



DECISION

Fair Work Act 2009

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

Construction, Forestry, Mining and Energy Union (AM2013/18)

Building, metal and civil construction industries

SENIOR DEPUTY PRESIDENT WATSON

MELBOURNE, 12 NOVEMBER 2013

Application to vary the Building and Construction General On-site Award 2010 [MA000020].

[1] On 20 August 2013, the Construction Forestry Mining and Energy Union (CFMEU) applied to vary the *Building and Construction General On-site Award 2010*¹ (the On-site Award) in respect of employees performing traffic control work within the industry. An earlier decision in relation to the application and a related application (AM2013/5) was issued on 26 September 2013.²

[2] A conference of interested parties was conducted by the Fair Work Commission (the Commission) in Sydney on 21 October 2013.

[3] Following the conference, the CFMEU corresponded on 21 October 2013 with the Commission indicating that:

“Further to the Conference held this morning regarding our application to vary the *Building and Construction General On-site Award 2010* in AM2013/18, the CFMEU wishes to formally advise that it withdraws those parts of the application that deal with matters other than the coverage of the award. In particular the union no longer presses the variations identified in items 4 to 7 under section 3. Variations sought, as set out in the application.

The CFMEU further advises that we reserve our right to revisit the withdrawn matters in the forthcoming 2014 Review of awards.”

[4] The effect of the CFMEU correspondence is that it is currently pressing only the following variations concerning coverage (the coverage variations):

“1. Insert a new sub-clause 4.10(a)(iv) as follows:

(iv) traffic management in or in connection with work under clauses 4.10(a)(i)-(iii).

2. Delete sub-clause 4.10(b)(vii), renumerate (sic) sub-clauses 4.10(b)(i)-(x), and insert a new sub-clause 4.10(b)(xi) as follows:

(xi) traffic management in or in connection with work under clauses 4.10(b)(i)-(x).

3. Insert a new sub-clause 4.10(c)(iii) as follows:

(iii) traffic management in or in connection with work under clauses 4.10(c)(i)-(ii).”³

[5] In order to finalise the determination of the CFMEU application in respect of the coverage variations, the following directions were made on 21 October 2013:

- “1. Any interested party wishing to put further submissions will file submissions in the Commission by noon on Friday, 1 November 2013; and
2. The CFMEU and The Australian Workers’ Union will file any reply submissions, if necessary, in the Commission by 4.00 p.m. on Wednesday, 6 November 2013.”

[6] On 30 October 2013, the Master Builders Australia Ltd (MBA) on behalf of itself, Australian Business Industrial (ABI) and Business SA (the Joint employers) filed a written submission opposing the coverage variations, submitting that the “variations are unnecessary and that the On-Site Award currently covers those engaged in traffic management in the building and construction industry”.⁴

[7] The Joint employers submitted that the On-site Award covers employers in the “on-site building, engineering and civil construction industry and their employees in the classifications within Schedule B” (clause 4.1), is defined in clause 4.9 as “the industry of general building and construction, civil construction and metal and engineering construction, in all cases undertaken on-site” are defined in clause 4.10.

[8] They submitted that traffic management, defined in clause 3.1 as “duties in or connection with the directing and controlling of traffic”, is clearly part of the work of the industry (in its broadest sense) undertaken on-site.

[9] The Joint employers submitted that businesses engaged in traffic management on a building site are covered by the On-site Award and that traffic management is an implicit part of the construction process. They submitted that workers engaged by those businesses

undertaking traffic management work will be classified either as a general labourer (CW1) or as the traffic controller specifically mentioned at the CW2 level.

[10] In its submissions of 30 October 2013, the Housing Industry Association (HIA), whilst not opposing the Joint employers submission, relied on its submissions of 13 September 2013, in which it submitted “that the classification of ‘traffic controller’ within Schedule B of the On-site Award is targeted at the occupation as carried out within the civil sector” and its inclusion in the On-site Award “should not be seen as a window through which to expand the coverage of the On-site Award”. The HIA further submitted that its preliminary investigations suggest that “those engaged in general building and construction work do not carry out traffic management. Where traffic management is required on a general building and construction site such services are provided by ‘traffic management companies’ whom a building company will engage”, largely regulated by enterprise agreements. It submitted “that the On-site Award is not an appropriate vehicle through which to capture traffic management carried out on construction sites”. The HIA further submitted that there is no evidence that construction employers covered by the On-site Award engage employees on a residential construction site for the distinct or sole purpose of carrying out traffic management duties.

[11] The Traffic Management Association of Australia (TMAA) submission of 13 September 2013 included a statement of its President, Mr S O’Dwyer asserting “that the On-site Award does not provide exhaustive coverage of the traffic management industry, as traffic control is not exclusively linked to the building and construction industry”. In its 1 November 2013 submission, the TMAA did not oppose the position of the Joint employers and HIA but distinguished its position in respect of the “traffic management industry”, submitting that whilst traffic management work may be incidental to work performed under the On-Site Award, as defined in that Award, it is broader than the work of controlling traffic on a construction site. It submitted that, at present, “the functions of traffic management in the general building and construction sector are adequately provided for by reference to the current classification” in the On-site Award.

[12] The CFMEU, supported by The Australian Workers’ Union, replied on 5 November 2013, submitting that the On-site Award covers traffic control work within the general building and construction, civil construction and metal and engineering construction sectors but uncertainty as to the coverage of traffic control work beyond the civil sector has arisen and is evident in a decision of Senior Deputy President O’Callaghan in *Badman v Altus Traffic Pty Ltd*.⁵ The CFMEU contended that whilst Senior Deputy President O’Callaghan was inclined to the view that the traffic management classification can apply to both building and civil work, uncertainty is evident and should be removed by varying the On-site Award to remove any scope for doubt. The CFMEU submitted that whilst traffic control work might be undertaken at the CW1 or CW2 level, a number of Certificate III qualifications include and implement Traffic Management Plan competency, so that a worker employed on the basis of their qualification at the CW3 level would not be reduced to the CW2 level whilst performing traffic management work.

[13] I am not persuaded that there is uncertainty in the On-site Award in respect of traffic management work which requires rectification. The current formulation reflects the terms of the primary federal pre-modern instruments, with specific reference to traffic controllers within the *Australian Workers’ Union Construction and Maintenance Award 2002*⁶ and

traffic management falling within the scope of the award classifications in the other sectors.⁷ The industry parties are in agreement that businesses (and their employees) engaged in traffic management on a building site are covered by the On-site Award. Traffic control work clearly falls within the scope of the award classifications within the On-site Award.

[14] In my view traffic control work falls within the scope of the classification structure of the On-site Award in respect of all sectors of the industry within the On-site Award and there is no uncertainty requiring correction. Accordingly, the CFMEU application to vary the On-site Award on the basis of anomaly, technical error and/or uncertainty is dismissed.

[15] If necessary, the specification of coverage of traffic management may be further considered during the 2014 four yearly review.

[16] In their 30 October 2013 submissions, the Joint employers advanced an approach to determining award coverage. The CFMEU contended that the considerations advanced in that approach are not the totality of relevant considerations, relying on my decision of 15 July 2013.⁸ It is not necessary for purposes of determining the coverage variations to further comment on the approach to determining award coverage.

SENIOR DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<Price code A, MA000020 PR544206 >

¹ MA000020.

² [2013] FWC 7458.

³ Application Form F46 by CFMEU to Vary a Modern Award.

⁴ Submissions of the Joint Employers, 30 October 2013, at para 3.

⁵ [2013] FWC 4409, at paras 47-48.

⁶ AP815828.

⁷ *National Building and Construction Industry Award 2000* [AP790741] and *National Metal and Engineering on-site Construction Industry Award 2002* [AP816828].

⁸ [2013] FWC 4576, at paras 152-162.