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

---

CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) RESPONSE ON QUANTUM OF INDUSTRY ALLOWANCE AND MULTISTOREY ALLOWANCE

14th November, 2018

Construction, Forestry, Mining and Energy Union (Construction and General Division) ABN 46 243 168 565	**Contact Person:** Stuart Maxwell, Senior National Industrial Officer	**Address for Service:** Level 9, 215-217 Clarence Street Sydney NSW 2000	**T:** **F:** **E:**	(02) 8524 5800 (02) 8524 5801 hearings@fed.cfmeu.asn.au smaxwell@cfmeu.org

Introduction

1. On 26th September 2018 the Fair Work Commission Full Bench issued a Decision ([2018] FWCFB 6019) on the substantive matters under consideration regarding the Construction Awards as part of the 4 yearly review of modern awards. In section 9. Allowances (see paragraphs [298] to [372]), the Full Bench dealt with the various expense related, skill related and disability related allowances contained in clauses 20, 21, and 22 of the current *Building and Construction General On-site Award 2010*.

2. In the Decision the Full Bench determined to vary and rename clause 20.1 – Tools and protective or other clothing or equipment. In regard to the consolidation of allowances in clauses 21 and 22, the Full Bench stated that it intended to proceed with the general approach foreshadowed in the December 2017 Statement ([2017] FWCFB 6487) and, save for the multistorey allowance, abolish all other disability allowances and replace them with "*an enhanced industry allowance, variable in quantum having regard to the particular industry sector in which an employee is engaged*."[1] (Emphasis added)

3. The Full Bench expressed a provisional view that rather than the four industry sectors proposed in the December 2017 Statement, it would be sufficient for there to be two sectors only: residential building and construction, and all other building and construction.[2] In regard to the quantum the Full Bench stated:

> *"[369] As to the quantum of the allowance, the Commission has not been assisted by reluctance of the industry parties to engage with the reforms proposed in the December 2017 Statement to simplify that which is clearly an overly-complex and outdated system of disability allowances that is no longer appropriate in a modern award. In those circumstances we proposed to state our provisional view concerning the quantum of the allowance, and then give interested parties one further opportunity to advance any alternative proposals, make any submissions or confer in relation to the quantum of the proposed sectoral industry allowances. It is obviously not possible in undertaking the exercise we propose to ensure that no employee will be worse off in any circumstance. Nor is it possible to ensure that some employees will not be better off than under the current system. Our general objective is to simplify the current system on the basis that it will generally be cost neutral for workforces over the longer term. The amount we propose for the industry allowance for the residential building and construction sector is an all-purpose amount of 4% of the weekly standard rate per week, and 5% for all other building and construction work. The amount for residential construction is lower because many of the disability allowances are either not applicable at all to, or rarely paid in, that sector*."

4. The Full Bench decided to allow interested parties 28 days from the date of the decision to file any further submissions they wished to make concerning the quantum of the sectoral industry allowances. The Full Bench also gave the opportunity to interested parties to request a further conference or hearing to be conducted in relation to this issue.[3]

5. The AWU on behalf of the unions requested a further conference on the issue of the consolidation of allowances and a number of parties sought an extension of time for the filing of submissions. In response to the AWU request, DP Gostencnik arranged a

1 [2018] FWCFB 6019 at [368]

2 Ibid

3 [2018] FWCFB 6019 at [372]

conference of the parties which was held on 1st November 2018. At the conference the CFMMEU (construction and General Division) (CFMMEU C&G) tabled a Combined Unions Proposal for the industry allowance and for height work (see Appendix 1). At the conclusion of the conference DP Gostencnik requested that the employer parties respond to the unions proposal on height work by Friday 9th November 2018, and that if the parties sought a further extension of time for the filing of submissions and submissions in reply, the parties should consult on an agreed revised timetable and submit it to the Full Bench.

6. On the 2nd November 2018 the CFMMEU C&G sent an email on behalf of the parties to the Associate of DP Gostencnik which set out the parties proposed timetable.[4] Revised directions were published by the Full bench on 8th November 2018 inviting written submissions in relation to the matters identified in paragraphs [151]-[152], [244], [246], [372], [412]-[413] and [451] by no later than 5.0pm on Wednesday 14th November 2018. This submission is filed in accordance with that revised timetable and addresses the issues identified in paragraph [372].

CFMMEU C&G Response

7. The CFMMEU C&G is extremely disappointed with the Decision of the Full Bench on allowances and cannot fathom how the Full Bench considers a 4% industry allowance to be an "enhancement" on the existing allowances. There is no explanation as to how the 4% has been calculated.

8. The CFMMEU C&G is also concerned that the Full Bench may not fully understand the implications of what is now being proposed. The provisional view on the sectors and the quantum of the industry allowance will actually reduce the award safety net wage rates of many building and construction workers covered by the *Building and Construction General On-site Award 2010*. This will not only reduce the weekly pay packets of workers paid the award rates but will also have far reaching consequences for bargaining in the industry and effect many workers covered by existing enterprise agreements that incorporate the *Building and Construction General On-site Award 2010.*

9. The proposed residential industry allowance of 4% of the standard rate (or $33.50 per week) is totally inadequate and less than the existing combined industry allowance and special allowance (currently $7.70 and $30.98 respectively, a total of $38.68), equivalent to 4.6% of the standard rate. The Full Bench proposal reduces the existing safety net of all workers in the residential construction industry by an average of $5.18 per week, and by $1.33 to $2.49 per week for apprentices. (This is in addition to the loss of a further $2.91 per week due to the removal of the payment of the fares and travel allowance on RDO's and the fares and travel allowance no longer being included in the calculation of annual leave loading.). Appendices 2 to 4 set out the reductions in ordinary time rates for relevant daily hire employees, weekly hire employees, casual employees and apprentices, if the proposed 4% industry allowance is applied.

10. There is clearly no compensation in the 4% industry allowance for the loss of the special rates that would normally apply to many workers such as carpenters, painters, bricklayers, roof tilers, etc. These special rates include:

    - Carpenters - insulation allowance, explosive power tools, second hand timber, wet work, dirty work

4 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-corr-cfmmeu-021118.pdf

- Roof tilers and fixers - insulation allowance, roof repairs, roof slater and tiler allowance
- Bricklayers - wet work, heavy blocks, cleaning down brickwork, bricklayer operating cutting machine, bagging
- Painters - toxic substances, bagging, spray application
- Plasterers - bagging, plaster or composition spray
- Tilelayers - dry polishing of tiles, cutting tiles, toxic substances

11. For employees engaged on special building and construction work[5] in the residential sector, such as asbestos removal work and air-conditioning work, the decreases in minimum award weekly wage rates are even greater, being a further $90.44 per week and $66.15 per week respectively, due to the removal of the asbestos eradication allowance and the air-conditioning industry and refrigeration industry allowances.

12. It is to be noted that it is generally accepted that there are many award reliant workers in the residential construction sector. According to the HIA:

> "*The construction industry has a high proportion of award-reliant businesses*."[6]

13. Such workers should, as far as possible, have the existing monetary value of their safety net of wages (which would include allowances) maintained, unless there are significant or meritorious reasons supporting a change.

14. This view is consistent with Preliminary Jurisdictional Issues Decision, as re-affirmed in the Penalty Rates Case[7]:

> *"[111] The scope of the Review was considered in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision. We adopt and apply that decision and in particular the following propositions:*
>
> *(i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.*
>
> *(ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award.*
>
> *(iii) The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.*
>
> *(iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances*."

15. The CFMMEU C&G submits that in these proceedings the Full Bench has given scant reasons as to why the majority of allowances have been removed, stating:

> *"[355] In an overall sense, the scheme of allowances in clauses 20-22 does not constitute a fair relevant safety net, having regard in particular to their impact on the*

5 For the purposes of this submission "special building and construction work" refers to refractory work, asbestos removal, air-conditioning work and work in compressed air.

6 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-hia-021216-.pdf at p.6

7 [2017] FWCFB 1001

regulatory burden (s.134(1)(f)) and the need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g)).”

16. Whilst it is accepted that s.134(1)(f) and (g) are important considerations to be taken into account in determining a fair and relevant minimum safety net of terms and conditions, it is submitted that s.134(1)(a), the relative living standards and the needs of the low paid, is of equal importance, especially from an employee perspective. There appears to be no consideration of the relative living standards and the needs of the low paid in the decision to remove allowances, particularly where those allowances currently form part of the minimum ordinary time hourly rate as defined in clause 3- definitions of the *Building and Construction General On-site Award 2010*, and the removal of the allowances will reduce the ordinary time hourly rates.

17. Fairness to both employers and employees is a central consideration of the modern awards objective, as recognised by the Expert Panel in the 2018 Annual Wage Review Decision[8],

> *“[17] Fairness is central to both the modern awards objective and the minimum wages objective. Section 134(1) refers to a ‘fair … minimum safety net’ and s.284(1) refers to ‘a safety net of fair minimum wages.’ In the Annual Wage Review 2016–17 decision (2016–17 Review decision) the Panel concluded that fairness in this context ‘is to be assessed from the perspective of the employees and employers’ affected by the Review decision*”

18. If many of the allowances are to be removed to assist employers then it is submitted that, to ensure fairness, employees should not be disadvantaged and that, as far as possible, employees’ ordinary time hourly rates are not reduced. Compensation should also be made for the removal of other special rates which would otherwise apply.

19. As for the proposed industry allowance for the rest of the building and construction industry, this is also detrimental to many building and construction industry workers. The removal of many of the allowances for special building and construction work significantly reduces the award safety net, e.g. for refractory bricklayers by an amount of $83.60 per week due to the removal of the refractory bricklaying allowance; for workers working under compressed air by between $57.76 to $935.56 per week due to the removal of the compressed air work allowance; and for workers engaged on asbestos removal and air-conditioning work by the amounts set out in paragraph 11 above. There is also no compensation for employees working at heights where such work is not covered by the current multistorey allowance.

20. The proposed increase in the industry allowance to 5% is only a 0.4% increase over the existing special allowance and industry allowance, which we submit is hardly fair compensation. It equates to a paltry 28c per week increase (once the loss of the fares and travel allowance on RDO’s and in the calculation of annual leave loading is factored in). Considering that the average special rate (not including those applicable to the trades working in residential construction or applicable to special building and construction work) is $0.78 per hour (or $29.67 per week) (see Appendix 5) it is not too difficult to see how the average construction worker will be worse off under the industry allowance proposed by the Full Bench.

---

8 https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb3500.htm

21. The CFMMEU C&G is still of the view that, apart from special building and construction work where the current allowances payable are significantly higher, the best approach is to have one industry allowance for the rest of the industry. Including different industry allowances for the residential sector (as defined by the Full Bench[9]) and the rest of the industry would add a significant amount of complexity to the Award, particularly for small to medium businesses that do work on both single occupancy residential dwellings and commercial projects.

22. Looking through the prism of the actual work performed by building and construction workers in new construction, maintenance and renovation work, it can be seen that a number of the existing special rates still apply across the industry, whether it is single occupancy residential construction, multi-unit residential construction, commercial or industrial construction, e.g.:

- Explosive power tools are used across the industry in attaching timber or metal to concrete or other materials[10]. This is especially the case with the move to steel frame housing and greater use of concrete floors in multi-unit development.

- Wet work applies whenever there is substantial rain and water congregates on site, particularly on concrete slabs.

- Carpenters, roof tilers and fixers, and trades labourers would handle insulation materials in the roof area of residential buildings particularly where maintenance or renovation work is being performed, but also during new construction. The use of insulation materials is also prevalent in commercial and industrial premises.[11]

- Workers engaged on renovation work will be exposed to unusual dirty work where there is build-up of dust, particularly in the roof areas of buildings or where internal walls are being removed, or work is performed under floors.

- Second hand timber is increasingly being used in the building and construction industry. Where older buildings or structures (such as wooden bridges) are being demolished the increasing practice is for the timber to be carefully removed so that it can be recycled and then used in either new builds or renovations. A September 2016 article in Sanctuary Magazine titled "*Recycled timber: material that tells a story*"[12] explains how and where recycled timber is being used in both the residential and commercial sectors.

- Toxic substances such as epoxy based materials are widely used in the building and construction industry by painters, tilers, concreters, etc. Epoxy resins are used for decorative flooring applications such as terrazzo flooring, chip flooring, and coloured aggregate flooring.[13] Epoxy-based mortar products

9 [2018] FWCFB 6019 at paragraph [368]

10 See the video http://wsi.tafensw.libguides.com/c.php?g=294682&p=1965651 for an explanation of explosive power tools and how they are used.

11 See https://www.bradfordinsulation.com.au/commercial-and-industrial-insulation for the areas where insulation materials are used.

12 https://renew.org.au/sanctuary-magazine/in-focus/recycled-timber-material-that-tells-a-story/

13 https://en.wikipedia.org/wiki/Epoxy#Applications

which include patches, crack fill, heavy duty and high-performance coating systems are used to repair concrete areas.[14] Epoxy resins also have a wide use in applications like coatings, sealants, grouts, waterproofing, damp courses and adhesives.[15]

- Heavy blocks are used by bricklayers and stonemasons in the construction of houses, schools and commercial buildings, and for the construction of retaining walls. These blocks can range in weight from 4kg to 23.9kg. The Design Guide for South Queensland and NSW, published by National Masonry, (see Appendix 6) sets out the types of heavy blocks used in residential construction and where they can be used (see pages 17-38).

- Brick cutting machines are still widely used in the industry wherever bricks are and blocks are used, and brick cutting machines are readily available for hire at hardware stores.[16]

- As referred to in the National Masonry Design Guide, brick and blocks are still cleaned using acids and other corrosive substances:

  "***Acid Treatments***

  Only if hand cleaning and pressure washing methods have failed to fully remove mortar stains, should acid treatments be considered for cleaning of concrete blockwork.

  ***Note** Acids react with and dissolve cement, lime and oxide colourants in concrete blocks and mortar joints and are thus capable of etching, fading and streaking the masonry finish. When acid is applied to dry blockwork without pre-wetting, it is drawn in below the surface it is intended to clean. Salts may appear when the masonry dries out.*

  If it is considered necessary to use an acid for general cleaning, it should only be used after trialing in an inconspicuous area as outlined under 'Essential Preliminaries' and strictly in accordance with the following procedures.

  Hydrochloric acid (otherwise known as Muriatic Acid or Spirits of Salts) can be tested at a strength of 1 part acid to 20 parts water. A less aggressive alternative is powdered Citric Acid which can be used at strengths up to 1 Part acid to 10 parts water (by volume).

  Procedures for Acid Cleaning

  1. Remove mortar dags and smears as described under 'Hand Tools';

  2. Working from the top of the wall down in vertical 'runs', thoroughly pre-wet (SOAK) an area of blockwork of approximately 2m2 at a time;

14 https://www.simonsurfaces.com/concrete-repairs-resurfacing/

15 https://www.pcimag.com/articles/91312-toughening-of-epoxy-coating-systems-with-novel-bio-based-materials and https://buildingwithchemistry.org/chemistry-in-bc/epoxies-in-building-and-construction/

16 https://www.bunnings.com.au/for-hire-brick-saw-with-blade-4hr_p5470033

3. Apply dilute acid to the water-soaked area by brush or broom with a horizontally (sideways) action to prevent runs and streaks;

4. Within 2 to 3 minutes, rinse this area from top to bottom under tap pressure only;1. Pressure clean this area thoroughly, gently and evenly, as outlined previously;

5. Repeat steps 1 to 5 as necessary to achieve the best compromise between cleaning and damage caused by excessive treatment."[17]

- Roof repair is part and parcel of the everyday work of roofing companies, especially for roof slaters and tilers. Companies that specialise in this work do repair work on houses, public buildings and heritage buildings.[18] Other companies do a wider range of maintenance services, including roofing services in both the domestic and commercial sectors.[19]

- Airless spray painting is increasingly being used by painters in the domestic and commercial industry to paint walls and ceilings and on outside applications such as the painting of fences.[20]

- Bagging of brickwork can be done by bricklayers or plasterers,[21] and sometimes painting companies provide a combined bagging and painting service.[22]

- Plasterers use plaster or composition spray equipment in both the domestic and commercial sectors.[23]

- Dry polishing of tiles is done in the residential, commercial and industrial sectors.[24]

23. The CFMMEU C&G therefore does not agree with the Full Bench suggestion that the amount for residential construction should be lower because many of the disability allowances are either not applicable at all to, or rarely paid in, that sector. Many clearly are applicable (see paragraph 22 above) and should be paid. The failure of employers to comply with the award and pay the allowances should not be rewarded by the removal of the allowances without providing adequate compensation to employees.

CFMMEU C&G/Combined Unions Proposal

24. As demonstrated above, the provisional view on the industry allowance proffered by the Full Bench will be detrimental to significant numbers of building and construction

17 Appendix 6 at p.15
18 http://www.hgnroofing.com.au/heritage-renovation/
19 http://www.abprop.com.au/roofing-services/
20 http://www.ol-painting.com.au/services/airless-spray-painting.html
21 https://www.centralcoastcementrendering.com.au/our-services-top/bagging-topping
22 http://kraudeltpainting.com.au/rendering-block-walls/
23 http://www.kingofsprayplaster.com.au/
24 https://instyle-stone.com.au/Flooring-Specialists-3/?gclid=Cj0KCQiA2o_fBRC8ARIsAIOyQ-muTsDMvKhtC1bPVkQYV6TFP8AjlNr1e5g0HgQBUVIFsApijgr70FMaAutzEALw_wcB

workers covered by the *Building and Construction General On-site Award 2010* who are paid minimum award ordinary time rates, as well as a significant number of other building and construction workers covered by enterprise agreements (particularly those employees engaged by labour hire companies, that typically pay $1 an hour (or less) above the award rates).

25. The CFMMEU C&G recognises the difficult task faced by the Full Bench in dealing with allowances and that,

> *"It is obviously not possible in undertaking the exercise we propose to ensure that no employee will be worse off in any circumstance. Nor is it possible to ensure that some employees will not be better off than under the current system"*

But it is submitted that more can be done to ensure that the majority of award reliant employees are not worse off under the proposed changes than they were under the existing *Building and Construction General On-site Award 2010*.

26. The CFMMEU C&G and the other unions (i.e. AMWU, AWU and CEPU) (the Combined Unions) have given consideration to what the Full Bench has proposed and taken up the opportunity to advance an alternative proposal as set out in Appendix 1. The CFMMEU C&G submits that this is the best way to ensure that the majority of workers on the minimum award rates are not worse off by the significant changes to be made to the *Building and Construction General On-site Award 2010*.

27. There are 3 parts to the Combined Unions proposal:

- A general industry allowance of 6.6% of the standard rate to apply to all building and construction work except for "special building and construction work" (as defined)
- An industry allowance of 14.2% of the standard rate to apply to special building and construction work (as defined)
- A variation to clause 21.4- Multistorey allowance, to include a provision to apply to any work at heights, other than on a multi-storey building, requiring the payment of either the multistorey allowance or a height allowance of 3.2% of the standard rate for each 15m in height.

The General Industry Allowance

28. In the Combined Unions Proposal document tendered at the Conference before DP Gostencnik (see Appendix 1), the unions included a table setting out the method of calculation of the 6.6% (of the standard rate) industry allowance. The table referred to the average of special rates paid to the trades and a figure of $0.73 per hour. That figure was arrived at by looking at the special rates that would apply to tradespersons working in the residential construction sector (as defined by the Full Bench) and determining an average figure. Appendix 7 sets out a revised list of the special rates that should be included in the calculation (based on the allowances referred to in paragraph 10 above) and how the average is determined. On this revised list the average of the special rates is $0.78 per hour ($29.77 per week), which is slightly higher than the $0.73 per hour figure used in the table in Appendix 1, however, to avoid complicating the matter, the Combined Unions have not sought to amend the total figure claimed.

29. Having determined the average of the special rates paid to tradespersons, the Combined Unions Proposal then applies an across the board 50% discount recognising that the special rates would not necessarily be paid for all hours worked (although this would vary between the trades). The 50% rate is then converted to a percentage of the standard rate which results in an additional figure of 1.7% of the standard rate for the loss of special rates.

30. As is generally recognised the majority of employees engaged in residential construction (as defined by the Full Bench) are tradespeople but, as noted in paragraphs 21 and 22 above, many of these tradespeople also work in multi-unit residential construction, commercial construction and industrial construction and perform work of the same nature which would attract the payment of the same special rates. Therefore the compensation for the loss of the special rates should be the same wherever such tradespeople work.

31. As for other workers in the building and construction industry the average special rate payable, calculated in accordance with Appendix 5 and referred to in paragraph 17 above, is $0.78 per hour. There is therefore a fairly consistent level of special rates applicable across the building and construction industry which supports one level of industry allowance being paid for all work other than special building and construction work (as defined) which is discussed below.

Special Building and Construction Work Industry Allowance

32. As set out in this submission the Combined Unions have proposed a separate industry allowance of 14.2% of the standard rate for special building and construction work (as defined). This industry allowance would be limited to employees engaged on refractory work, asbestos removal work, air-conditioning and refrigeration industry work, and work in compressed air.

33. The reason a separate industry allowance is sought is the fact that the overwhelming majority of employees who do this work, specialise in this work (i.e. they perform the work all the time) and would be paid the allowances currently payable under the award for all hours worked. In the case of the refractory bricklaying allowance and the air-conditioning and refrigeration allowance, the existing allowances are part of the ordinary time hourly rate, as defined in clause 3 – Definitions, and as provided for in clauses 19.3(a), 19.3(b), 19.7(e) and 21.8(b), which effectively makes them all-purpose allowances.

34. In regard to the refractory bricklaying allowance the CFMMEU C&G notes that to date the MBA have made what we consider to be misleading submissions as to its all-purpose nature. To dispel these false assertions the CFMMEU C&G is compelled to bring to the attention of the Full Bench the following decisions and award provisions.

35. On 2nd March 1981, in dealing with an industrial dispute in *The Building Workers' Industrial Union of Australia and Andreco Pty Ltd and others*, Justice Alley handed down a decision (Print E5490 – see Appendix 9) which set out the then history of award provisions covering refractory work,

> "*Prior to the prescription of the new appendix in the N.B.T.C.A., refractory bricklayers received the same base rate and other all purpose allowances and rates as other tradesmen under that award together with a refractory allowance of 68c payable for all purposes of the award……Under the agreement reached in December the base rate of the refractory bricklayer was increased by some $18*

per week with a further increase of $10 to take effect from the first pay period on or after 1 June 1981, and the refractory allowance was increased to 80c per hour with the proviso that it is paid in lieu of all special rates prescribed in clause 12 of the award except hot work and cold work rates." [25]

36. In the same decision Justice Alley drew the following conclusion based on the evidence called by the MBAV as to the manner in which refractory work was carried out in all states,

> *"(1) Much of the work in the refractory bricklaying area is carried out by the companies operating in more than one State and employing a core of skilled employees who are frequently called on to perform work in states other than the State in which they were engaged.*" [26]

37. It is significant that this aspect of the industry has not changed as demonstrated by the witness evidence of Dave Kelly (Exhibit 30) and Frank O'Grady (Exhibit 11) already provided to the Full Bench in the main proceedings.[27]

38. Another interesting aspect of this decision is Justice Alley's comments on the inconsistent position adopted by the MBAV,

> "*The position adopted by the Victorian employers has been curiously inconsistent. The M.B.A.V. has been represented at all hearings before me and the Victorian respondent contractors have participated in discussions which preceded the finalisation of the agreement with the BWIU. ……Thus on the one hand the MBAV and its members who are parties to this dispute have through the process of conciliation joined in on agreement for uniform rates and conditions on a national basis for refractory bricklaying, while on the other hand the same association and employers have been parties to the making of a new state determination which is at variance with this concept.*"[28]

Having a consistent position appears to be a re-occurring problem for the MBA.

39. In 1987 Justice Alley varied Appendix F of the *National Building Trades Construction Award 1975* to extend the coverage of the Appendix to refractory bricklayers assistants, to insert a weekly base rate for a refractory bricklayers' assistant and to alter the refractory bricklayers special allowance clause to include an allowance of 81c per hour for refractory bricklayers assistants.[29] In the decision Justice Alley made the following findings of fact;

> "*From the evidence given before me in both proceedings C Nos 4524 and 4656 of 1986, and from the knowledge derived from my association with the building industry over a long period of years I make the following findings of fact:*
>
> *1. Refractory brickwork in the building industry is in most cases carried out by specialist contractors. These contractors, or at least the larger ones, perform work wherever they obtain contracts which may be anywhere in Australia.*

25 Appendix 8 at p.278
26 Ibid at p.279
27 See paragraphs 5, 15 and the first paragraph of Attachment 1 of Exhibit 30 and paragraph 15 of Exhibit 11
28 Appendix 8 at p.283
29 Print G6847 (see Appendix 9)

2. *These contractors tend to employ a core of specialised employees covering both tradesmen and assistants.*

3. *Until the registration of the BLF was cancelled the great majority of refractory bricklayers' assistants belonged to the BLF, but where membership of another union was required then in most cases such membership was taken in addition under a system of dual tickets."*[30]

40. Justice Alley also noted that "The BWIU's application is not opposed by any of the employers or employer associations that are bound by the NBTCA."[31] In the order varying the NBTCA 1975 it specifically stated that the refractory bricklaying allowance was to "*be regarded as part of the wage rate for all purposes of the award*".[32]

41. On 2nd January 1990, Justice Ludeke of the Australian Industrial Relations Commission made the *National Building and Construction Industry Award 1990*[33]. Clause 5 of appendix F provided as follows:

"*5 - REFRACTORY BRICKLAYING ALLOWANCE*

A special allowance to compensate for disabilities associated with the work of refractory bricklaying shall be paid as follows:

Classification	*Per hour*
	$
Refractory bricklayer	*1.06*
Refractory bricklayer's assistant (NSW)	*.93*

This allowance shall be paid in lieu of all special rates prescribed in clause 12 of the award except 12(1)(b) and 12(1)(c), and shall be regarded as part of the wage rate for all purposes of the award."

42. On 6th June 2000 Commissioner Merriman made the *National Building and Construction Industry Award 2000*[34], and clause 18.10 provided as follows:

"*18.10 Refractory work*

18.10.1 Application

[30] Appendix 9 at p.5
[31] Ibid at p.6
[32] Print G6848
[33] Print J4733
[34] http://www.fwa.gov.au/awardsandorders/S0643.doc

This subclause shall apply to employers with respect to employees engaged in the construction, alteration or repairs to:

18.10.1(a) *Boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar refractory work;*

18.10.1(b) *Acid furnaces, acid stills, acid towers and all other acid resisting brickwork.*

18.10.2 Refractory bricklaying allowance

A special allowance to compensate for disabilities associated with the work of refractory bricklaying shall be paid as follows:

Classification	***Per hour*** ***$***
Refractory Bricklayer	*$1.25*
Refractory Bricklayer's Assistant	*$1.08*

This allowance shall be paid in lieu of all special rates prescribed in clause 24 of this award except 25.1.4(b) and 25.1.4(c), and shall be regard as part of the wage rate for all purposes of the award.

18.10.3 Apprentices

An apprentice refractory bricklayer shall be paid the appropriate percentage as prescribed by clause 20 - Junior labour of this award, of the wage rates and allowances prescribed by 18.1.1 and 18.10 hereof."

43. When the *Building and Construction General On-site Award 2010* was first made by the Award Modernisation Full Bench,[35] clause 21.8 provided as follows:

"21.8 Refractory bricklaying allowance

(a) *A special allowance to compensate for disabilities associated with the work of refractory bricklaying must be paid as follows:*

[35] PR986361

Classification	***Per hour*** ***% of the hourly standard rate***
Refractory bricklayer	*10.0*
Refractory bricklayer's assistant	*8.5*

(b) *This allowance must be paid instead of all special rates prescribed in clause 22—Special rates, except clauses 22.2(b) and 22.2(c) and will be regarded as part of the wage.*

(c) *An apprentice Refractory bricklayer must be paid the allowance on a proportionate basis reflecting the appropriate percentage of the adult wage in clause 19.1."*

44. The Award Modernisation Full Bench did not include the words "for all purposes of the award" but as it referred to being "part of the wage" and the allowance was included in the calculation of the hourly rate of pay for daily hire employees as provided in clause 19.3(a), there was no suggestion that the all purpose nature of the allowance had changed.

45. During the Modern Award Review 2012, the MBA submission of 7th March 2012[36] included a table at Attachment A – suggested changes to allowances under the On-Site Award, which said the following in regard to the refractory bricklaying allowance:

10% x hourly standard rate per hour, paid instead of special rates, part of wage for all purposes	Retain as cumulative allowance

46. It is therefore clear that during the Modern Award Review 2012 all the parties, including the MBA, recognised the all purpose nature of the refractory allowances, and there was no suggestion by any party that it had changed.

47. The Decision of SDP Watson[37] on the *Building and Construction General on-site Award 2010* noted the following agreed position of the parties,

> ***[12]*** *Correspondence by the MBA on 1 February 2013, the terms of which were settled with the CFMEU, advised that agreement was pending in relation to the definition of the concept of ordinary hours/reference rates under the Building On-site Award. An agreed position between the MBA and the CFMEU was concluded and filed in the Commission. It was placed on the website dated 6 March 2013 and the matter was listed for further conference/hearing on 21 March 2013.*
>
> **…..**
>
> *3. Reference rate issue*

[36] https://www.fwc.gov.au/documents/documents/awardmod/review/am201248.pdf

37 https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc4576.htm

> ***[33]*** *The MBA's initial application sought variations directed to providing greater clarity in respect of reference rates throughout the Building On-site Award. It submitted that, whilst most allowances are defined under the Building On-site Award as a proportion of the "standard rate", which is described at clause 3.1 as the minimum wages as expressed for CW/ECW 3 workers under clause 19.1, i.e. 19.1(a) base rates, the reference rates for a range of other entitlements under the Building On-site Award are less clear. It submitted that many loadings, redundancy payments, distant work entitlements etc., are often described as being payable at "ordinary time rates of pay", "ordinary rates", "time and a half" or "double time" etc., which are not defined under the Building On-site Award. The MBA submitted that this resulted in employers being often uncertain about which rates should be paid upon redundancy, or to which rates loadings should be applied, proposing that reference rates under the Building On-site Award be specifically defined, based both on the penalty reference rate definitions contained in the NBCIA and common law precedent on the meaning of "ordinary time rates of pay".*
>
> ***[34]*** *As already noted in this decision, organisations appearing sought a further opportunity to progress the simplification of reference rates. They utilised that opportunity productively, resulting in a variation agreed between the CFMEU, the HIA, the MBA, the AWU, the AMWU and the CEPU which was conveyed to the Commission in a submission and correspondence of 6 March 2013, which was posted on the website."*

48. the parties agreed on a number of variations to the award which included for 21.8(b),

> ***"(b)*** *This allowance must be paid instead of all special rates prescribed in clause 22—Special rates, except clauses 22.2(b) and 22.2(c) and will be regarded as part of the ordinary time hourly rate."*[38]

49. The only change made to this clause was the replacement of "*part of the wage rate*" with "*part of the ordinary time hourly rate*". As the previous version of this subclause did not include the words "for all purposes of the award" the words were not added as the parties were just replacing terms such as wage rate, ordinary time rate, etc with the words "ordinary time hourly rate". No party suggested that the non-inclusion of the words "for all purposes of the award" changed the well understood and historical all purpose nature of the allowance**.** It is abundantly clear from clause 19.3(a) that it is part of the hourly rate for daily hire employees and, as there is no exclusion in clause 22.8(b), it is required to be paid to weekly hire employees.

50. Further support for the all purpose nature of the refractory bricklaying allowance can be found in clauses 22.2(m) and (n) and clause 19.7(e). Clauses 22.2(m) and (n) refer to furnace work and acid work allowances, that would otherwise apply to refractory work if employees are not paid the refractory bricklaying allowance, and clearly state that such allowances are paid on an all purpose basis. Clause 19.7(e) refers to the allowances to be paid to apprentices on an all purpose basis and provides as follows:

> ***"(e)*** *In addition to the above rates apprentices will be paid amounts prescribed in:*
>
> - *clause 21.2—Industry allowance;*

38 https://www.fwc.gov.au/documents/awardsandorders/html/pr538792.htm

- *clause 20.1—Tool and employee protection allowance;*
- *the relevant percentage (as identified in clauses 19.7(b) and (d) for the year of the apprenticeship) of the Special allowance contained in clause 21.1;*

and, where applicable,

- *clause 21.3—Underground allowance; and*
- ***for refractory bricklaying apprentices the relevant percentage (as identified in clause 19.7(b) for the year of the apprenticeship) of the Refractory bricklaying allowance contained in clause 21.8.***

as part of the ordinary weekly wage for all purposes." (Emphasis added)

51. As previously stated (see paragraph 19 above) removing the refractory bricklaying allowance from the award without any compensatory increase in the industry allowance will reduce the award weekly ordinary time rates for refractory bricklayers by $83.60 per week, and for refractory bricklaying apprentices by between $45.98 to $75.24 per week. The reductions would be significantly more where overtime or shiftwork loadings apply. The introduction of a separate industry allowance for special building and construction work, which includes refractory work, as proposed by the Combined Unions, will mitigate the potential disadvantage to these employees.

52. In regard to the allowance paid for asbestos eradication (defined as work on or about buildings involving the removal or any other method of neutralisation of any materials which consist of or contain asbestos), the CFMMEU C&G submits that this work is usually performed by employees of specialist licensed contractors.

53. When the allowance was first introduced into the *National building Trades Construction Award 1975*, Justice Evatt of the Australian Conciliation and arbitration Commission said the following,

"*Asbestos*

The unions sought a special rate requiring compliance with safeguards laid down by health authorities for persons using asbestos and providing for a special rate where protective clothing is worn. The union submitted that it wished to highlight the danger involved in the use of asbestos and put the onus on the employer to ensure that established safeguards were provided and used. The special rate would compensate for the disability of wearing the protective equipment.

The claim was opposed by employers. It was argued that there was no legislation in force requiring the use of protective clothing outside factories so that the clause claimed would have no application.

The claim was accepted in principle and leave was reserved to the unions to apply to the Commission for the inclusion in the award of a special rate should legislation be introduced in respect of the use of asbestos.

The matter was raised by the unions on 27 February, and reference was made to the Queensland Construction Safety Act 1971 and the Regulations thereunder and to the New South Wales Scaffolding and Lifts Act ……Although it is not clear

whether these provisions apply directly to the handling of asbestos in respect of work covered by this award it does seem possible from examination of the legislation that requirements may be imposed not by general regulation but by specific directions in regard of particular sites. There would be advantages in having a provision in the award rather than waiting until a direction is given and then applying for a variation. Therefore, although I am not aware of any actual requirements at present or of any situation to which the clause could apply, I grant the application to include the clause in the proposed award, with the amendment suggested by the unions to make it clear that it is intended to apply only where full overalls and breathing gear are required to be work. The rate will apply only where there is an actual requirement in force that such gear is worn."[39]

54. It would be an understatement to say that society's awareness of the dangers of asbestos and its relevance to the building and construction industry has increased significantly since the decision of Justice Evatt. The Asbestos Safety and Eradication Agency[40] was established by the Federal Government in 2013 to provide a "*national focus on asbestos issues which goes beyond workplace safety to encompass environmental and public health concerns*". Approximately one third of all homes built in Australia contain asbestos products.

55. According to the Agency web site:

"*Professional removal*

In the ACT, it is a legal requirement that all asbestos removal work is carried out by a licensed asbestos removalist.

In all other states and territories, asbestos removal work must be carried out by a licensed removalist, unless the area being removed is 10m² or less.

However, it is always recommended that asbestos is removed by a licensed asbestos removalist no matter how big or small the job is.

How do I find a licensed asbestos removalist?

The work health and safety regulator in your state or territory will have a list of licensed asbestos removalists on their website.

Asbestos removalists are also listed in the Yellow Pages. If you are choosing a removalist from the Yellow Pages, ask them for a copy of their license, or contact the work health and safety regulator in your state or territory to confirm if they have the right class of license for the job.

A licensed asbestos removalist will have one of the following licenses:

Class A license holders are permitted to remove all types of asbestos, including friable and non-friable forms.

Class B license holders can only remove non-friable asbestos."

[39] Print C7322 at pp.8-9

[40] https://www.asbestossafety.gov.au/

56. Depending on the site, the type of asbestos and size of asbestos to be removed, there are regulatory requirements as to the specific protective clothing and breathing equipment to be worn, and the use of decontamination units.[41]

57. The CFMMEU C&G submits that this work is not only now regarded as specialist work, but also extremely dangerous work as exposure to just ONE fibre can be a death sentence. According to the Asbestos Safety and Eradication Agency "*An average of 4000 people die from asbestos-related diseases each year in Australia, a trend that continues to rise*". It is submitted that workers engaged in asbestos eradication should not be disadvantaged by the removal of the specific asbestos eradication allowance and that the Full Bench should mitigate the potential disadvantage to these employees by introducing the separate industry allowance for special building and construction work (as defined) as proposed by the Combined Unions.

58. It is recognised that the current asbestos eradication allowance is not currently paid on an all-purpose basis, however the proposed industry allowance for special building and construction work, of 14.2% of the standard rate, is approximately $10.21 per week less than the current total (for a 38 hour week) of the combined asbestos eradication allowance, special allowance and industry allowance. It is therefore submitted that Combined Unions proposal is fair compensation to both employers and employees..

59. In regard to the allowance for work in compressed air, again it is recognised that it is not currently paid on an all - purpose basis but as there is such a large variance in the current allowance, this will always be a swings and roundabouts argument.

Height Work

60. As referred to in the Combined Unions Proposal an amendment is sought to clause 21.4 to provide for an allowance payable to employees working at heights where the multistorey allowance does not currently apply. This work is currently covered by clause 22.2(e) - Swing Scaffold and clause 22.3(a) – towers allowance. The specific changes sought by the Combined Unions is set out in Appendix 8.

61. The current clause 21.4 – Multistorey Allowance, applies to the construction or renovation of a multistorey building (clause 21.4(a)). It can also apply to any "buildings or structures which do not have regular storey levels but which are not classed as towers (e.g. grandstands, aircraft hangers, large stores, etc.) and which exceed 15 metres in height" by agreement between the employer and employee, or alternatively they may agree on the payment of the towers allowance (clause 21.4(d)). Renovation of a multistorey is defined as "work performed on existing multistorey buildings and such work involves structural alterations which extend to more than two storeys in a building" (clause 21.4(b)).

62. The removal of the Swing Scaffold allowance (clause 22.2(e)) and towers allowance (clause 22.3(a)) will significantly disadvantage employees working at heights on buildings or structures not covered by the multistorey allowance. This would include:

- employees working on a swing scaffold doing repair work (e.g. repairing glazing or curtain walling) on a multistorey building where the work does not involve structural alterations that extend to more than two storeys

[41] E.g. see the Qld code of practice at https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0009/58194/how-to-safely-remove-asbestos-cop-2011.pdf

- employees working on a chimney stack, spire, tower, radio or television mast or tower, air shaft, cooling tower, water tower or silo above 15 metres

63. The removal of the towers allowance may also disadvantage employees working on grandstands, aircraft hangers, large stores etc (i.e. buildings or structures that do not have regular storey levels but which are not classed as towers) as the removal of clause 22.3(a) makes the wording and meaning of clause 21.4(d) unclear, i.e. does it require the agreement of the employer and employee for the multistorey allowance to apply. If there is no agreement what applies?

64. The removal of the towers allowance will also disadvantage employees working on service cores at more than 15 metres above the highest point of the main structure (see clause 21.4(g)) as there will no longer be a towers allowance in the award.

65. The CFMMEU C&G submits that the disabilities faced by employees working in the open at heights are similar to if not greater than those working with the alignment of a multi- storey building.

66. The decision of Commissioner Bennett of the Australian Industrial Relations Commission of 31st March 1989 (Print H7542 – See Appendix 11) provides an insight into these disabilities and why a separate special rate was struck for swing scaffolds. Significantly this decision was made after site inspections of the Gateway Project in Sydney, and witness evidence from employees who worked on a swing scaffold. The types of disabilities involved included:

- The increased possibility of an employee being struck by lightening
- The wind tunnel effect of being caught between tall buildings in the city
- The chill factor
- The changing climatic conditions
- The blowing about when correcting the stage
- The general discomfort of being so high up including the glare which comes off the increasing use of large window cladding material.

67. Also of significance is the remark by Commissioner Bennett that,

> "*The attitudes of the employer organisations appeared to have changed dramatically as a result of the inspections, and whereas opposition to the claim was paramount at the first hearing, there was acceptance at least in principle by all the parties at the final hearing.*
>
> *The only major factor of disagreement finally was the quantum of the allowance*."[42]

68. As referred to in the decision the union in determining its claim,

> "*had some difficulty in finding some other allowances which might bear some resemblance to the swing scaffold in order to fix appropriate quantum.*
>
> *There was no allowance which bore a direct resemblance, the closest being the multi-storey allowance and the height allowance*."[43]

[42] Appendix 9 at p.3
[43] Ibid., p.8

69. The CFMMEU C&G therefore submits that if the swing scaffold allowance is to be abolished then it would be appropriate for the multistorey allowance to apply to such work.

70. Also if the towers allowance is to be abolished that the provisions of the towers allowance (i.e. a rate of 3.2% of the hourly standard rate where construction exceeds 15 metres in height and an additional 3.2% of the hourly standard rate for work above each additional 15 metres) should be incorporated into the multistorey allowance clause as per the clause in Appendix 8.

71. A final comment in regard to the multistorey allowance is required as paragraph [369] of the Full Bench decision refers to the removal of the plant room allowance in clause 21.4(e). The CFMMEU C&G would point out that this is not an allowance as such but more an additional definition to determine how a plant room is to be treated in the calculation of a storey level.

Conclusion

72. The provisional view of the Full Bench on the quantum of the industry allowance will disadvantage many award reliant employees in the building and construction industry. This will not be consistent with the modern awards objective and the requirement to apply fairness to both employers and employees. Similarly the removal of the swing scaffold allowance and towers allowance will disadvantage employee unless changes are made to the multistorey allowance clause.

73. The Combined Unions proposal for a general industry allowance of 6.6% of the standard rate, a special building and construction work industry allowance of 14.2% of the standard rate (as set out in Appendix 1), and the variations to the multistorey allowance (as set out in Appendix 8) will reduce the disadvantage to employees and should be adopted by the Full Bench to ensure fairness to both employers and employees.

Appendix 1

AM2016/23 – 4 Yearly Review of Modern Awards – Construction Awards

Conference on Quantum of Industry Allowance

Combined Unions Proposal

1. **Building and Construction work – Industry allowance** – (does not apply to Special Building and Construction Work)

   An industry allowance of **6.6%** of the standard rate

2. **Special Building and Construction Work – Industry Allowance** – applies to asbestos removal, refractory work, air conditioning work and work in compressed air

   An industry allowance of **14.2%** of the standard rate

3. **Height Work**

   Amend 21.4(d) of the multi-storey allowance clause to provide a height allowance of 3.2% of the standard rate for each 15m in height to apply to any work at heights other than on a multi-storey building.

Method of Calculation of Building and Construction work – Industry Allowance

The 6.6% is calculated as follows:

Calculation of New Industry allowances

Existing allowances			**% of standard weekly rate**
Special rate	$7.70	per week	0.9
Industry Allowance	$30.98	per week	3.7
		sub total	4.6
Loss of fares on RDO and in leave calculation			
	$2.91	per week	0.3
		sub total	4.9
Average of special rates paid to trades			
$0.73	$27.88	per week	
50%	$13.94		1.7
		Total	6.6

Method of Calculation of Special Building and Construction Work – Industry Allowance

The 14.2% is calculated as follows:

Rate for new industry allowance - special work

	Existing allowance		% of standard rate	Additional payment for loss of other existing allowances	total
Refractory Allowance	$2.20	$83.60	10.0	4.9	14.9
Refractory Assistant	$1.87	$71.06	8.5	4.9	13.4
Asbestos Allowance	$2.38	$90.44	10.8	4.9	15.7
					0.0
Air-conditioning allowance	$1.74	$66.15	7.9	4.9	12.8
Average	**$2.05**	**$77.81**	**9.29**	**4.90**	**14.19**

(**NB** The existing compressed air allowances are as follows:

	per hour	per week	% of standard rate
0-35 kpa	$1.52	$57.76	6.9
Over 35 to 65 kpa	$1.92	$72.96	8.7
Over 65 to 100 kpa	$3.88	$147.44	17.6
Over 100 to 170 kpa	$7.71	$292.98	35.0
Over 170 to 225 kpa	$12.85	$488.30	58.3
Over 225 to 275 kpa	$24.62	$935.56	111.7

)

Appendix 2

Reductions in Daily Hire and Weekly Hire Rates of Pay if 4% Industry Allowance is Applied

		Current Award Rates - Daily hire		Award Rate with 4% industry allowance				Current Award Rates - Weekly Hire		Award Rate with 4% industry allowance			
Occupation	**Wage Group**	**HOURLY RATE**	**WEEKLY RATE**	**HOURLY RATE**	**WEEKLY RATE**	**Reduction**		**HOURLY RATE**	**WEEKLY RATE**	**HOURLY RATE**	**WEEKLY RATE**	**Reduction**	
						per hour	**per week**					**per hour**	**per week**
Foreperson	CW8	$28.04	$1,065.52	$27.91	$1,060.58	**$0.13**	**$4.94**	$27.19	$1,033.22	$27.05	$1,027.90	**$0.14**	**$5.32**
Sub-foreperson	CW7	$27.43	$1,042.34	$27.29	$1,037.02	**$0.14**	**$5.32**	$26.59	$1,010.42	$26.45	$1,005.10	**$0.14**	**$5.32**
Special Class Tradesperson, Carver	CW5	$26.07	$990.66	$25.94	$985.72	**$0.13**	**$4.94**	$25.28	$960.64	$25.14	$955.32	**$0.14**	**$5.32**
Marker or Setter Out, Letter Cutter	CW4	$25.35	$963.30	$25.22	$958.36	**$0.13**	**$4.94**	$24.58	$934.04	$24.44	$928.72	**$0.14**	**$5.32**
Signwriter	CW4	$24.70	$938.60	$24.57	$933.66	**$0.13**	**$4.94**	$23.95	$910.10	$23.81	$904.78	**$0.14**	**$5.32**
Carpenter, Carpenter and/or Joiner, Floorsander , Marble and Slate Worker, Stonemason, Tilelaye,etcr	CW3	$24.64	$936.32	$24.51	$931.38	**$0.13**	**$4.94**	$23.89	$907.82	$23.75	$902.50	**$0.14**	**$5.32**
Caster, Fixer, Floorlayer Specialist, Plasterer	CW3	$24.49	$930.62	$24.36	$925.68	**$0.13**	**$4.94**	$23.74	$902.12	$23.61	$897.18	**$0.13**	**$4.94**
Bricklayer	CW3	$24.39	$926.82	$24.26	$921.88	**$0.13**	**$4.94**	$23.65	$898.70	$23.51	$893.38	**$0.14**	**$5.32**
Roof Tiler, Slater Ridger, Roof Fixer	CW3	$24.23	$920.74	$24.10	$915.80	**$0.13**	**$4.94**	$23.49	$892.62	$23.36	$887.68	**$0.13**	**$4.94**
Painter, Glazier	CW3	$23.99	$911.62	$23.85	$906.30	**$0.14**	**$5.32**	$23.26	$883.88	$23.12	$878.56	**$0.14**	**$5.32**
Labourer (2) - Scaffolder etc	CW2	$23.13	$878.94	$23.00	$874.00	**$0.13**	**$4.94**	$22.43	$852.34	$22.29	$847.02	**$0.14**	**$5.32**
Labourer (3) - Trades Labourer, Jack Hammerman, etc	CW1(d)	$22.69	$862.22	$22.55	$856.90	**$0.14**	**$5.32**	$21.99	$835.62	$21.86	$830.68	**$0.13**	**$4.94**
After 12 months in the industry	CW1 (c)	$22.29	$847.02	$22.15	$841.70	**$0.14**	**$5.32**	$21.61	$821.18	$21.47	$815.86	**$0.14**	**$5.32**
After 3 months in the industry	CW1 (b)	$21.99	$835.62	$21.86	$830.68	**$0.13**	**$4.94**	$21.32	$810.16	$21.18	$804.84	**$0.14**	**$5.32**
New Entrant	CW1 (a)	$21.57	$819.66	$21.43	$814.34	**$0.14**	**$5.32**	$20.91	$794.58	$20.77	$789.26	**$0.14**	**$5.32**

Appendix 3

Reductions in Casual Rates of Pay if 4% Industry Allowance is Applied

		Current Award Rates - Casuals		Award Rate with 4% industry allowance			
Occupation	**Wage Group**	**HOURLY RATE**	**WEEKLY RATE**	**HOURLY RATE**	**WEEKLY RATE**	**Reduction**	
						per hour	**per week**
Foreperson	CW8	$33.99	$1,291.62	$33.81	$1,284.88	**-$0.18**	**-$6.74**
Sub-foreperson	CW7	$33.24	$1,263.12	$33.06	$1,256.38	**-$0.18**	**-$6.74**
Special Class Tradesperson, Carver	CW5	$31.60	$1,200.80	$31.43	$1,194.15	**-$0.18**	**-$6.65**
Marker or Setter Out, Letter Cutter	CW4	$30.73	$1,167.74	$30.55	$1,160.90	**-$0.18**	**-$6.84**
Signwriter	CW4	$29.94	$1,137.72	$29.76	$1,130.98	**-$0.18**	**-$6.75**
Carpenter, Carpenter and/or Joiner, Floorsander, Marble and Slate Worker, Stonemason, Tilelaye,etcr	CW3	$29.86	$1,134.68	$29.69	$1,128.13	**-$0.17**	**-$6.56**
Caster, Fixer, Floorlayer Specialist, Plasterer	CW3	$29.68	$1,127.84	$29.51	$1,121.48	**-$0.17**	**-$6.37**
Bricklayer	CW3	$29.56	$1,123.28	$29.39	$1,116.73	**-$0.17**	**-$6.55**
Roof Tiler, Slater Ric	CW3	$29.36	$1,115.68	$29.20	$1,109.60	**-$0.16**	**-$6.08**
Painter, Glazier	CW3	$29.08	$1,105.04	$28.90	$1,098.20	**-$0.18**	**-$6.84**
Labourer (2) - Scaffolder etc	CW2	$28.04	$1,065.52	$27.86	$1,058.78	**-$0.18**	**-$6.75**
Labourer (3) - Trades Labourer, Jack Hammerman, etc	CW1(d)	$27.49	$1,044.62	$27.33	$1,038.35	**-$0.16**	**-$6.27**
After 12 months in the industry	CW1 (c)	$27.01	$1,026.38	$26.84	$1,019.83	**-$0.17**	**-$6.56**
After 3 months in the industry	CW1 (b)	$26.65	$1,012.70	$26.48	$1,006.05	**-$0.17**	**-$6.65**
New Entrant	CW1 (a)	$26.14	$993.32	$25.96	$986.58	**-$0.18**	**-$6.75**

Appendix 4

Reductions in Apprentice Rates of Pay if 4% Industry Allowance is Applied

APPRENTICES	**Existing Award Rates**								
4 year Apprenticeship	**% of Standard Rate**	**$ per week**	**Industry Allowance**	**Special Allowance**	**Total with Tool Allowance**				
					$31.69	*$26.20*	*$22.49*	*$16.60*	*$7.61*
First Year/Stage - not completed yr 12	50%	$418.70	$30.98	$3.85	$485.22	$479.73	$476.02	$470.13	$461.14
First Year/Stage - completed yr 12	55%	$460.57	$30.98	$4.24	$527.48	$521.99	$518.28	$512.39	$503.40
Second Year/Stage - not completed yr 12	60%	$502.44	$30.98	$4.62	$569.73	$564.24	$560.53	$554.64	$545.65
Second Year/Stage - completed yr 12	65%	$544.31	$30.98	$5.01	$611.99	$606.50	$602.79	$596.90	$587.91
APPRENTICES	**Award Rates With 4% Industry Allowance**								
4 year Apprenticeship	% of Standard Rate	$ per week	Industry Allowance		Total with Tool allowance				
					$31.69	*$26.20*	*$22.49*	*$16.60*	*$7.61*
First Year/Stage - not completed yr 12	50%	$418.70	$33.50		$483.89	$478.40	$474.69	$468.80	$459.81
First Year/Stage - completed yr 12	55%	$460.57	$33.50		$525.76	$520.27	$516.56	$510.67	$501.68
Second Year/Stage - not completed yr 12	60%	$502.44	$33.50		$567.63	$562.14	$558.43	$552.54	$543.55
Second Year/Stage - completed yr 12	65%	$544.31	$33.50		$609.50	$604.01	$600.30	$594.41	$585.42
					Reduction				
First Year/Stage - not completed yr 12					**$1.33**	**$1.33**	**$1.33**	**$1.33**	**$1.33**
First Year/Stage - completed yr 12					**$1.72**	**$1.72**	**$1.72**	**$1.72**	**$1.72**
Second Year/Stage - not completed yr 12					**$2.10**	**$2.10**	**$2.10**	**$2.10**	**$2.10**
Second Year/Stage - completed yr 12					**$2.49**	**$2.49**	**$2.49**	**$2.49**	**$2.49**

Appendix 5

Calculation of average special rates not including those applicable to residential construction and special work

Allowance		**Per Hour**	**Per Week**
Underground allowance		$0.40	$15.07
Coffer Dam worker		$0.37	$14.24
Hot work	46/54 C	$0.71	$26.98
	>54 C	$0.88	$33.44
Cold Work		$0.71	$26.98
Confined space		$0.88	$33.44
Bitumen work		$0.88	$33.44
Suspended perimeter work platform		$1.08	$41.04
Employee carrying oils		$1.47	$55.67
Pile driving		$2.09	$79.56
Dual lift allowance		$0.45	$16.96
spray aplication (painters)		$0.71	$26.98
Pneumatic tool operation		$0.49	$18.43
Hydraulic hammer		$1.19	$45.22
Pipe enamelling		$0.94	$35.82
Powderd lime dust		$0.77	$29.26
Sand blasting		$0.09	$3.42
Live sewer work		$0.64	$24.32
Special work		$0.09	$3.42
	Total	$14.83	
	Average	**$0.78**	**$29.67**

Appendix 6

National Masonry Design Guide

https://www.nationalmasonry.com.au/wp-content/uploads/National_Masonry_Design_Guide_Book_2_SQLD.pdf

Appendix 7

Calculation of the average of special rates paid to tradespersons in residential construction

Carpenters						
Insulation allowance			$0.88	per hour	$33.44	per week
Explosive power tools		$1.68 per day	$0.21	per hour	$8.40	per week
Second hand timber		$2.78 per day	$0.35	per hour	$13.90	per week
wet work			0.71	per hour	26.98	per week
Dirty Work			$0.71	per hour	26.98	per week
		Average	**$0.57**	**per hour**	**$21.72**	**per week**
Roof tilers and fixers						
Insulation allowance			$0.88	per hour	$33.44	per week
Roof repairs			$0.88	per hour	$33.44	per week
roof tiler	over 15m		$0.64	per hour	$24.32	per week
	pitch>35		$0.88	per hour	$33.44	per week
	pitch>40		$1.28	per hour	$48.64	per week
Dirty Work			$0.71	per hour	26.98	per week
		Average	**$0.88**	**per hour**	**$33.38**	**per week**
Bricklayers						
wet work			$0.71	per hour	$26.98	per week
heavy blocks	>5.5<9kg		$0.71	per hour	$26.98	per week
	>9<18kg		$1.28	per hour	$48.64	per week
	>18kg		$1.81	per hour	$68.78	per week
cleaning down brickwork			$0.64	per hour	$24.32	per week
Bagging			$0.64	per hour	$24.32	per week
bricklayer operating cutting machine			$0.88	per hour	$33.44	per week
		Average	**$0.95**	**per hour**	**$36.21**	**per week**
Painters						
Toxic substances			$0.88	per hour	$33.44	per week
Bagging			$0.64	per hour	$24.32	per week
spray application (painters)			$0.71	per hour	$26.98	per week
		Average	**$0.74**	**per hour**	**$28.25**	**per week**
Plasterers						
bagging			$0.64	per hour	$24.32	per week
plaster or composition spray			$0.71	per hour	$26.98	per week
		Average	**$0.68**	**per hour**	**$25.65**	**per week**
Tilelayers						
dry polishing of tiles			$0.88	per hour	$33.44	per week
toxic substances			$0.88	per hour	$33.44	
cutting tiles			$0.88	per hour	$33.44	per week
		Average	**$0.88**	**per hour**	**$33.44**	**per week**
	Average all trades		**$0.78**	**per hour**	**$29.77**	**per week**

Appendix 8

CFMMEU Proposed Changes to the Multistorey Allowance

21.4 Multistorey allowance

(a) A multistorey allowance must be paid to all employees on-site whilst engaged in construction or renovation of a multistorey building to compensate for the disabilities experienced in, and which are peculiar to construction or renovation of a multistorey building.

(b) Provided that for the purposes of this clause **renovation work** is work performed on existing multistorey buildings and such work involves structural alterations which extend to more than two storey levels in a building, and at least part of the work to be performed is above the fourth floor storey level in accordance with the scale of payments appropriate for the highest floor level affected by such work.

(c) In this clause:

multistorey building means a building which will, when complete, consist of five or more storey levels

complete means the building is fully functional and all work which was part of the principal contract is complete

storey level means structurally completed floor, walls, pillars or columns, and ceiling (not being false ceilings) of a building and will include basement levels and mezzanine or similar levels (but excluding **half floors** such as toilet blocks or store rooms located between floors)

floor level means that stage of construction which in the completed building would constitute the walking surface of the particular floor level referred to in the table of payments.

(d) ~~Any buildings or structures which do not have regular storey levels but which are not classed as towers (e.g. grandstands, aircraft hangars, large stores, etc.) and which exceed 15 metres in height may be covered by this subclause, or by clause 22.3(a) by agreement between the employer and an employee.~~

Any buildings or structures which do not have regular storey levels which exceed 15 metres in height, and any work performed on a swing scaffold, bosun's chair or suspended scaffold will be covered by this clause. An employer must reach agreement with an employee to either:

(i) **pay the appropriate allowance in accordance with clause 21.4(f);**

or

(ii) **pay an allowance of 3.2% of the hourly standard rate per hour for all work above 15 metres, with an additional 3.2% of the hourly standard rate per hour for work above each additional 15 metres. For example, an employee working at a height of 31 metres is paid an allowance of 6.4% of the hourly standard rate per hour.**

(e) Plant room: a plant room situated on the top of a building will constitute a further storey level if the plant room occupies 25% of the total roof or an area of 100 square metres whichever is the lesser.

(f) Rates

(i) Except as provided for in clause 21.4(g), an allowance in accordance with the following table must be paid to all employees on the building site. The higher allowances presented in respect of work on the 16th and subsequent floors will be paid to all employees when one of the following components of the building—structural steel, reinforcing steel, boxing or walls—rises above the floor level first designated in the allowance scale:

Storeys	Allowance per hour
From the commencement of building to 15th floor level	2.6% of the hourly standard rate
From the 16th floor level to 30th floor level	3.1% of the hourly standard rate
From the 31st floor level to 45th floor level	4.8% of the hourly standard rate
From the 46th floor level to 60th floor level	6.2% of the hourly standard rate
From the 61st floor level onward	7.6% of the hourly standard rate

(ii) The allowances payable at the highest point of the building will continue until completion of the building.

(g) Service cores

(i) All employees employed on a service core at more than 15 metres above the highest point of the main structure must be paid the multistorey rate appropriate for the main structure plus the allowance prescribed in clause ~~22.3(a)~~ 21.4(d)(ii), calculated from the highest point reached by the main structure to the highest point reached by the service core in any one day period. (i.e. For this purpose, the highest point of the main structure will be regarded as though it were the ground in calculating the appropriate ~~Towers~~ allowance prescribed in clause ~~22.3(a)~~ 21.4(d)(ii)).

(ii) Employees employed on a service core no higher than 15 metres above the main structure must be paid in accordance with the multistorey allowance prescribed herein.

(iii) Provided that any section of a service core exceeding 15 metres above the highest point of the main structure will be disregarded for the purpose of calculating the multistorey allowance application to the main structure.

Appendix 9

Print E5490

N2 Mis 70/81 MD Print E5490

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of a notification of an industrial dispute between

THE BUILDING WORKERS' INDUSTRIAL UNION OF AUSTRALIA

and

ANDRECO PTY. LIMITED and others

in relation to wages and working conditions for refractory bricklayers

(C No. 4018 of 1980)

MR JUSTICE ALLEY

MELBOURNE, 2 MARCH 1981

DECISION

This decision is in respect of an application pursuant to Section 41(1)(d) of the Act by the Victorian Operative Bricklayers' Society (the V.O.B.S.) for an order that the Commission refrain from further hearing the abovementioned dispute insofar as it extends to the State of Victoria.

The dispute is between The Building Workers' Industrial Union of Australia (the B.W.I.U.) and some 11 employer companies in respect of the wages and working conditions of refractory bricklayers. It arose from the service by the B.W.I.U. of a log of claims which was despatched to all respondents on 2 September 1980. The dispute was notified on 16 September and it first came before the Commission on 17 October 1980 when I formally found the existence of a dispute and referred the parties into conference.

At the request of Mr Johnstone who appeared for Queensland respondents and who also represented certain New South Wales companies the matter was listed on 4 December 1980. At that hearing Mr Johnstone reported on conferences which had been held between the parties, and indicated that there had been some industrial action. This was confirmed by Mr Clancy for the B.W.I.U. who stated that there was a degree of urgency as his members were dissatisfied at the progress of negotiations. Conferences proceeded and a further hearing was arranged for 12 December 1980 in Sydney. At that hearing the V.O.B.S. intervened and foreshadowed a Section 41(1)(d) application. At the same hearing Mr Johnstone expressed concern at the position of the V.O.B.S. and the Victorian situation. He sought further adjournment to enable the matter to be fully considered by a meeting of the respondent contractors.

On Friday 19 December 1980 a further hearing took place at which Mr Johnstone reported that following a meeting of contractors held on the previous day there had been further discussions with the B.W.I.U. at which basic agreement had been reached for settlement of the dispute. He sought a conference for the purpose of finalising the terms of the settlement. Mr Clancy supported this request.

The solicitor for the V.O.B.S. submitted that the implementation of any agreement should be deferred pending the determination of the Section 41(1)(d) application. However he subsequently stated that the V.O.B.S. would not oppose the agreement in respect of its operation outside Victoria, and a programme was then arranged for the hearing of the 41(1)(d) application. Following this a conference was held under my chairmanship attended by Messrs Clancy and Rothman for the B.W.I.U., Mr Johnstone, Mr Glasson for respondent members of the Master Builders' Association of Victoria (M.B.A.V.) and Mr Roy for respondent members of The Master Builders Association of South Australia (Incorporated).

Following this conference Mr Johnstone tendered a proposed appendix to the National Building Trades Construction Award (the N.B.T.C.A.)[1] binding the parties to the dispute in respect of refractory Bricklayers - Furnace and/or said work. In speaking to this document he indicated that the rates of pay had been fully debated by the contractors at their meeting on the previous day and he made the following statement -

> "So we can say categorically that the respondents cited in this schedule believe that this reflects the true value of the work in this particular industry. We were fortunate enough, your Honour, to have refractory bricklaying contractors present who were privy to and party to the protracted work value hearing before the State Wages Board, a determination in the state of Victoria in relation to refractory bricklaying contractors and their employees' rates of pay.
>
> Your Honour, this hearing in Victoria has not been what one could call a truncated work value. There have been inspections, there have been submissions by both parties and it has been a very full and exhaustive work value exercise before that determination. We have been advised that when they looked in Victoria at the increased skills and what should be compensated for they were of the opinion that it goes far in excess of the general community work value. It is a very specialised industry which in the last decade not only has brought new materials, new shapes, new sizes - it has brought into the industry a very high standard of workmanship."

After hearing Mr Johnstone and Mr Clancy I approved the agreement and announced that a variation would be made to the N.B.T.C.A. to insert the new appendix. The following extract from page 41a of the transcript expresses the conclusion which was reached -

> "I am satisfied that in respect of refractory bricklaying work undertaken by employees of the respondent employers to this dispute there has been a change in work value constituting a significant net addition to work requirements. I am aware of the extensive work value investigation which has been undertaken by the Bricklayers Wages Board in Victoria. I have consulted with the chairman of that board and he assures me that as a result of that investigation he has no doubt that there has been a significant change in the value of the work.

---

[1] Print C6006

The parties to this dispute by agreement have assessed the money value of the change. I see no reason to disagree with their assessment as I hold the view that provided the assessment is genuinely made the parties are the best judges of a matter of this nature. The parties are in agreement as to the terms of the proposed Appendix N to be made in settlement of this dispute. The Commission clearly has power to include that appendix within the award. I believe that the appendix complies with the wage fixation principles of the Commission and there are no reasons as to public interest whereby the Commission should refuse to award it."

The final clause of the new appendix reads as follows -

"II Until further order of the Commission this appendix shall not apply to the State of Victoria."

In the present proceedings the V.O.B.S. seeks the deletion of this provision, and is supported by the M.B.A.V. and the Victorian contractor Crow Industries Pty. Ltd. The B.W.I.U. opposes this and submits that the provisions of the appendix should apply in Victoria.

Some reference needs to be made to the history of award coverage of bricklaying operations in Victoria and other states. Prior to 1948 separate Bricklayers Societies operated in the various states. In 1948 the New South Wales Bricklayers Society and certain other unions merged with what was then known as the Amalgamated Society of Carpenters and Joiners to form the B.W.I.U. Eventually all Bricklayers Societies other than the V.O.B.S. merged with the B.W.I.U.

Until 1975 bricklaying operations were covered by State awards or determinations. In the early 1970's negotiations took place between representatives of unions and employer organizations concerned in the building industry which eventually led to the making of the N.B.T.C.A. in 1975. The V.O.B.S. participated in these discussions until 1973 or 1974. However, having secured an understanding from the B.W.I.U. that the new award would not apply to bricklayers in Victoria it dropped out of the negotiations. Since 1975 the federal award, the N.B.T.C.A. has regulated the wages and working conditions of bricklayers in all states except Victoria where the provisions of determinations of the Bricklayers Wages Board have continued to apply. One of the reserved matters listed in the N.B.T.C.A. in 1975 was "refractory work."

The Victorian Bricklayers Wages Board has been in existence since approximately 1910. It has the power to determine any industrial matter in relation to the process, trade, or business or occupation of any person or persons or classes of persons (other than labourers) wheresoever employed in the process, trade or business of a bricklayer, including the applying and placing of all plastic or castable refractory substances or other materials used in the construction of or repairs to, gas retorts, stills, towers, acid-resisting brickwork, boilers, bakers ovens, furnaces and chimney stacks. Part 1 of the determination applies to persons engaged on construction work, and until the most recent determination this part covered employees engaged in refractory work.

In early 1980 the Wages Board commenced a work value investigation in respect of refractory work. Inspections commenced in June and continued until

October. On 19 January 1981 the Board made a new determination by which it created a new Part III applying to persons engaged as refractory bricklayers. The terms of that new part differ in certain material respects from the provisions of the new appendix inserted into the N.B.T.C.A. on 19 December 1980.

Prior to the prescription of the new appendix in the N.B.T.C.A., refractory bricklayers received the same base rate and other all purpose allowances and rates as other tradesmen under that award together with a refractory allowance of 68c payable for all purposes of the award. The award also prescribed additional rates (known as block rates) for bricklayers laying other than standard bricks, with the proviso that such rates do not apply to employees being paid the extra rate for refractory work. Under the agreement reached in December the base rate of the refractory bricklayer was increased by some $18 per week with a further increase of $10 to take effect from the first pay period on or after 1 June 1981, and the refractory allowance was increased to 80c per hour with the proviso that it is paid in lieu of all special rates prescribed in clause 12 of the award except hot work and cold work rates. The commencing date of operation is the first pay period which commenced on or after 17 November 1980, and it continues in force until 31 August 1981.

The Bricklayers Determination as it operated in December 1980 prescribed an all purpose rate for the bricklayer (tradesman) incorporating the base rate and certain additional payments and allowances, and it also prescribed certain higher rates for specific types of work such as old firework, new firework and acid work. The same refractory allowance and block rates as appear in the N.B.T.C.A. were also prescribed in the determination, with the significant difference that there was no proviso in the block rates provisions excluding payment to employees who receive the refractory allowance. Under the new determination one rate is prescribed for the new classification of refractory bricklayers. This involved an increase of $20.80 per week for the lowest paid refractory worker. The refractory allowance of 68c per hour remains unchanged and is payable in addition, and certain special rates including the block rates are also paid when the particular disability is incurred. Also, the shift work provisions have been altered to provide that any 12 hour shift shall be paid as an afternoon or night shift.

The present position is that the total weekly rate including refractory and other all purpose allowances for a bricklayer under the Victorian determination is $302, compared with a rate of $299.60 under the appendix to the N.B.T.C.A. The N.B.T.C.A. rate is inclusive of special rates, except hot work and cold work, whereas under the Victorian provisions certain additional special rates (including extra block rates) are payable. The shift work provisions are different. Other differences are that the N.B.T.C.A. rates operate from 17 November 1980 compared with a commencing date of 14 January 1981 for the Victorian determination, and there is a further increase of $10 per week in the N.B.T.C.A. rate from 1 June 1981.

The proceedings in respect of the S41(1)(d) application took place on 21, 22 and 23 January 1981. Evidence for the V.O.B.S. was given by its secretary Mr W.C. Giles, and by Mr E.H. Winslade who was the Assistant Secretary until his retirement on 29 February 1980. Mr Glasson for the M.B.A.V. called evidence from Mr J.S. Luckman and Mr R.B. Crow both of whom are employer representatives on the Bricklayers Wages Board. This evidence provided a very comprehensive

picture of the operation of the bricklaying section of the building industry in Victoria, and of the manner in which refractory work is carried out in all states.

I draw the following conclusions from the evidence -

(1) Much of the work in the refractory bricklaying area is carried out by the companies operating in more than one state and employing a core of skilled employees who are frequently called on to perform work in states other than the state in which they were engaged.

(2) Victorian bricklaying employees engaged on refractory work have generally received higher total rates than N.S.W. employees engaged on similar work.

(3) It is a normal practice for Victorian employees performing work in another state to receive Victorian rates. It is the practice of Crow Industries to effect this by paying the N.B.T.C.A. rate to all their employees at the site and to pay an additional amount to their Victorian employees on return home.

(4) It is the policy of the V.O.B.S. that all employees on a Victorian job, including those from another state, should receive Victorian rates.

(5) Pursuant to an agreement between the B.W.I.U. and V.O.B.S. bricklayers permanently residing in Victoria are enrolled as members of the V.O.B.S. and those permanently residing outside Victoria are enrolled as members of the B.W.I.U. Each union recognises members of the other union working in the area. The B.W.I.U. has no present intention of altering this arrangement.

(6) Industrial relations between employers and the V.O.B.S. have been settled and harmonised.

Mr Lawrence of counsel who appeared for V.O.B.S. relied on both placita (ii) and (iii) of S41(1)(d). He claimed that the whole history of state regulation by wages board determinations has been a satisfactory one and that it should not be disturbed. He pointed out that the new Part III of the Bricklayers Determination grants higher remuneration than the new appendix to N.B.T.C.A., and that when block rates are taken into account the difference could be substantial. He also claimed that the removal of the right to receive block rates would cause great industrial difficulties with builders labourers.

On the public interest side Mr Lawrence drew attention to the fact that the B.W.I.U. has no members in bricklaying in Victoria, and that the extension of the federal award into Victoria is opposed by the only union in the field in that state and also by the Victorian employers. He claimed that the imposition of the Federal Award would jeopardise the good industrial relations which presently exist, and that it would be contrary to the objects of the Act as there is no evidence of any dispute within Victoria which calls for the intervention of the B.W.I.U. as the union to service the industrial interests of employees in the bricklaying industry.

Mr Glasson for M.B.A.V. and Crow Industries Pty. Ltd. submitted that circumstances do not warrant any change to the industrial regulation system operating in Victoria in respect of bricklaying. The essence of his submission is that it would be industrially undesirable and confusing to have two differing rates operating in Victoria in respect of respondents to the N.B.T.C.A. on the one hand and employers covered only by the Victorian determination on the other hand. He also claimed that the extension of the new appendix to Victoria would inevitably lead to competition for membership between the two unions.

Mr Rothman for the B.W.I.U. drew attention to the national nature of the building industry in respect of which the N.B.T.C.A. operates as the parent award for all determinations in Victoria. He submitted that it was the clear understanding of all parties to the proceedings in dispute C No. 4018 of 1980 that there should be one national uniform rate in respect of all refractory operations carried on by all respondents to the dispute, and this would not be fully achieved unless the appendix operates in Victoria.

A large number of authorities were cited by Mr Lawrence and Mr Rothman. I find it necessary to refer to a few of them only Mr Lawrence relied, inter alia on the following often quoted passage from the Municipal Officers, Electricity Undertakings case[1].

> "We believe that the Commission's practice, in cases of this nature, of testing existing state coverage against defined circumstances which are claimed to warrant the disturbance of the status quo is the correct approach. It is a practice which allows maximum flexibility of argument to the parties in an area of discretion normally requiring the exercise of broad judgement. In our view the approach is equally applicable whether some federal regulation exists or not. The weight to be given to individual circumstances may well vary but the general approach easily accommodates such variations."

This is not an exhaustive test applicable in all cases as is apparent from the following passage from the A.W.I.U. Albion Reid Pre-Mix Concrete decision of 12 December 1975.

> "The observation in the Municipal Officers' case 138 C.A.R. 500 at p. 517 that it is the practice of the Commission to test 'existing state coverage against defined circumstances' has been used by imaginative advocates as though it were legislation and not a useful means by which legislation can be implemented in appropriate cases."

In this context it is well to remember the warning contained in the decision of a Full Bench in a case relating to the Slaughtering, Freezing and Processing Works (Meat Industry) Interim Award 123 C.A.R. at p. 719 that

> "it is preferable that no one bench of the Commission should attempt to formulate codes intended to control in any precise way the exercise in the future of discretions reposed in the Commission by the Act. In the end, each case must be decided on its own facts and surrounding circumstances."

---

[1] 138 C.A.R. 500 at 517

Reliance was also placed on the decisions of a Full Bench of 4 July 1973 in an appeal by Queensland Bacon Pty. Ltd.[1] In that case The Australasian Meat Industry Employees Union, with few if any members in the establishments concerned, sought federal award coverage in the face of joint opposition of the employers and members of the state registered union the Bacon Factories Union of Employees Queensland. The appeal bench upheld the appeal and granted the S41(1)(d) application.

Amongst other decisions cited in respect of the undesirability of dual union coverage were those of a Full Bench given on 3 May 1979 in respect of attempts by The Australian Insurance Employees' Union (A.I.E.U.) to obtain award coverage for employees of health funds and of the Health Insurance Commission.[2] The bench laid stress on the desirability of preventing the evils which arise from competing unions and the fact that the A.I.E.U. had no members of the Health Insurance Commission and found against the A.I.E.U. decisions.

If the B.W.I.U. was seeking to enrol Victorian bricklayers as members then the A.I.E.U. decisions would be strong authorities against it. However it is precluded from doing so by its agreement with the V.O.B.S., and I accept Mr Rothman's assurance that the B.W.I.U. is not seeking to change the status quo of union coverage. As to the Queensland Bacon decision, there may be at first sight appear to be a great degree of similarity with the present case where the B.W.I.U. seeks federal award coverage in the face of the joint opposition of the V.O.B.S. and the Victorian employers. However this must be viewed in the light of the whole circumstances and as will appear from my later observations, I find the attitude of the Victorian employers somewhat inconsistent.

Of the authorities cited by Mr Rothman I will mention two only. Firstly there is the following well known passage from the decision of Kelly J. in the 1944 Process Engravers decision - [3]

> "I am inclined to take a broad view of what would be such other circumstances as might call for Federal intervention, instead I would extend it to comprehend any set of conditions in which there was some substantial reason for holding that a national rather than a local outlook should be taken of the particular issues to be decided."

The other authority is the Pre-Mix Concrete decision to which I have already referred. In that case the appeal bench upheld a decision of Mr Commissioner Brack refusing an application under S41(1)(d) of the Act made by Queensland employers. In its reasons for decision the appeal bench remarked on the probability of the concrete batching industry being regulated on a substantially national basis, and the undesirability of fragmentation of that industry. It also laid stress on the fact that the concrete batching industry co-exists with the building industry which is regulated substantially in Queensland by the N.B.T.C.A. Without quoting any specific passage it is true to state that the appeal bench took the view that it was industrially desirable in the circumstances for the pre-mix concrete industry in Queensland to be covered by federal rather than state jurisdiction and that in so doing it considered that it was appropriate to adopt a national rather than a local outlook.

---

[1] 153 C.A.R. 104 [2] 221 C.A.R. 125 and 132 [3] 52 C.A.R. 664 at p. 670

Decisions in previous cases are useful in assessing and applying general principles. However as was stated in the Slaughtering, Freezing and Processing Works decision "In the end each case must be decided on its own facts and surrounding circumstances." Accordingly I now turn to a consideration of the facts and surrounding circumstances in this case.

Refractory bricklaying is a specialised aspect of the trade of a bricklayer, who is a skilled tradesman engaged in the building industry. In all states other than Victoria, conditions of employment for bricklayers are regulated by the N.B.T.C.A. and bricklayers are members of the B.W.I.U. The building construction industry in Victoria is regulated primarily by federal awards namely the N.B.T.C.A. which covers building tradesmen including carpenters and painters and the Building Construction Employees and Builders Labourers Award which, inter alia, covers labourers who assist bricklayers. Refractory work carried on by the respondents to this dispute is performed in various parts of Australia and is performed to a significant degree by employees who frequently do work in more than one state. Thus what the B.W.I.U. now seeks is the extension to Victoria of one portion of a federal award so as to apply to work performed by interstate operators within an industry which is predominantly regulated by federal awards.

The argument that the state determination has operated successfully over many years and should not be disturbed does not impress me when looked at in the light of the circumstances of this case. There is a clear need for one national rate to apply to refractory bricklaying operations carried on by contractors who tender for and perform work in more than one state. The practice of paying Victorian rates which are higher than those prescribed by the N.B.T.C.A. to Victorian employees performing work in states outside Victoria is in my view highly undesirable. The M.B.A.V. and its member contractors are bound by the N.B.T.C.A. which is a paid rates award binding employers in respect of all employees within the classifications contained in the award whether members of the unions covered by the award or not. The payment of higher rates to Victorian employees when working in New South Wales is not in harmony with the paid rates award. The reverse practice of paying Victorian rates to New South Wales employees performing work in Victoria may be unavoidable in order to comply with the provisions of the applicable Victorian determination. However both practices militate against what all parties seem to regard as desirable, namely the attainment of uniformity of rates and conditions in a national industry.

There is also the argument that the coverage of the appendix to the N.B.T.C.A. should not be extended to Victoria as it would result in a reduction of amounts paid to bricklayers in Victoria. At first sight this may be a powerful argument, but when it is realised that the superior Victorian determination was made one month after the approval of the N.B.T.C.A. appendix and three days before the commencement of the S41(1)(d) proceedings then the argument loses a lot of its sting. The Wages Board for reasons which its members obviously consider to be good and proper chose to bring down a determination which differs in certain material respects from the appendix to the federal award which had substantially increased rates beyond the amounts which had previously been payable under the award and the determination. From a short term point of view a reduction of rates is obviously undesirable. However from a long term viewpoint the perpetuation of a situation of differing state and federal rates with its attendant leapfrogging in a national industry operated by contractors employing labour which moves interstate is even more undesirable.

Another objection to federal coverage in Victoria which at first sight appears to be a powerful one is that it is opposed jointly by the only union having coverage of bricklaying in Victoria and by Victorian employers. As already mentioned support for this objection is drawn from the decision in the Queensland Bacon case. However the position of both sides of this alliance requires some examination. The attitude of the V.O.B.S. is understandable as it is striving to preserve its position of influence and it has a genuine fear that this position will be severely weakened if federal award coverage for bricklayers extends in any form to Victoria. However it is clear from the evidence that the influence of the V.O.B.S. is not confined to within Victoria but extends also to the performance of contracts by Victorian employers in other states. In 1973 the V.O.B.S. chose to remain outside the N.B.T.C.A. It had the opportunity in 1980 to participate in the discussions between the B.W.I.U. and the contractors which led to the new appendix, but it chose to remain aloof. It has deliberately followed a path by which it has remained outside the federal system while operating in an industry which is predominently regulated by federal awards. It can hardly be surprised that it now faces federal award penetration within this section of a nationally regulated industry.

The position adopted by the Victorian employers has been curiously inconsistent. The M.B.A.V. has been represented at all hearings before me and the Victorian respondent contractors have participated in discussions which preceded the finalisation of the agreement with the B.W.I.U. It was made abundantly clear by Mr Clancy on 12 December 1980 (see page 21 of transcript) that the B.W.I.U. was seeking one national rate to be paid in all states including Victoria. On this basis discussions proceeded, and in the final conference and proceedings before me on 19 December no dissension was voiced by the M.B.A.V. representative to any of the terms of the agreement, nor at that stage was any indication given that it would oppose coverage within Victoria. In the light of this participation in proceedings and discussions in the agreement one must surely conclude that the Victorian contractors being parties to the agreement approved its terms, and that the M.B.A.V. endorsed the principle of one national rate for refractory bricklaying. However, one month later the Victorian employer wages board representatives consented to a determination which effectively rejected the concept of a national rate, and the M.B.A.V. representative in proceedings before the Commission opposed the implementation within Victoria of the national rate. Thus on the one hand the M.B.A.V. and its members who are parties to this dispute have through the process of conciliation joined in on agreement for uniform rates and conditions on a national basis for refractory bricklaying, while on the other hand the same association and employers have been parties to the making of a new state determination which is at variance with this concept.

There is also the allegation that the extension of the appendix to Victoria will lead to competition for union membership. This was answered by Mr Rothman by reference to the agreement between the B.W.I.U. and V.O.B.S. providing for Victorian bricklayers to be members of the V.O.B.S. and his assurance that the B.W.I.U. did not seek to change the status quo in respect to union coverage. In my experience the B.W.I.U. is meticulous in its adherence to its agreements and undertakings, so I accept its assurance in this case.

Some stress was also laid on the harmonious relations which have existed between the V.O.B.S. and the employers coupled with the prediction that such harmony might be shattered if the N.B.T.C.A. appendix is extended to Victoria.

I commend the V.O.B.S. for its good industrial record and express the hope that such responsible behaviour will continue. At the same time the Commission cannot be detered from giving what it considers to be a correct decision by the fear that it will cause industrial action at the hands of a dissatisfied party.

It was also claimed before the Wages Board and in the proceedings before me that the extension of the appendix to Victoria would cause industrial trouble at the instigation of other classes of employees namely builders labourers and carpenters and joiners. In particular it was asserted that the builders labourers would not take kindly to any loss of block rates. Builders labourers employed by members of the M.B.A.V. are bound by a paid rates federal award which contains substantially similar conditions to those in the N.B.T.C.A., including the provision that the extra payments for block rates do not apply to employees being paid the refractory allowance. The carpenters and joiners are covered by the N.B.T.C.A. Regardless of any practice to the contrary, there is no award entitlement to block rates to builders labourers or carpenters who are covered by their respective federal awards and are in receipt of a refractory allowance.

Having considered all the facts and circumstances I have formed the view that there is a need for uniform national regulation of refractory bricklaying carried on by the employers who are respondents to the disputes. Accordingly I regard as unsatisfactory the retention of the present situation whereby Victorian rates are at variance to those applying elsewhere and Victorian employees when outside Victoria receive rates and conditions which differ from those accorded to other employees working on the same projects. I have paid due regard to the arguments advanced on behalf of the V.O.B.S. and the M.B.A.V. that the existing regulation by determination of the Victorian State Wages Board should not be disturbed. However in my view this is a clear case for the adoption of a national outlook in preference to a local one.

My conclusion is that it is not appropriate for the refractory bricklaying operations which fall within the ambit of the dispute to be dealt with by the Victorian Industrial Authority, and that a continuance of such coverage would not be in the interests of the refractory bricklaying section of the building industry when viewed from an overall national basis. It follows that I do not uphold the argument that further proceedings in respect of Victoria are not necessary or desirable in the public interest.

It is apparent from what I have stated in this decision that I have paid regard primarily to the interests of the industry from a long term point of view. However I must consider the immediate short term effects of any reduction in award benefits. Mr Rothman addressed himself to this problem and submitted that I should give retrospective effect to the variation so as to give the Victorian employees the full advantage of the operative date of 17 November 1980 which presently applies in respect of the appendix. As an alternative he proposed a prospective operation as from 1 June 1981 when the additional amount of $10 per week will become payable. I do not favour the granting of any retrospectivity to the variation providing for coverage in Victoria, as in the absence of consent this is contrary to normal industrial principle and practice. I adopt the alternative and determine that the operative date for the variation order will be the beginning of the first pay period to commence on or after 1 June 1981.

DECISION - BUILDING INDUSTRY

The application pursuant to S41(1)(d) of the Act is refused. I will make an order providing for the operation within Victoria of the new Appendix O. I direct the B.W.I.U. to submit a draft variation order, and I request all parties including the V.O.B.S. to confer with a view to overcoming the immediate short term problems.

Appendix 10

Print G6847

N002 Dec 133/87 M Print G6847

N002 Dec 133/87 M Print G6847

#TYPE = D

IN THE AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION

Conciliation and Arbitration Act 1904

In the matter of an application by the Building Workers' Industrial Union of Australia to vary

The National Building Trades Construction Award 1975(1)

(C No. 4524 of 1986)

And in the matter of a notification of an industrial dispute between

The Building Workers' Industrial Union of Australia

and

Andreco Pty. Ltd. and Others

(C No. 4656 of 1986)

Employee organisation coverage (BWIU and AWU) - award coverage - Conciliation and Arbitration Act S.41 (1)(d) - public interest - application for single union federal award coverage granted.

MR. JUSTICE ALLEY MELBOURNE, 20 MARCH 1987

DECISION

In these matters the Building Workers' Industrial Union of Australia (BWIU) is seeking additional provisions in Appendix F - Refractory Bricklayers - Furnace and/or Acid Work - of the National Building Trades Construction Award 1975 (NBTCA). Appendix F (then numbered Appendix O) was first inserted into the NBTCA by an order by consent issued on 6 April 1981(2)having operative effect from the first pay period which commenced on or after 17 November 1980. The appendix has application only to the BWIU and employers named in a schedule to the appendix. Those respondents consist of a number of specialist refractory Bricklaying contractors. The appendix covers one classification only namely that of Refractory Bricklayer, which classification is defined as follows:

> "'Refractory Bricklayer" means a bricklayer skilled in the performance of the work required in the laying of refractory brickwork, the use of pliable, castable, ramable, moulding and insulating materials and the use of tools and machines necessary for the carrying out of this work with refractory materials, in the construction or alteration of repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles and similar

structures and instruments used in refractory work, together with refractory work associated with acid stills, acid furnaces, acid towers and all other acid resisting brickwork."

---

(1)Print F9770 (N002) (2)Print E5179(N002 V127);(1981) 254 CAR 210

The alterations to Appendix F which the BWIU seeks are:

1. The inclusion of the following additional definition - "Refractory Bricklayers' Assistant (NSW)" means an employee, in the State of New South Wales, wholly or substantially assisting a "Refractory Bricklayer" as defined.

2. The insertion in the weekly base rate clause of the following classification and rate:

"Refractory Bricklayers' Assistant - $256.70".

3. The alteration of the Refractory Bricklayers Special Allowance clause to include an allowance of 81c per hour for the Refractory Bricklayers' Assistant (NSW).

Before the cancellation of registration of The Australian Building Construction Employees' and Builders Labourers' Federation (BLF) most of the refractory bricklayers' assistants employed by respondents to Appendix F of the NBTCA were members of the BLF, and the Award which was usually applied to this classification was the Building Construction Employees and Builders' Labourers (Consolidated) Award 1982(3)(the BLF Award). However, depending on the nature of the structure on which the refractory bricklaying work was to be performed, members of the Australian Workers' Union (AWU) and the Federated Ironworkers' Association of Australia (FIA) also performed work as refractory bricklayers' assistants. In the case of members of the AWU performing work in New South Wales the relevant award in respect of such work is an award of the New South Wales Industrial Commission known as the General Construction (State) Award. By the Builders Labourers Federation (Cancellation of Registration - Consequential Provisions) Regulations persons in a wide range of classifications which had previously been filled by BLF members within New South Wales, Victoria and the Australian Capital Territory were declared to be eligible for membership of organisations specified in the schedule to the regulations. As a result of these regulations all bricklayers labourers within the State of New South Wales were declared to be eligible for membership of the BWIU.

On 30 May 1986 Mr. Justice Ludeke issued a decision(4)in respect of a dispute arising out of competing claims by the BWIU and AWU as to which union should be entitled to enrol approximately 40 refractory bricklayers' assistants performing work at 7A coke oven battery at the BHP steelworks at Port Kembla in New South Wales. His Honour held that the AWU is entitled to the exclusive right of representation of such employees.

On 21 July 1986 the BWIU served a log of claims on a number of specialist refractory bricklaying contractors and the subsequent notification of dispute arising from the service of that log became matter C No. 4656 of 1986. On 24 July 1986 the BWIU filed its application for variation of the NBTCA which became matter C No. 4524 of 1986. That application was first listed for hearing before me on 2 September 1986. Opening submissions were made by the BWIU and it was indicated that the log in matter C No. 4656 of 1986 had been served in order to achieve the necessary ambit to enable the BWIU to proceed with its application to vary Appendix F of the NBTCA. Proceedings in matter C No. 4524 of 1986 were then adjourned to enable the matter arising from the service of the log in C No. 4656 of 1986 to be determined. During the hearing of that matter the AWU contended that refractory bricklayer's assistants are not eligible for membership in the BWIU and that the Commission should not find the existence of a dispute.

---

(3)Print F2272 (B067) (4)Print G3433

In my decision of 27 November 1986(5) I found in favour of the BWIU and made a finding of the existence of an industrial dispute between the BWIU and the employers served with the log. The AWU and its New South Wales Branch

On 4 December 1986 matter C No. 4524 of 1986 came on for further hearing. The BWIU reiterated its case for a variation of Appendix F and the representatives of the Master Builders Association of New South Wales and the Chamber of Manufactures of New South Wales maintained their earlier position that they did not oppose the application. Mr. Bodkin for the AWU sought an adjournment on the basis that his organisation proposed to appeal against the decision made in matter C No. 4656 of 1986. However he indicated that he was in a position to deal with a Section 41(1)(d) argument, and the matter then proceeded.

The application under Section 41(1)(d) of the Act was made by the AWU and also the Australian Workers' Union New South Wales Branch. Reliance was placed on placitum (ii) that the dispute has been dealt with or is proper to be dealt with by a State industrial authority namely the Industrial Relations Commission of New South Wales and placitum (iii) that further proceedings are not necessary or desirable in the public interest. Evidence was given on behalf of the AWU by Mr. M. Redding an organiser of the AWU with responsibility in the Newcastle and Hunter Valley areas. Mr. Redding gave evidence of AWU involvement in refractory brickwork at a number of sites including the Vales Point Power Station, the Munmora Power Station, Erraring Power Station, the Kurri Kurri Smelter, the Tomago Smelter and the BHP Furnace and Coke Ovens Port Kembla.

Mr. Bodkin submitted that the work of refractory bricklayers' assistants within New South Wales is already covered by an award of the State Commission of New South Wales namely the General Construction (State) Award which has common rule application. He pointed out that the BWIU was seeking a variation having application only within New South Wales, and that the existing State award already adequately dealt with the situation. He submitted that there was no proper basis for interfering with the existing State coverage.

In relation to the public interest aspect Mr. Bodkin relied on undertakings given by the BWIU in the past which he claimed were completely inconsistent with its present application. He referred in particular to undertakings given in 1975 before the Industrial Registrar Mr. K.D. Marshall in an application by the BWIU for consent to an alteration of its conditions of eligibility and description of industry. On that occasion the BWIU gave undertakings to a number of unions that it had no intention by virtue of the application to intrude into any area of other unions constitutional rights. More specific undertakings were given in proceedings before Elizabeth Evatt DP in 1975 in relation to the disputes which led to the making of the NBTCA. In addition to this undertaking given in transcript were specific undertakings given to the AWU in correspondence. These undertakings amounted to a pledge that the BWIU would not seek to extend coverage into areas already held by the AWU and other unions.

Mr. Bodkin also tendered a letter from the Minister for Employment and Industrial Relations to the Federal Secretary of the AWU dated 14 April 1986 written at the time of the passing of the Builders Labourers Federation (Cancellation of Registration - Consequential Provisions) Act. By this letter the Minister confirmed that any reallocation of the constitutional coverage of

---

(5)Print G5939 (6)Print G6786

the BLF will not affect, alter or cut across the constitutional rights of any union that existed prior to the reallocation. The Minister also confirmed a recognition that work which had been poached by the BLF should rightly revert

to the appropriate union.

Reference was also made to a news release issued by the Minister on 15 April 1986 headed "Reallocation of BLF work". Emphasis was laid by Mr. Bodkin on the following extract:

> "Building industry unions which gained coverage of BLF work and those operating in related areas had already held discussions to deal with potential problems and issues that plagued the construction industry for developed by relevant unions in conjunction with the regulations to minimise disputes over the reallocation of BLF work.
>
> In particular, it had been agreed that regulations may not be necessary to reallocate work in the civil and mechanical engineering sectors as a substantial proportion of BLF work in these sectors would automatically fall to unions such as the Federated Ironworkers' Association and the Australian Workers' Union which already had such coverage."

Mr. Bodkin submitted that to give the BWIU award coverage of refractory bricklayers' assistants would re-open the whole question of demarcation in this area and would be contrary to sentiments expressed by the Minister in his letter to the AWU and in his news release.

Reliance was also placed by Mr. Bodkin on the decision of Mr. Justice Ludeke of 30 May 1986 in respect of the 7A coke oven battery at Port Kembla. He submitted that if the application were granted it would have the effect of overturning this decision, not only in relation to the Port Kembla works but also in respect of similar projects in relation to heavy industry which are the preserve of the AWU.

In responding to Mr. Bodkin's argument Mr. Borrow for the BWIU urged the Commission to adopt a national rather than a State outlook. He pointed out that the dispute upon which the application is founded is national in character as is the NBTCA, and that although the proposed award variation is to have application only within New South Wales the effect which it may have in other States should also be considered. In referring to the evidence given by Mr. Redding he drew attention to evidence appearing in the transcript of the proceedings before Mr. Justice Ludeke in respect of the Port Kembla works. He submitted that this evidence clearly shows a custom and practice of the performance of the overwhelming bulk of the work of refractory bricklayers' assistants by members of the BLF prior to its deregistration. He also drew attention to the evidence given before a Full Bench in June 1986 in proceedings brought by the AWU in matters C Nos 3996 of 1980 and 4480 of 1984. He submitted that this evidence illustrated that there are specialised refractory bricklayers' assistants who were previously members of the BLF who occasionally performed work with a dual AWU ticket where necessary, and that the bulk of the refractory bricklaying work in New South Wales had been performed by BLF rather than AWU members. He submitted that there was no strong custom and practice case available to the AWU in respect of refractory bricklaying work.

Mr. Borrow submitted that the undertakings given in 1975 should not be viewed as inhibiting or hindering an organisation from adapting to new circumstances which were unforseen at the time such undertakings were given. He submitted that the cancellation of registration of the BLF and the allocation of its work to other unions was a notable changed circumstance and that the present application should not be regarded as a breach of the earlier undertakings.

Mr. Borrow also stated that the BWIU operates in a national industry regulated by a national award and accordingly so he contended, it is appropriate that the refractory bricklayers' assistants that have such a close connection with the tradesmen bricklayers should be covered by the same award. In particular it is desirable that they should be covered by a federal award and not an award of a State tribunal.

From the evidence given before me in both proceedings C Nos 4524 and 4656 of 1986, and from the knowledge derived from my association with the building industry over a long period of years I make the following findings of fact:

1. Refractory brickwork in the building industry is in most cases carried out by specialist contractors. These contractors, or at least the larger ones, perform work wherever they obtain contracts which may be anywhere in Australia.

2. These contractors tend to employ a core of specialised employees covering both tradesmen and assistants.

3. Until the registration of the BLF was cancelled the great majority of refractory bricklayers' assistants belonged to the BLF, but where membership of another union was required then in most cases such membership was taken in addition under a system of dual tickets.

I am satisfied that until the cancellation of registration of the BLF the great bulk of the work of refractory bricklayers' assistants was performed by BLF members operating within the scope of the BLF award. It is true that in recent years, due to the disruptive actions of the BLF within the State of New South Wales, there was a strong move on various sites such as the Kurri Kurri Smelter and the Tomago Refinery to restrict BLF work and to ensure that wherever possible construction work should be performed by members of the AWU. However viewed overall the custom and practice has been overwhelmingly for refractory bricklayers' assistants to be BLF employees working under a federal award. It is also true that in many instances the refractory brickwork was performed on a structure which could not be regarded as a building and that in such cases BLF members had no constitutional right to the work. Nevertheless I am satisfied that the work of bricklayers' assistants employed by specialised refractory companies was regarded within the building industry as BLF work and that members of the AWU have played only a minor role in respect of refractory brickwork.

Before the cancellation of registration of the BLF the BWIU was a union comprised solely of tradesmen. In the State of New South Wales a large number of classifications formerly covered by the BLF including that of bricklayer's labourer are now eligible for membership of the BWIU. Accordingly the BWIU's area of constitutional coverage has been expanded significantly since 1975. What it now seeks is to preserve the coverage which was occupied by the BLF and to rationalise it so that demarcation problems and dual ticketing will be minimised.

I acknowledge that if the application is granted the BWIU refractory Bricklayers' assistants covered by the NBTCA will be entitled to perform work on non-building structures which previously fell outside the constitutional eligibility of members of the BLF. This would clearly have the effect of giving eligibility in areas where the AWU has constitutional and State award coverage. Accordingly, to some degree the application impinges on the coverage of the AWU. It is also clear that if granted the application will have the effect of altering the situation as clarified by the decision of Mr. Justice Ludeke in respect of the BHP Port Kembla works. Accordingly it cannot be denied that the granting of the application will cut down the constitutional rights of the AWU as they existed prior to the reallocation of former BLF classifications. However there are other factors which must be taken into consideration.

The award variation will be limited in its application to a relatively small number of contractors who operate within a specialised industry on a national basis. There are obvious advantages of operating within the State of New South Wales under one award with one union rather than having a two award dual ticket situation depending on the site of the project. The history of demarcation problems involving the AWU and the BLF is an indication of the

difficulty which previously existed where the BLF federal award employees were confined to work on buildings and AWU State award employees had coverage in respect of work on other structures. I consider it highly undesirable that this situation should be allowed to continue. I am satisfied that within the State of New South Wales members of the AWU covered by the General Construction State Award have performed only a minor portion of the work of refractory bricklayers' assistants. I consider that it is in the public interest that within this specialised area of refractory bricklaying contractors there should be a single union single award coverage.

The BWIU's application is not opposed by any of the employers or employer associations that are bound by the NBTCA. The only opposition comes from intervening unions namely the federal AWU and the Australian Workers' yers as to
classification and the rates set out in the application. These rates do not involve any actual increases, as they preserve the amounts previously paid under the BLF award as adjusted by National Wage increases. Accordingly the application falls within the National Wage Principles.

The applications made by the AWU and the Australian Workers' Union New South Wales Branch pursuant to Section 41(1)(d) of the Act are dismissed and the application for variation by the BWIU is granted.

The BWIU also seeks a roping-in order applying the terms of Appendix F of the NBTCA to a number of additional refractory bricklaying contractors. That application is granted and a roping-in order will be made with operative effect from the first pay period to commence on or after the date of this decision and to remain in force for a period of three months.

When Appendix F was first inserted into the NBTCA as Appendix O a schedule of respondents was set out at the end of the appendix. When the the schedule to the appendix was not reproduced. I consider it most desirable that the schedule should appear in the appendix so that the extent of the coverage of that appendix is clear to all. Accordingly the variation order will insert a consolidated schedule of respondents.

(7)Print G6800 (8)Print E8935(N002);(1982) 272 CAR 3

The new respondents who are to be the subject of the roping-in order are as follows:

Ashlar Engineering Pty. Ltd.,
Brem L.M. & Co. Pty. Ltd.,
Hilldav Industries,
A. Kahane & Co. Pty. Ltd.,
Nonporite (NSW),
Pfizer Quigley,
Sanders Shotcreting and Refractory Services Pty. Ltd.,
Wardrobe Refractories Pty. Ltd.

The consolidated schedule of respondents is as follows:

SCHEDULE OF RESPONDENTS

Andreco Pty. Ltd.,
Ashlar Engineering Pty. Ltd.,
Australian Industrial Refractories Ltd.,
Beech J.W. Pty. Ltd.,
Brem L.M. & Co. Pty. Ltd.,
C.C.R. Engineering Pty. Ltd.,
Crow Industries Pty. Ltd.,
Davidson Ray Pty. Ltd.,
Ellis Furnace and Incinerator Co. Pty. Ltd.,
Hilldav Industries,
N.J. Hurll and Co. (Aust) Pty. Ltd.,
A. Kahane and Co. Pty. Ltd.,
McDonald Bros. and Co. (Lidcombe) Pty. Ltd.,

Nonporite (NSW),
Pfizer Quigley,
Sanders Shotcreting and Refractory Services Pty. Ltd.,
Simon Carves Australia,
Wardrobe Refractories Pty. Ltd.,

In summary my decision is as follows:

1. The application made by the AWU and the Australian Workers' Union New South Wales Branch pursuant to Section 41(1)(d) of the Act is dismissed.

2. The application by the BWIU in matter C No. 4524 of 1986 for variation of Appendix F to the NBTCA is granted.

3. A roping-in award will be made applying the terms of Appendix F to nine additional refractory bricklaying companies.

4. The order varying Appendix F to the NBTCA will contain a provision inserting a consolidated schedule of respondents to the appendix.

5. Both the variation order and the roping-in award will come into operation from the first pay period to commence on or after the date of this decision and shall remain in force for a period of three months.

* * END OF TEXT * *

[Show First Hit] [Prev Doc in List]

Appendix 11

Print H7542

Dec 205/89 S Print H7542

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988

Conciliation and Arbitration Act 1904
s.59 application for variation

The Building Workers' Industrial Union of Australia
(C Nos 22772 and 22773 of 1988)

THE NATIONAL BUILDING TRADES CONSTRUCTION AWARD 1975[1]
(ODN C No. 2783 of 1974)

THE NATIONAL BUILDING AND CONSTRUCTION INDUSTRY LABOURERS (ON-SITE) AWARD 1975[2]
(ODN C No. 3698 of 1986)

Building workers — Building and construction industry

COMMISSIONER BENNETT — SYDNEY, 31 MARCH 1989

Swing scaffold allowance

DECISION

On 7 October 1988 The Building Workers' Industrial Union of Australia (BWIU) made applications to vary The National Building Trades Construction Award, 1974 and The National Building and Construction Industry Labourers (On-Site) Award, 1986 by inserting amended provisions in relation to special rates payable for work performed from swing scaffolds.

Both matters came before me on 27 October 1988 and were joined. It was decided that the tradesman award would be dealt with as the main vehicle.

In introducing the matter Mr S. Borrow (BWIU) drew attention to existing clause 12(1)(e) of the award which provides as follows:

Swing scaffold

(e) A payment of $2.38 for the first four hours or any portion thereof, and 49 cents for each hour thereafter on any day shall be made to any persons employed:

(i) on any type of swing scaffold or any scaffold suspended by rope or cable, bosun's chair, etc.

(ii) on a suspended scaffold requiring the use of steel or iron hooks or angle irons at a height of six metres or more above the nearest horizontal plane. Provided that an apprentice with less than two years experience shall not use a swing scaffold or bosun's chair. And further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

Mr Borrow said that this provision was introduced into the National Building Trades Construction Award in 1975 at a time when buildings were seldom constructed beyond 15 storeys in height.

---

[1] Print F9770 [NO02]

[2] Print G3455 [NO49]

He said that in the last 5 years, particularly in Sydney there had been an increase in the number of buildings that rose well in excess of that level.

In response to some urging from members of the union, particularly window cleaners the union had made application to extend the award provision for buildings which rise in excess of 15 storeys.

I was informed by Mr S. Clancy of the Australian Federation of Construction Contractors (AFCC) that arrangements had been made for a meeting on 3 November 1988 between AFCC and the BWIU to discuss this issue and a related matter.

As Mr M. Pyers representing the various Master Builders Associations and also the Australian Chamber of Manufactures had indicated opposition to the union application, I recommended that those organisations also involve themselves in the discussions.

This recommendation was extended to the Employers Federation of New South Wales which was represented at the hearing by Mr P. Ludeke and which had also indicated opposition to the claim.

On 31 January 1989 the matter again came before me and the BWIU on this occasion was represented by Mr R. Salpeter.

Mr Salpeter said that he wished to involve the Commission in inspections of the type of work being performed from swing scaffolds.

He indicated that at least one witness would be called, and gave some examples of the types of disabilities that were involved.

These included:

- The increased possibility of an employee being struck by lightning.
- The wind tunnel effect of being caught between tall buildings in the city.
- The chill factor.
- The changing climatic conditions .
- The blowing about when correcting the stage.
- The general discomfort of being so high up including the glare which comes off the increasing use of large window cladding material.

Mr Salpeter submitted that the claim would be proceeded with in accordance with the National Wage Case decision principles and would be based on work value.

On 23 February 1989 inspections were made of the work involving the use of swing scaffolds at the Gateway project close to Circular Quay, Sydney.

Following those inspections a further hearing took place in the Commission and I reserved my decision.

The attitudes of the employer organisations appeared to have changed dramatically as a result of the inspections, and whereas opposition to the claim was paramount at the first hearing, there was acceptance at least in principle by all the parties at the final hearing.

The only major factor of disagreement finally was the quantum of the allowance.

Examples of the changed views of the parties are as follows:

Master Builders Association

At the first hearing on 27 October 1988 Mr Pyers who also appeared at that hearing for Australian Chamber of Manufactures was firmly opposed to the application. He said that the work in question was already covered by clause 12(1)(e) of the award. The employees were also compensated by the multi-storey allowance.

At the second hearing on 31 January 1989 Mr C. Bubb said that the Master Builders Association saw some merit in the application but was unable to agree in regard to quantum.

At the third hearing on 23 February 1989 Mr B. Seidler did not submit any changed view of his organisation but merely raised a number of points for clarification.

Australian Federation of Construction Contractors

At the first hearing Mr S. Clancy appeared to have an open mind on the issue. He informed the Commission of the pending meeting with the unions set down for 3 November 1988 at which the matter would be discussed.

At the second hearing Mr P. Quinlan who now appeared for AFCC said that there had been discussions with the unions and his organisation believed there was some merit in the claims. Although there was not agreement on quantum there was agreement that the special rates should be on a graduated scale.

He also raised the matter of a requirement that whatever was agreed upon, it should cover all the disabilities, including the wearing of safety equipment.

At the third hearing Mr Quinlan was of the same view and he assisted the hearing by raising a number of relevant issues. He said his organisation did not intend to introduce any fresh evidence.

Employers' Federation of New South Wales

At the first hearing Mr P. Ludeke who also appeared for the Victorian Employers' Federation supported Mr Pyers in his opposition to the application. He said however that this did not preclude involving his organisation in the proposed discussions with the unions.

At the second hearing, Mr J. Wigmore opposed the application. He said that although it was agreed that buildings were becoming taller, there had not been any significant change in the work.

At the third hearing Mr Wigmore said that the inspections and the submissions had revealed that perhaps there were some merits but there was no agreement on quantum. So far as the VEF was concerned it now offered no objections subject to the BWIU being able to substantiate the increases and justify them in accordance with the relevant wage fixation principles.

This followed a submission by Mr B. Richardson of the VEF at the second hearing that the organisation was not fundamentally opposed to the principle of the allowance being further examined.

Australian Chamber of Manufactures

This organisation which at the first hearing had been represented by Mr M. Pyers of MBA was represented at the second hearing by Mr D. Grozier who said that it was not yet convinced of the merits of the claim.

At the third hearing Mr Grozier who now also represented the Chamber of Commerce and Industry South Australia Incorporated said that following the inspection it appeared that there was some merit in the claim. His principals were now not opposed to the claim other than in regard to quantum. He offered no submissions on rates but raised an important question on the height of the anchorage of the scaffolds which will be referred to later.

At the hearing on 23 February following the inspections of the Gateway building at Circular Quay, Sydney, Mr Borrow called two witnesses for the Union.

The first witness was Gary John Waddell who in the previous four years had worked on a daily basis out of swing scaffolds for two companies on the work of window cleaning.

His evidence included the following observations:

- The swing scaffold resembled a boat. It was never stable and employees continually readjusted their balance.
- Rubber suckers are used to anchor the stage to curtain walls. The rope attachment allows two to three feet of play but the scaffold constantly sways from side to side.
- When moving from one level to another the sucker has to be detached with one hand while the winch is operated with the other. This is difficult on windy days.
- Whilst agreeing that it takes a certain type of person to be able to adjust to this work he had at various time felt very nauseus, very uneasy and on several occasions had suffered attacks of fear.
- There are problems with the glare from the glass particularly on sunny days. Squinting is done all day, even when wearing sun glasses.
- The sun reflection causes sunburn, sunstroke, heat exhaustion and with windburn, the laceration of lips.
- Every person on the job suffers from chronic tiredness and irritability, extending to home life.

- There is an incredible fear of dropping implements or materials overboard, particularly when working high. Dropped items might not necessarily go straight down; the could hit part of a building and go out into the street or pedestrian area. One workmate burst into tears on dropping an implement because of the fear of killing a passer-by.

- Because it was situated outside the building, a scaffold attracted lightning. When working recently on the north face of the Carringbush Tower job he had seen lighting approaching from a distance. It had taken up to 40 minutes to get down from that particular job. Other jobs might entail a 25 minute descent.

- The temperature varies considerably from bottom to top of a building. In the mornings, particularly in winter or spring, the bottom of the building would be in shadow and the worker would be fully clothed. By the time he reached the working height it would be too hot, and clothes would be taken off.

- Some days might start off calm but suddenly a strong wind will come up. It is sometimes necessary in this situation to lower the scaffold two or three storeys and sucker on just through fear that you might be turned around and speared through a window.

- Harness is used as a safeguard against being blown out of the scaffold.

- Sometimes the movement of the scaffold against the side of a building results in what is known as "finger-crunch" or "elbow-crunch". This occurs when arms are extended to prevent the scaffold smashing against protrudences.

- Agreements had been made between the union and a number of companies in regard to safety gear and safety procedures. Some of these procedures involved the use of walkie-talkies, parachute harness, medical kits in the "boats" and even the checking with Bankstown or Mascot airports or the Weather Bureau for wind and weather reports.

- Union involvement in these areas had followed the death of a worker in Chandos Street North Sydney whilst working with a swing scaffold. He agreed that safety was much more assured than it had been prior to this accident.

The Union's second witness was Alexander Melnikoff who was currently employed on the Gateway Project as a carpenter. He was a senior union delegate on the job and a member of the Safety Committee.

Mr Melnikoff had been employed for 37 years in the building industry. Originally from Queensland he had been employed in Sydney for the past 25 years.

His evidence included the following:

- There had been many changes in the use of swing scaffolds on multi-storey buildings since the period 1975 to 1978. Movement was created manually compared with the current use of electric motors.

- Buildings are much taller. Prior to 1978 the tallest buildings were 15 to 20 storeys. Exceptions included Australia Square and Park Regis.

- There were big differences today to the methods used on the construction of buildings such as Australia Square. In those days pre-cut panels were lifted by crane and hooked up and bolted by the riggers from inside the building. Windows were also installed from the inside; there was no need for the swinging stages.

- Swinging stages were not used for patch-up work or placement of tiles. They were used to some extent for rendering but the type of scaffold in use was extremely heavy and could not swing even half as much of the present aluminium type.

- The Police Headquarters in College Street Sydney had been erected in 1966 or 1967. People working on scaffolds had been paid 40 cents per hour. This payment had been incorporated in the Award in 1975 as current clause 12(1)(e). It related to buildings far less in height to 15 storeys.

In opening his submission Mr Borrow drew attention to the National Wage Case principles particularly in regard to Existing Allowances and the use of the Work Value principle.

The specific references from the National Wage Case August 1988 decision[3] are as follows:

ALLOWANCES

(a) Existing Allowances

(i) ...

(ii) ...

(iii) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of the work value changes principle.

WORK VALUE CHANGES

(a) ...

(b) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(c) The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments are not included in any work evaluation under this principle.

---

[3] Print H4000

Mr Borrow said that paragraph (c) was particularly pertinent when weighing the evidence of Mr Melnikoff who had presented evidence to the effect that there had been significant work value changes since 1 January 1978 which would support the claim.

He said that the work value principle requires the applicant to demonstrate a number of things.

Firstly that there is new or changed work justifying a higher rate, secondly that any special rate is only payable when work involving the disabilities comprehended in it is being experienced, and thirdly that such changes had not been counted in a previous work value review and are not comprehended in an existing allowance. Further, that such changes had become extant subsequent to 1 January 1978.

He submitted that the application satisfied this criteria. The claim had been framed so as to load up the existing allowance to provide an appropriate loading for the additional disabilities associated with the escalating height of buildings.

The precise form of the application was as contained in a draft order prepared by the union as follows:

"A. The above award is varied by deleting paragraph 12.1(e) and inserting the following:

12.1(e) An employee required to work from any type of swing scaffold or any scaffold suspended by rope or cable, bosuns chair, or a suspended scaffold requiring the use of steel or iron hooks or angle irons shall be paid the appropriate allowance set out below for a minimum of four hours work or part thereof:

height of building	first four hours $	each additional hour $
0 - 15 storeys	2.38	0.49
16 - 30 storeys	3.05	0.63
31 - 45 storeys	3.59	0.74
46 - 60 storeys	5.90	1.22
greater than 60 storeys	7.52	1.55

Provided that an apprentice with less than two years' experience shall not use a swing scaffold or bosun's chair. And further provided that solid plasterers when working off a swing scaffold shall receive an additional 11 cents per hour.

B. This variation shall come into operation the first pay period to begin on or after 31 January, 1989 and remain in force for six months."

Mr Borrow said that the application did not seek to place further financial burden on an employer up to 15 storeys. Prior to 1978, according to the evidence, it was unusual to find a building in excess of 15 storeys where swing stages would be utilised.

He referred at length to the evidence put forward by the two witnesses and amplified certain aspects of the disabilities.

Although the work environment was not as safe as fixed scaffolding Mr Borrow made it clear that the claim should not be seen as a loading for unsafe work practices.

It was a claim based on the acceptance that the work environment had high levels of risk even where all precautions had been adopted.

Mr Borrow said that the industry allowance which is applied generally throughout industry did not contemplate the sorts of disabilities described by the union. Therefore double counting was not involved.

The multi-storey allowance relates to work within the alignment of the building and is based on averaging over the whole site.

In fact the multi-storey allowance has coexisted with the swing stage allowance since the award was made in 1975.

He said that Sydney at the moment was going through something of a boom in multi storey building, and there were a number of reasons for this.

The pushing up of the cost of prime real estate had created pressures for taller and taller buildings. This was amplified by the rewards that came from record breaking leases.

The union had some difficulty in finding some other allowances which might bear some resemblance to the swing scaffold in order to fix appropriate quantum.

There was no allowance which bore a direct resemblance, the closest being the multi-storey allowance and the height allowance.

In attempting to relate the height allowance to even a 15 storey building (say 92 metres), escalation of the existing allowance would produce a figure of $16.29 for the first four hours. He believed the Commission would regard that as an excessive cost even though there was some merit in drawing that comparison.

Mr Borrow then explained the multi-storey allowance principle as follows:

> "So we abandoned that approach and looked at escalating it at the same rate as the multi-storey allowance. Because although the disabilities are different, and perhaps in a strict sense, are difficult to compare with multi-storey, we see that the parties have accepted that the incidence of greater height can reasonably be escalated at a rate of 28 per cent between 16 and 30 storeys, 51 per cent based on the lowest allowance in the multi-storey clause for buildings between 31 and 45;
>
> 148 per cent for buildings between 46 and 60, and for those greater than 60, 216 per cent.
>
> What I am saying there, Mr Commissioner, is that we took the multi-storey allowance, we had a look at the way that the rate escalates for each increasing storey level or groups of storey levels, and we escalated this rate in accordance with that."

Mr Borrow submitted that this was in accordance with the work value principle which allows comparisons to be made with other wages and work requirements within the award.

In looking at the words "provided that the same changes have occurred" he agreed that a very liberal interpretation was being given, but it was a measure that required a certain exercise of license. He believed it was the only appropriate way of tackling the problem.

As to the type of buildings envisaged in the near future, he said.

> "We read in the press that there are 24 sky towers planned for Sydney alone over the next 3 years and if you can believe an article which appeared in the Weekend Australian, 3 weeks ago, these are likely to be between 30 and 35 storeys at least. And there is a further article which appeared in the Weekend Australian on 13 November 1988 which indicates that there is a growing preference to tall buildings."

Mr B. Seidler (MBA) drew attention to work on buildings where there was no building construction or renovation taking place.

In his view the swing scaffold rate alone should apply only during the construction or renovation period.

Mr Grozier (ACM) pointed out that the building that had been inspected that day had the scaffold anchored from the 36th level, even though the building itself would be taller than this.

This was an important point that was given some thought by the parties during the hearing.

Mr Quinlan raised the issue of not double counting with the disability of having to wear special equipment and Mr Borrow agreed that there could be such a proviso.

He agreed that after the words "or part thereof" at the end of the second sentence in A of the Union Draft the following words should be inserted.

> "... provided that the payment contained in this sub-clause is in recognition of all disabilities associated with such work including the associated wearing of a safety harness."

The application in my view has been made in accordance with the principles of the Commission and it has been clearly shown that substantiate changes in the nature of the described work have taken place since 1 January 1978.

Accordingly I agree with the organisations who appeared that the award should be varied to provide for an appropriate allowance to comprehend those changes.

The allowance should operate only whilst a building is being constructed or renovated and the allowance will cease to operate at lock-up stage of a project.

Whilst the employers finally offered no objection to the insertion of an appropriate allowance, they submitted no alternative to the scale provided by the unions and left this matter entirely to the Commission.

Because of the reasons submitted by Mr Borrow I believe the unions' scale to be appropriate and reasonable, and it is therefore agreed to by the Commission with one specific alteration.

As the scales of payment relate to the disabilities which in turn relate among other things to height, I consider that reference to the building height itself is not relevant.

The highest the scaffold is capable of travelling is up to the storey level of the anchor or bracing. The draft should be amended to conform with this provision.

As the current scaffold allowance is paid in addition to the multi-storey allowance so too should the new allowance particularly as it will apply as a result of disabilities external to the building itself.

To avoid any misunderstandings or ambiguity, the variation should make this point quite clear.

The variation is to apply from the first pay period beginning on or after 1 April 1989 and will operate for a period of six months thereafter.

The unions are requested to draw up fresh draft orders for both awards comprehending the requirements of this decision and submit them to the Commission after providing the parties with copies.

BY THE COMMISSION:

COMMISSIONER

Appearances:

S. Burrow and R. Salpeter for The Building Workers' Industrial Union of Australia.

J. Parker for the The Amalgamated Society of Carpenters and Joiners of Australia.

C. Bubb, M. Pyers and B. Seidler for The Master Builders' Association of New South Wales, Victoria, South Australia, Tasmania, the A.C.T. and respondent members of the Master Builders' Association of Queensland and Western Australia.

S. Clancy and P. Quinlan for the Australian Federation of Construction Contractors.

P. Ludeke and J. Wigmore for respondent members of the Employers Federation of New South Wales and the Victorian Employers Federation.

D. Grozier for respondent members of the Australian Chamber of Manufactures.

B. Richardson for the Victorian Employers Federation.

R. Lanthois for the Chamber of Commerce and Industries S.A. Inc.

Date and place of hearing:

1988.
Sydney:
October 27;

1989.
Sydney:
January 31;
February 23;

Circular Quay:
February 23.