug and alcohol committee and assist with rolling out decent drug and alcohol policies and programs in workplaces. I have a particular focus on this issue in Tasmania where I have worked with Aus Health in regard to drug and alcohol issues in the building and construction industry.

    - I'm involved and preparing wage claim underpayment, particularly where they involve false classification of employees, often young employees, when they are labelled apprentices and not actually signed up as apprentices.

    - I'm involved in the local learning network for Werribee, a Victorian Government scheme which seeks to help young people enter the workforce and is focused on regions of unemployment and disadvantage, where I seek to promote apprenticeships to young people leaving school or looking to find employment.

6. Apart from my industry experience and qualifications as a carpenter I also hold a certificate IV qualification which includes competency to conduct training and assessment.

The industry

Young employees and apprenticeships

7. From my experience it is very rare to non-existent that the industry seeks to hire 15 and 16 year olds. This is for a number of reasons, employers will often want at least a driver's license, and they want them to be able to be ticketed to operate different machinery which often require you to be at least 18. For example you have to be 18 to hold a forklift license.

8. The concept of an unskilled labourer is just outdated. On most jobs or even just signing up to a labour hire company they'll seek that a 'labourer' hold a range of tickets such as tickets for operating, being competent in, driving a forklift ticket, traffic management, dogging, rigging, hoist, scaffolding. Tickets for these competency can range from basic, intermediate to advanced, there is a very clear need for workers to seek to gain extra skills. So for a 16 yearold they may be too young to gain the tickets, so to receive training it is critical they are signed up as an apprentice.

9. There is in the industry flexibilities for young employees and employers to review if the partnership can work. An employer has 10 days to register an employee as an apprentice once they have taken on an apprentice. They have a probationary period of 3 months to see if things are going to work out but importantly employers can also seek to extend the probationary period.

10. I have direct knowledge of the desire for young people to enter the industry as apprentices. We get around 40 calls a week enquiring about opportunities to become an apprentice. The industry has a reputation of providing a career path for young people to enter unskilled and get themselves a trade to work in the construction and building industry. There are young people, thousands of them, wanting to gain apprenticeships in the building and construction industry.

Industry concerns

11. I have been involved with apprentices and young people in the industry for many years now. In my current role for over 8 years. In that time I have consulted widely with industry participants and with employers about getting young people into the industry. I do not recall it <u>ever</u> being raised with me that the industry needs or should look at junior wage rates.

12. Unfortunately, the industry can and does fail its workers. I regularly see young employees paid as apprentices when not signed up and not receiving the training. It is just as an attempt to pay low wages. I spend a substantial part of my work time preparing, settling and negotiating wage underpayments based on young employees being incorrectly paid as apprentices when they are not signed up as apprentices. In one of the worst cases I dealt with an underpayment where the young worker was paid for <u>two and a half years</u> as an apprentice when he wasn't an apprentice at all.

13. There are also systemic problems with a failure to train and have proper assessment and certification carried out across the industry. This is just an unsafe practice and a practice that causes serious quality control concerns. There are certain occupations that have an extremely well know reputation for operating illegally with unqualified 'trades' people. Examples include plasterers and painters. Whilst more prevalent in some occupations it occurs across the board. I would hold serious concerns, based on my industry knowledge and experience, that establishing a junior wage rate would lead to problematic 'on the job' 'she'll be right' training where young workers are sought to be skilled up without rigorous formal training and assessment procedures. I have concerns that it would operate in competition to apprentices as they would be set up in at least partial if not direct competition as much of the so called labouring work on a job site is currently being undertaken by apprentices. I would be concerned that employers may seek to not hire apprentices based on being able to access a low wage and no obligation owed junior wage employee.

14. Finally, young people are substantially over represented in workplace accidents. I would have serious concerns that a junior wage entry for young workers without a connection to training and development would pose serious safety concerns.

Signed: _____

Date: _____

Appendix D – Witness Statement of Robert Cameron

IN THE FAIR WORK COMMISSION

Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010
[MA000020]
Joinery and Building Trades Award 2010
[MA000029]
Mobile Crane Hiring Award 2010
[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

Witness Statement of Mr Robert Cameron

I, Robert Cameron, of [redacted] Queensland, state the following:

Background

1. I am employed as Apprentice Training Coordinator for the CFMEU Construction and General Division Queensland-Northern Territory Divisional Branch. I have been engaged in that capacity since January 1997. Prior, I completed a Cabinetmaking apprenticeship in 1977 and spent the next 20 yrs. working in the domestic and commercial carpentry sectors of the construction industry. During this period, I gained a Certificate III qualification in Carpentry and worked with many apprentices**.**
2. I have responsibility for management of the CFMEU Apprentice Scholarships programme, which involves the recruitment, placement and mentoring of apprentices, with a focus on achievement of the highest completion rate possible.
3. Further to the above I am currently a board member of BIGA Training (a private RTO), Bert Training QLD (a training fund aimed at increasing the apprentice/trainee uptake and worker up skilling in the commercial construction industry). I sit on various steering committees with Construction Skills QLD, including the 10% policy committee, which provides advice to the Queensland Government. I am a past member

the Queensland Government Training and Employment Recognition Council and a past Board Member of Construction Training Queensland.

Junior Wage Rates

4. I am aware of the application before the Fair Work Commission to include junior wage rates in the *Building and Construction General Onsite Award 2010* (Onsite Award).

5. I believe that the provision of a junior wage rate in the Onsite Award would severely impact on the uptake of apprentices, as employers could and would employ young people and provide minimal on-the-job training and use them as cheap labour until they reached the minimum adult wage rate, only to dismiss the employee and start the procedure over again.

6. Our experience shows that there are many employers who are more than happy to let others do all the formal training for skilled tradesmen and then offer them inducements for employment once their training is completed.

7. I believe the probation period in formal apprenticeships provides more than an adequate amount of time to trial prospective apprentices for suitability for full-time employment.

8. Further, there is provision in most Training Contracts for the employer to apply to have the probation period extended if they are still unsure after three months.

Civil Construction Training

9. Formal training of apprentices and trainees in the Civil construction industry has only been in place since the early 2000s and, as such, does not have a historical culture of apprentice training.

10. A lot of work has been done in this area and our experience shows this sector of the industry is beginning to see and accept the value of a formal Certificate III-level training.

11. The introduction of a junior wage rate, in my view, would destroy all advancements in this area and take it back to informal, minimal on-the-job, enterprise-specific training.

12. I believe this would be a major backward step for the industry as a whole.

Signed:.....

Date:.....

Appendix E – Witness Statement of Brendan Holl

IN THE FAIR WORK COMMISSION
Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010
[MA000020]

Joinery and Building Trades Award 2010
[MA000029]

Mobile Crane Hiring Award 2010
[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

Witness Statement of Brendan Holl

I Brendan Holl, c/of [redacted] NSW, state the following:

1. I have been employed in the construction industry for about 22 years and currently live at Bateau Bay on the Central Coast of NSW.

2. For the last two years I have been employed as an Organiser with the CFMEU (Construction & General Division) NSW Branch and travel to work sites across Sydney from my home on the Central Coast on a daily basis.

3. Before that I was employed as a scaffolder and worked with a number of scaffolding companies including Erect Safe Scaffolding and Waco scaffolding. This work also required me to travel across the Sydney basin on a daily basis.

4. I understand that the MBA has made an application to vary the *Building and Construction General On-site Award 2010* to increase the radius for the application of the travel allowance from 50 km to 75 km. I understand that the rationale for this proposed change is a claim that travel times are reducing with improvements in travel infrastructure and transport technology.

5. My experience, both as a construction worker and now as an Organiser in attending construction sites is that over, say, the last five years, travel times in and around Sydney are increasing.

6. My daily commute from the Central Coast has become longer over the last five years. The Central Coast is growing in population every year and the roads are becoming more congested. If I leave the Central Coast after 6 AM the M1 is like a car park. In order to arrive at the city it often takes in excess of one hour 30 minutes. For example, on Monday 6 March I encountered a heavily loaded truck on the M1 which was being towed at one end and pushed at the other end such that it occupied two of three lanes of the M1. I left home at 5:00 to travel to Roseville and the journey took just short of two hours and I arrived on site at 6:50. If there is an accident or other incident on the M1 a simple trip from Central Coast to Roseville north of Sydney can take from 5 AM to 6:45 AM. Journeys into the city or south of the city can take longer. These times become worse as the morning peak progresses.

7. The journey back from the city to the Central Coast is even worse. If I leave at 5 PM in the afternoon I am generally not home until 6:30 or 6:45 PM, even without traffic incidents. If I leave during the earlier part of the peak period I can encounter 4 to 6 school zones which slows the traffic down.

8. The M2 to the west has many 80 km an hour zones and can often be a gridlock. The M2 and the M7 both have two lanes only for much of their length. In my experience the new motorways to the west and south-west of Sydney have not reduced travel times.

Signed: _____

Date: _____

[i] MA000057.