



**CIVIL CONTRACTORS
FEDERATION**

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30th September 2016

Justice Ross
Fair Work Commission President

Submitted by Email amod@fwc.gov.au

Dear Justice Ross

Re: Submission by Civil Contractors Federation in response to
the 4 yearly modern award review

The submission following is in response to the Statement and Directions issued by yourself on the 26th of August 2016 in relation to all Group 4 Awards, requesting that parties “file a short submission confirming the substantive claims being pursued.

If you have any queries please do not hesitate to contact the undersigned.

Yours faithfully

Anthony Baulderstone
National President

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Constructing Australia's Infrastructure



Submission by Civil Contractors Federation in response to the 4 yearly modern award review

Introduction

The Civil Contractors Federation (CCF) is the peak industry body representing Australia's civil construction industry. It has branches in all states and territories and around 2000 Contractor and Associate Members nationally. CCF Members are responsible for the construction and maintenance of Australia's infrastructure, including roads, bridges, pipelines, drainage, ports and utilities.

CCF Members also play a vital role in the residential and commercial building construction industry by providing earthmoving and land development services including the provision of power, water, communications and gas.

CCF is an organisation registered under the Fair Work (Registered Organisations) Act 2009. It is governed by a National Board comprised of member-elected representatives from each state and territory. A commitment to furthering its Members' interests and helping them manage their businesses more effectively is at the core of CCF's operations.

Reasons for Submission

This submission is in response to the Statement and Directions issued by President Justice Ross on the 26th of August 2016 in relation to all Group 4 Awards, requesting that parties *"file a short submission confirming the substantive claims being pursued. This is not expected to be a full submission, but should include the following:*

- (i) the nature of the change sought;*
- (ii) a draft variation determination;*
- (iii) the type of case to be run (merits or evidentiary based); and*
- (iv) if the case is evidence-based, how many witnesses will be called?*

Submission

On the 23rd of January 2015 President Ross issued directions to parties in relation to Group 4 (building awards) requesting that parties *'identify the nature of any changes they intend to propose during the review of these awards'*.

On the 2nd of March 2015 CCF filed a submission in relation to the Building and Construction General On-Site Award 2010 with 10 proposed variations to the award.



The table below outlines the current status of each proposed variation:

Variation 1 Clause 17.2 Definition of Redundant	This variation is still pressed, referred to Full Bench
Variation 2 Introduction of Junior Rates	This variation is still pressed, referred to Full Bench
Variation 3 Payment of Wages	This variation is still pressed; CCF requested this matter is referred to the Full Bench in August 31, 2016 as it appeared to have been missed.
Variation 4 Definition of Dirty Work	This variation is still pressed, referred to Full Bench
Variation 5 Living Away from Home Allowance	This variation is still pressed, referred to Full Bench
Variation 6 Travelling Time	This variation is still pressed, referred to Full Bench
Variation 7 Provision of Transport	This variation is still pressed, referred to Full Bench
Variation 8 Payment of Annual Leave	Withdrawn in response to Full Bench Decision – [2015] FWCFB 5771
Variation 9 Cashing of Annual Leave	Withdrawn in response to Full Bench Decision – [2015] FWCFB 5771
Variation 10 Clause 4.10 (b) (ii) Definition of Civil Work	This variation is still pressed, referred to Full Bench

In relation to the remaining applications, CCF makes this short submission, in accordance with paragraph [5] of the Statement and Directions.

CCF Proposed Variation 1: *Clause 17.2 Definition of Redundant*

The nature of the change sought

CCF is seeking to vary the industry specific definition of redundant in the Building and Construction General On Site Award 2010 to stop payment of redundancy benefits to employees who terminate their employment of their own accord, for example to commence work with another company.

The definition of redundant in the Building and Construction General On-site Award 2010 is provided in Clause 17.2;

17.2 Definition

For the purposes of this clause, redundancy means a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty. Redundant has a corresponding meaning.

This definition of redundant is contrary to the provisions in s.119 of the Fair Work Act, which provides:

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or



(b) because of the insolvency or bankruptcy of the employer.

The redundancy obligations in this Award impose an unreasonable financial burden on businesses, and discourage employment in the industry. It is contrary to common sense that an employee should be entitled to redundancy pay when leaving the employer entirely of their own accord.

Small businesses in the civil construction industry are hit particularly hard by these provisions, because the award's definition of redundancy also overrides the redundancy concessions for small business in s.121 of the Fair Work Act, so small businesses employers are also required to pay redundancy entitlements to employees who terminate their own employment for any reason.

(ii) A draft variation determination

CCF is seeking to vary the definition of Redundant in Clause 17.2 of the Building and Construction General On-site Award 2010 by adding new terms to the definition of redundant, underlined:

“For the purposes of this clause, redundancy means a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty or if the employee terminates the employment relationship of his/her own accord. Redundant has a corresponding meaning.”

(iii) The type of case to be run

CCF will run this claim on evidence, with up to 5 witnesses expected to provide evidence.

Proposed Variation 2: Introduction of Junior Rates to the Award

(i) The nature of the change sought

The Building and Construction General On –Site Award 2010 does not have Junior Rates of Pay. Its predecessor, the National Building and Construction Award 1990, had junior rates in Clause 20.5.3, but it appears that Junior Rates were lost in the Award modernisation process.

The elimination of Junior Rates has had a profound effect on youth employment and training in the industry because it discourages employment of young people and school leavers by the industry.

Many young employees and school leavers would like to undertake a traineeship or apprenticeship after first serving a period of experience in the industry; however, since Junior Rates were removed there is little encouragement for employers to employ young employees with limited skills and experience.

New entrants to the industry start at the CW1 (a) classification regardless of age. The current rate of pay for a new entrant is \$743.68 per week, inclusive of Industry and Special Allowances for the first 3 months. In addition, an employee is entitled to a Daily Travel Allowance in accordance with Clause 25 of the award, currently \$17.43 per day. Therefore, the real cost to employ a school leaver who is not a trainee or an apprentice to try the industry is \$830.84 per week or \$21.86 per hour. If casual employment is used for the trial period 25% loading must be added to the hourly rate of the new employee.

If the probation period is successful and both the employer and the school leaver are willing to enter into a traineeship or apprenticeship arrangement, employees are unwilling to drop their wages back to traineeship or apprenticeship rates. Employers are very reluctant to enter into an apprenticeship arrangement with such high wages.

The lack of Junior Rates in this award has greatly contributed to the current skill shortage in the industry, and the very low number of apprenticeship and traineeships undertaken in the civil construction industry.

(ii) A draft variation determination

CCF proposes that the following table, based on the previous National Building and Construction industry Award 1990 is inserted in the Building and Construction General On-site Award 2010:

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

(iii) The type of case to be run

CCF will run this claim on evidence, with up to 5 witnesses expected to provide evidence.

Proposed Variation 3: Clause 31.3 Payment of Wages

(i) The nature of the change sought

This provision is a significant administrative burden for employers in this industry and limits the ability for employers to implement cost and time effective payroll cycles. Clause 31.3 of the Award provides less flexibility for employers than the provisions in s.323 (1) (c) of the Fair Work Act which provides that employers may pay employees weekly, fortnightly or monthly.

(ii) A draft variation determination

CCF proposes that Clause 31.3 of the Building and Construction General On-site Award 2010 is replaced with the following Clause 31.3:

31.3 Payments must be paid and available to the employee not later than the end of ordinary hours of work on each Thursday for weekly pay arrangements, or every second Thursday for fortnightly pay arrangements.

(iii) The type of case to be run

CCF will run this claim on its merits.

Proposed Variation 4: Clause 22.2 (h) Definition of Dirty Work

(i) The nature of the change sought

CCF is seeking to have a clear definition of “unusually dirty work” inserted in the Award to identify situations where this allowance should be paid to employees. The lack of a clear definition has caused a number of disputes and claim for underpayment which are extremely difficult to settle without an accurate definition of dirty work.

(ii) A draft variation determination

New paragraph added to clause 22.2 (h) of the Building and Construction General On-site Award 2010;

“Unusually dirty work is defined as a situation where the employee is required to work on sites with dirty or contaminated substances or materials not commonly found on building and construction sites, and these substances or materials not covered by any other disability allowance paid under this award”.

On the alternative, if no suitable definition can be agreed upon, we submit that this allowance is deleted.

(iii) The type of case to be run

CCF will run this claim on its merits.

Proposed Variation 5: Clause 24.3 (a) (i) Living Away from Home Allowance

(i) The nature of the change sought

Clause 24.3 of the Building and Construction General On-site Award 2010 provides a living away from home entitlement for employees on the following terms:

(i) Pay a living away from home allowance of \$454.75 per complete week. In the case of broken parts of the week the living away from home allowance will be \$65.06 per day. This allowance may be increased if the employee satisfies the employer that the employee reasonably incurred a greater outlay than that prescribed; or

(ii) Provide the worker with reasonable board and lodging in a well-kept establishment with three adequate meals each day; or

(iii) Where employees are required to live in camp, provide all board and accommodation free of charge.

The value of the accommodation component and the value of each meal are not specified in the Award. Many employers prefer to pay for the employee’s accommodation directly to an establishment, and pay meals allowances directly to the employee. Many accommodation establishments do not provide meals or cooking facilities, or only provide breakfast.

It should be noted that CCF is not seeking to vary the value of the current living away from home allowances in the Award; CCF is seeking to identify the value of the meals entitlement to provide clarity about the entitlement.

(ii) A draft variation determination

CCF proposes a new subclause 24.3 (iii) is inserted in the Building and Construction General On-site Award 2010 on the following terms:

(iii) or, where the employer provides accommodation only, the following meal allowances will be paid to the employee:

Breakfast \$xx

Lunch \$xx

Dinner \$xx

(iii) the type of case to be run

CCF will run this case on its merits.

Proposed Variation 6: Clause 25.2 Travelling Time

(i) The nature of the change sought

Many employees in civil construction perform maintenance, repairs and other work on earthmoving and equipment at the employer's sheds and workshops. These employees rarely, if ever, work on building sites, yet are entitled to two separate disability allowances to compensate for the alleged special travel requirements of the industry. The first allowance is in Clause 21.1 (i) of the Award, which provides an all-purpose Special allowance in the following terms:

21.1 Special allowance

(a) Employees must be paid a special allowance of \$7.70 per week to compensate for the following matters:

(i) excess travelling time incurred by employees in the on-site building and construction industry; and

(ii) the removal of loadings from the various building awards in this industry.

(b) This allowance will not be adjusted.

Clause 25 .1 provides the rationale for additional compensation for travel:

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

Clause 25.2 provides the value of the allowance:

An employee, other than an employee in the metal and engineering construction sector who is required to commence or cease work at the employer's workshop, yard or depot other than on a construction site, must be paid an allowance of \$17.43 per day for each day worked when employed on construction work, at a construction site located:

(a) within a radius of 50 kilometres of the GPO in a capital city of a State or Territory; or

(b) within a radius of 50 kilometres

Clause 25.10 prescribes the circumstances under which the allowance in clause 25.2 .is paid:

25.10 Daily entitlement

(a) The travelling allowances prescribed in this clause will be payable for:

(i) any day upon which the employee performs or reports for duty, or allocation of work;

Clearly, an employee who is not required work on building sites as part of their normal duties does not suffer the cost and disadvantages described in Clauses 25.1, or 21.2.

Nevertheless these employees are classified in Schedule B of the Award as building workers, and are entitled to the same travel allowances as employees who do work on building sites daily.

We propose that the Award is varied to exclude, and make it clear that employees not working on a building site as part of their normal duties are not entitled to the travel allowance in Clause 25.2 of the Award, and that such employees are already compensated for any disabilities related to travel by Clause 21.1 Special Allowance.

(ii) a draft variation determination

CCF proposes that the following new Sub-clause 25.10 (a) (iii) is inserted in the Building and Construction General On-site Award 2010:

(iii) the travel allowances prescribed in this clause will not be payable to employees not required to work on a building site as part of their normal duties;

(iii) the type of case to be run

CCF will run this case on its merits.

Proposed Variation 7: Clause 25.8 (b) Provision of Transport

(i) The nature of the change sought

We proposed that Clause 25.8(b) is varied to exclude employees who are issued with a company vehicle free of charge receiving the Travel Allowance prescribed in 25.2 Metropolitan Radial Areas.

An employee who is provided with a vehicle free of charge by an employer does not incur travel cost, nor does the employee suffer the circumstances described in Clause 25.1 if required to drive a fully maintained company vehicle from home to a work site within the radial areas prescribed in Clause 25.2 Metropolitan Radial Areas.

Employees covered by this Award already receive an all-purpose allowance for alleged travel disabilities in Clause 21.1.

21.1 Special allowance

(a) Employees must be paid a special allowance of \$7.70 per week to compensate for the following matters:

(i) excess travelling time incurred by employees in the on-site building and construction industry; and

(ii) the removal of loadings from the various building awards in this industry.

(b) This allowance will not be adjusted.

(ii) a draft variation determination

CCF proposes that Clause 25.8 (b) of the Building and Construction General On-site Award 2010 is deleted.

~~25.8 (b) The allowance prescribed in this clause will be payable on any day for which the employer provides a vehicle free of charge to the employee for a purpose related to their contract of employment, and the employee is required by the employer to drive this vehicle from the employee's home to their place of work and return.~~

(iii) the type of case to be run

CCF intends to run this case on its merits.

Proposed Variation 10: Clause 4.10 (b) (ii) Award (Coverage)

(i) The nature of the change sought

CCF proposes that Clause 4.10 (b) (ii) of the Building and Construction General On-site Award 2010 is deleted:

(ii) road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt;

The work described in Clause 4.10 (b) (ii) of the Building and Construction Award is not part of the civil industry. This type of work involving asphalt has its own dedicated Modern Award, the Asphalt Industry Award 2010 which coverage on the following terms:

4.1 *This industry award covers employers throughout Australia in the asphalt industry and their employees in the classifications listed in clause 13—Classifications, to the exclusion of any other modern award.*

(a) Definition of asphalt industry

*“For the purpose of this clause, **asphalt industry** means roadmaking and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt.”*

This award overlap creates demarcation disputes because of competing coverage by Unions. Members are uncertain about award coverage in roadmaking activities due to the identical definitions in both awards and conflicting advice from unions.

The Building and Construction General On-Site Award’s predecessor, the National Building and Construction Industry Award 2000 (AT90741 CRV) consolidated on the 29th of September 2008 by (PR83590) contains no mention of any work associated with asphalt in Clause 6, coverage.

CCF submits that Clause 4.10 (b) (ii) of the Building and Construction General On-Site Award 2010 was inserted in error, and should be deleted to allow the Asphalt Industry Award 2010 to do its intended work.

(ii) a draft variation determination

CCF proposes that Clause 4.10 (b) (ii) is deleted from the Building and Construction General On-site Award 2010:

~~(ii) road making and the manufacture or preparation, applying, laying or fixing of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparations, hot pre-mixed asphalt, cold paved asphalt and mastic asphalt; a draft variation determination;~~

(iii) the type of case to be run

CCF intends to run this case on its merits.