MASTER BUILDERS AUSTRALIA

AM2016/23 - 4 Yearly Review of Modern Awards

Construction Awards

SUBMISSION IN REPLY

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1 Introduction

1.1 This submission is made by Master Builders Australia (Master Builders).

1.2 Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890.

1.3 Master Builders represents over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering. The building and construction sector is now the second largest part of the economy in terms of GDP, and employs over 1 million people.

2 Summary of this Submission

2.1 Master Builders maintains an interest in the Building and Construction General *On-site Award 2010* ('On-site Award') and the *Joinery and Building Trades Award 2010* ('Joinery Award') (together, the 'Construction Awards').

2.2 This submission is made in response to those filed by the parties in AM2016/23, with a particular focus on submissions made by the Construction, Forestry, Mining and Energy Union (Construction and General Division) ('CFMEU') dated 9 December 2016 ('the CFMEU submission').

2.3 Master Builders continues to rely on our earlier submissions as filed in this matter dated: 13 October 2014; 2 March, 12 November and 22 December 2015; 30 June, 31 August, 2 and 16 December 2016. In addition, we rely on those submissions in various 'common issues' matters as part of the 4-yearly review of modern awards as referenced (where relevant) within this submission.

2.4 In terms of the claims and submissions filed by the other employer parties who have an interest in this proceeding, these are either not opposed or supported, or supported in the alternative (to the extent that they cover a provision or matter that is also the subject of Master Builders claims and the Commission is not minded to grant our related variation or change) save for the Housing Industry Association ('HIA') claims to abolish the industry specific redundancy scheme.

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3 The CFMEU claims

3.1 The CFMEU submission seeks a number of substantive variations to the Construction Awards. Master Builders submits that the Commission ought not grant the CFMEU claims for the reasons set out and detailed herein with respect to each individual claim.

3.2 In general terms, however, Master Builders submits that the CMFEU claims are not necessary to meet modern awards objective and should be rejected. Further, were the claims to be granted they would, in many cases, create inconsistencies with the modern awards objective or reduce the extent to which the Award meets it.

3.3 In the *4 yearly review of Modern Awards: Preliminary Jurisdictional Issues* decision,[1] the Commission held that the modern awards objective, with reference to section 134 of the *Fair Work Act 2009* (Cth) ('FW Act'), together with the NES, must be considered to provide a minimum safety net of terms and conditions in all modern awards.[2]

3.4 It was also found that as part of the 4 yearly review, the Commission should only include terms in an award to the extent necessary to achieve the modern awards objective (in accordance with section 138 of the FW Act).[3] It was also held that where a party sought a variation, a merit based argument would need to be advanced to justify the alteration, with evidentiary requirements being dependent upon the nature of the changes being sought.[4]

3.5 Further, the CFMEU claims are largely an endeavour to unreasonably boost conditions in the award to a point where it no longer reflects the objects of the Fair Work Act and provides conditions and entitlements that cannot be said to represent a minimum safety net. The object of the FW Act, as expressed under section 3, is *'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.'* Section 3 includes criteria by which this is achieved including relevantly by:

> *(a) Providing workplace relations laws that are fair to working Australians, are flexible for business, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*

[1] [2014] FWCFB 1788
[2] Ibid at para [23]
[3] Ibid at para [29]
[4] Ibid at para [60]

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> (b) *Ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders;*

And further at subsection (g):

> *(g) acknowledging the special circumstances of small and medium-sized businesses.*

3.6 The NES contain the legislated employment conditions essential to maintaining a basic minimum standard for all national system employees. Those minimum standards relate to 10 matters, including providing for weekly hours, leave arrangements, public holidays, flexibility and redundancy arrangements.

3.7 Section 59 of the FW Act states that the NES underpin what can be included in modern awards and enterprise agreements and refers to sections 55 and 56 to provide guidance on the interaction between the NES and modern awards or enterprise agreements.

3.8 Section 55(1) of the FW Act states:

> *A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.*

In addition section 55(2) states:

> *'A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:*
>
> *(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or*
>
> *(b) by regulations made for the purposes of section 127.*

3.9 The claims advanced by the CFMEU have the effect of extending the entitlements and obligations in the Awards so that they are beyond those that are part of a basic safety net and conditions that provide for essential, minimum conditions of employment. This is inconsistent with the intent of the 4 Yearly Review proceeding which is to ensure that modern awards contain matters that not only meet the modern award objectives, but are necessary to meet them.

3.10 In addition, many of the CFMEU claims would, if granted, have the effect of exacerbating circumstances that have partly contributed to the On-Site Award and related awards becoming barely workable by the insertion of provisions that are highly prescriptive in nature. Provisions of such a prescriptive nature are exactly why many of the current

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provisions in the award have become outmoded and redundant. Some of the claims surrounding distant work or communications technology, for example, seek to prescribe matters in such detail that they are guaranteed to become out of date almost immediately. The inclusion of such matters cannot be said to make the existing award modern and flexible, reflective of the needs of the industry and necessary to form an appropriate and relevant safety net. Rather, they have the effect of ensuring the award retains its status of being complex, lengthy and confusing to users. This is entirely inconsistent with s.134 (1) (g) that notes the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.

3.11 Lastly, nearly all the claims made by the CFMEU would have the effect of reducing the extent to which the modern award objectives are met. While some purport to 'clarify' aspects within the award, close examination reveals that overall the claims:

- are inconsistent with the need to promote flexible modern work practices and the efficient and productive performance of work;
- will increase costs to business;
- will adversely affect productivity;
- will substantially increase employment costs;
- will increase the extent of regulatory burden;
- adversely affect economic performance of the building and construction sector;
- are complex and confusing; and
- cannot be considered as necessary to ensure awards provide a fair and relevant minimum safety net of terms and conditions.

3.12 As a general proposition therefore, we submit that the CFMEU claims should be rejected on the basis that they are not *necessary* to give effect to the modern awards objective and generally inconsistent with them.

4 Clause 4 - Coverage

4.1 The CFMEU has proposed an variation to clause 4 of the On-Site Award which would have the effect of removing all coverage exceptions for employees engaged on-site who

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perform work contained in classifications under the award.[5] This would mean that every person who performs work on-site would be covered by the provisions of the On-Site Award for the period they are so engaged.

4.2 Master Builders opposes this claim.

4.3 Clause 4.1 of the current On-Site Award covers employers in the on-site building, engineering and civil construction industries and their employees whose classification of work is contained in Schedule B of the award. Clause 4.2, however, lists eight other awards relevant to the building and construction sector and excludes them from coverage to the extent that the work of those classifications is also covered by the On-Site Award. Included in this list are employers covered by the Joinery Award.

4.4 The CFMEU has claimed that the current wording of clause 4 does not reflect the intent of the award modernisation process which, they claim, was to make awards applicable to all award-covered employees in the relevant industry.

4.5 The CFMEU has also submitted that its proposed variation addresses what it sees as a conflict between clauses 4.2 and 4.8 in the Award. Clause 4.8 currently states:

> *'Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.*
>
> *NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage'.*

4.6 The issue of coverage was considered in *The Australian Workers' Union v Coffey Information Pty Limited*.[6] In that matter the Full Bench held that employees who were engaged to conduct geotechnical testing and analysis on a construction site were covered by the *Manufacturing and Associated Industries and Occupations Award 2013* ('the Manufacturing Award') as opposed to the On-Site Award.

4.7 The Full Bench held that the broad classifications in the On-Site Award were less appropriate, with reference to the employees under consideration, than those contained

[5] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 163.
[6] [2013] FWCFB 2894

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in the Manufacturing Award which specifically covered laboratory work and work of technical workers. [7]

4.8 At paragraph [25] of the decision, the Full Bench went on to state that the On-Site Award applied very widely to the construction industry and that the classifications contained therein were very general in nature. This proposition supported the conclusion that the more applicable technical classifications within the Manufacturing Award gave rise to its coverage of the employees under consideration.

4.9 Master Builders' submissions, dated 2 December 2016 ('December submissions') identified that clarification was needed with regard to those covered by the Joinery Award who undertake off-site joinery work, but whom perform work on construction sites to install materials they have prepared in a joinery shop or off-site establishment.[8]

4.10 Those submissions highlighted that employers were frequently faced with the impracticality of having to engage employees under the Joinery Award, to undertake joinery work in a workshop or similar establishment off-site, and then pay either the same, or other, employees under the On-Site Award to fix or erect those works on site, a scenario providing a frequent opportunity for conflict of award coverage on site.

4.11 Master Builders' proposed variations are the most appropriate solution to address the issue of conflict of coverage between the Construction Awards. This is in contrast to the variations put forward by the CFMEU, which are instead likely to magnify the current problem, cause greater uncertainty and are inconsistent with the decision in *Coffey.*

4.12 In addition, the CFMEU variation proposed would:

- remove flexibilities enjoyed by workplaces arising from the current Award coverage exceptions. It would mean that every employee who performs work on a building site would need to apply the terms of that Award for the period they are so engaged and any occupational flexibilities or other occupation specific provisions contained in their otherwise applicable award would not have effect. Such an variation is inconsistent with s. 134(1)(d);

- increase the regulatory and compliance burden upon workplaces in a manner inconsistent with s. 134(1)(f), by requiring the application of multiple Award

[7] Ibid at para [24]
[8] Master Builders Australia submission, AM2016/23, 2 December 2016 at para 25.

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instruments for those whom ordinarily would only need to apply one specific instrument; and

- increase complexity and reduce the extent to which the current coverage situation is simple and understandable, contrary to the intent of s.134(1)(g).

5 Clause 19 - Minimum wages – Daily and Weekly hire – inclusion of specific additional allowances

5.1 The CFMEU seek to vary clause 19 by including additional references to specific allowances. It is said that the basis for the proposed inclusion is to clarify the applicability of allowances to daily and weekly hire provisions and to reflect that all tradespersons and labourers can be engaged on a daily hire or weekly hire basis under the On-Site Award.

5.2 Master Builders submits that these claims should be rejected for a number of reasons including that they are unnecessary, would cause confusion amongst industry award users, and represent an unsubstantiated increase to the safety net for which there is no basis or justification. For example, the allowances pertaining to refractory bricklayers are already provided for under the existing clause 19.3(a)(ii).

5.3 While the historical limitations on daily hire workers to particular occupational categories has been removed, it remains the case that the use of daily hire is still largely concentrated on those previous occupational categories. The changes sought would therefore create additional uncertainty and confusion amongst industry award users.

5.4 It should also be noted that in other proceedings before the Commission, the CFMEU has argued that the casual hourly rate calculation should be made with reference to the permanent daily hire hourly rate (that includes a follow-the-job loading) and not the conventional permanent hourly rate. Master Builders rejected those earlier arguments and argued a position to the contrary.

5.5 We submit that the attempt to make the changes as proposed is not to clarify an existing provision, but an endeavour to create circumstances supporting arguments as to the appropriate reference rate for determining the casual rate of pay (e.g. altering relevant provisions so as to make the daily hire rate look to be like the conventional hourly rate thereby strengthening arguments made elsewhere as to casual rate calculations).

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5.6 Were the Commission to grant the claim it would have the effect of being read to extend existing obligations to new categories of employees and therefore represent an increase to the minimum hourly and the safety net, with no basis or justification for such an increase.

6 Clause 20 – Expense related allowances – "Communications Equipment Allowance"

6.1 The CFMEU seek the inclusion of a new provision creating an allowance to be paid when employees are using communications equipment and related devices, such as walkie-talkies, mobile phones, and tablets. The clause is categorised as an 'allowance' and is proposed for inclusion at Clause 20 – Expense Related Allowances.

6.2 Master Builders submits that this claim ought to be rejected. There are numerous bases for this position.

6.3 The clause does not provide for an allowance in its conventional sense, such as a laundry allowance where a fixed amount is paid on a regular basis to cover the cost incurred by an employee who is required to launder clothing necessary for work. Instead, the clause would oblige employers to reimburse the full cost of providing the equipment and any service or other charges incurred. As such, the use of the term allowance is misleading and would likely be the source of confusion amongst award users.

6.4 The clause contemplates circumstances that would rarely, if ever, exist. For example, it would be rare for an employer to require an employee to provide their own two-way radio system or walkie talkie for communications use on a building site. Such equipment is conventionally supplied by the employer and it is in their interest to do so in order to ensure consistency of communication method and discharge related legislative obligations.

6.5 In addition, such equipment is frequently sold as a system or with two devices. By default, the use of such equipment for communication purposes necessarily involves another person using a similar device or the same system. The clause does not contemplate such a circumstance and creates complexity as to whom an allowance would be payable and under what circumstances. As drafted, if employee A provided their own equipment and this was used by employee B with whom employee A was

required to communicate, the allowance would be arguably payable to one and not the other, or split between both.

6.6 The clause does not provide the necessary discretionary flexibility for employers to determine whether or not they would provide any such equipment or require employees to provide their own equipment. As drafted, the clause sets a requirement for employers to provide communications equipment but leaves employees free to provide their own equipment irrespective of whether it is provided by the employer. In other words, employees could claim the allowance even though the employer has made available appropriate communication methods. There is no discretion for an employee to be directed to use the employer's communication equipment if the employee simply decides to use their own.

6.7 Further, the determination as to whether the use of equipment provided by employees is 'required' also remains at the discretion of the employee. That is, the clause vests discretion as to whether use is required only to the employee who provides the equipment. This would likely be cause of significant disputation given the subjective nature of determining, on each and every occasion, whether or not a circumstance 'required' use of equipment. Requiring the use of such equipment is a precondition of the proposed clause payment i.e. "provided by the employee and required to be used…" As drafted, there is no discretion for an employer to require or not require the use of communications equipment.

6.8 The clause lacks definitional specificity as to what constitutes communications equipment and has broad application to the point of being unworkable. There are various definitions of what constitutes communications equipment, including:

> *"An umbrella term for hardware that transmits voice, video or text. It can refer to virtually any computing, phone or network device."* [9]
>
> *"A communication device is a hardware device capable of transmitting an analog or digital signal over the telephone, other communication wire, or wirelessly. The best example of a communication device is a computer Modem, which is capable of sending and receiving a signal to allow computers to talk to other computers over the telephone. Other examples of communication devices include a network interface card (NIC), Wi-Fi devices, and an access point."* [10]

[9] http://www.pcmag.com/encyclopedia/term/40075/communications-device
[10] http://www.computerhope.com/jargon/c/communication-devices.htm

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> *"Electronic communication device" means (i) any type of instrument, device, machine, equipment or software that is capable of transmitting, acquiring, encrypting, decrypting or receiving any signs, signals, writings, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems or (ii) any part, accessory or component of such an instrument, device, machine, equipment or software, including, but not limited to, any computer circuit, computer chip, security module, smart card, electronic mechanism, or other component, accessory or part, that is capable of facilitating the transmission, acquisition, encryption, decryption or reception of signs, signals, writings, images, and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems."* [11]

6.9 Others are more specific in referring to a 'personal' communications device, but this too is broad:

> *"Any device which is portable and used for communications such a voice calls, email, pages, or faxes. These include cellular phones, pagers, and properly equipped portable computers such as notebooks or PDAs. Also called personal communicator."* [12]

6.10 The proposed clause could, given the broad definitions that may be applicable, be read to include virtually any computer, phone, or device connected to, or able to access, a network. While some types of communication equipment are identified in the proposed clause premised by the words "*for example*" it is arguable that a desktop computer, a land-line handset telephone, or facsimile could also meet that definition – as would an iWatch, iPod, Kindle or Kobo Glo.

6.11 In addition, the clause is too broad insofar as what constitutes "*the cost of providing*" the equipment. While this will (in relation to a smart phone) include call charges, it could also extend to SMS messaging, network access or rental, excess usage charges, loss or damage to mobile communications devices, monthly fees, excess data fees, and related insurance.

6.12 The above reasons alone, we submit, form the basis for rejecting the proposed variation on the basis that it would be inconsistent with:

- S.134(1)(d) – reduces the capacity to ensure the efficient and productive performance of work by creating avenues for the use of various communications methods on site;

[11] https://definedterm.com/electronic_communication_device
[12] http://www.dictionaryofengineering.com/definition/personal-communications-device.html

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- S.134(1)(f) – increases compliance issues and red tape thereby increasing the regulatory burden; and
- S.134(1)(b) – discourages enterprise bargaining by seeking to include in a modern award instrument a provision that would be better being dealt with in an enterprise agreement or other document that is capable of being tailored to reflect the circumstances of a particular worksite, project or technology requirements.

6.13 Further, the proposed clause should be rejected as it would have the effect of creating obligations on parties that are unknown – that is, the interpretation of the proposed clause is specific upon the time in which it is read and the items relevantly available at that same time. Those items are of a type that is the subject of rapid change and technological advancement. This means that the requirements of the clause today may be different in terms of interpretation and arising obligations when compared with a reading of it in ten years from now.

6.14 When the Award was made in 2010, Blackberry PDAs were common, the iPad did not exist and the iPhone 3 was cutting edge; when the predecessor award was made in 2000 the Nokia 3310 was the latest technology and MP3 players were just starting to become available to ordinary consumers. The form of future technology and communications equipment cannot simply be known at this time and the consequences of the proposed clause (other than those made earlier above) cannot be adequately assessed.

6.15 Master Builders also submits that there is no evidence that the subject of the proposed clause is an issue for the industry or that other processes conventionally deployed in workplaces to address related matters (enterprise agreements or specific policy and procedures) cannot adequately accommodate such arrangements. To the contrary, leaving such specific matters to other processes is a far more appropriate way in which they can be dealt with in a tailored manner at the workplace level.

6.16 In addition, the subject of the proposed clause is not one that should justify inclusion in an Award instrument that forms a safety net of minimum employment conditions for construction industry workplaces. This proceeding involves a review of the Award to ensure it meets the Modern Awards Objective and that involves the Commission ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. Further, there is no evidence that the cost of communications equipment is a matter that is unique to the

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construction industry and should not therefore be included in an instrument that has industry specific application and relevance.

7 Clause 22 – Special rates

7.1 The CFMEU submission proposes the inclusion of a new consolidated special rates allowance which would allow employers, by agreement, to pay a flat 7.9% of the weekly standard rate (paid as an allowance for each hour worked), in lieu of any individual special rates which may be applicable, with the exception of those payable for the following:

- Hot work
- Cold work
- Confined space
- Swing scaffold
- Asbestos
- Asbestos eradication
- Suspended perimeter work platform
- Towers allowance; and
- Compressed air work [13]

7.2 In its submission, the CFMEU suggest the proposed variation provides employers and employees the opportunity to agree to the consolidation of certain disability allowances and is in response to comments made by the AIRC Full Bench during the Modern Award proceedings. [14]

7.3 Master Builders also identified that years of industrial processes and award modernisation (which resulted in numerous clauses contained in three federal awards being incorporated into the On-Site Award), has created a number of problems.[15]

7.4 The key issue is that a large number of allowances (including the vast majority of those contained within clause 22), deal with matters that are already covered by relevant WHS Laws, WHS Regulations, Safe Work Australia codes of practice and guidance materials and Australian Standards (together 'WHS laws').[16] This has resulted in the creation of

[13] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 180
[14] Ibid at para 181
[15] Master Builders Australia submission, AM2016/23, 2 December 2016 at para 4.2.
[16] Ibid at para 4.3

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inconsistencies within the award and an overlap between its prescriptive requirements and obligations under WHS laws.[17]

7.5 The CFMEU proposed the same arrangement in the 2 yearly review proceedings as it does now. At that time, however, the CFMEU chose to withdraw the claim having failed to reach an agreement with the employer parties at the time on any alternate proposal.[18]

7.6 Master Builders rejected the claim at the time as it would not address (and would in fact compound) existing concerns held with respect to allowances contained within the On-Site Award.[19] The basis for that rejection remains.

7.7 The CFMEU's claim would also instead introduce greater complexity, further administration and impose increased regulatory burden upon employers. For example, employers would need to substantially increase their record keeping requirements to ensure that the special rate would see the amounts paid to an employee under the CFMEU claim is the same or greater than if they were paid according to the existing arrangements.

7.8 There is no logic to the proposal in that the majority of allowances under clause 22 have no practical correlation to warrant their inclusion in a flat rate of 7.9% payable in lieu of the amounts currently prescribed under the award. It would be uncommon, for example, for an employee to claim an allowance for Furnace work (22.2(n)) as well as for working from Heights (clause 22.2(q)) and brewery cylinder painting work (22.3(l)) in the same pay period.

7.9 While there is merit in addressing the problematic nature of allowances in the On-Site Award, the CFMEU proposal is unwieldy and would compound existing complexities in a manner that would increase the extent to which relevant provisions are already inconsistent with the modern awards objective.

8 Clause 28 – National Training Wage

8.1 The CFMEU has sought an variation to vary the National Training Wage (NTW) Schedule within the On-Site Award. The proposed changes relate to clause 28.2 and expand upon the existing competency-based progression provisions with regard to civil

[17] Ibid at para 4.4
[18] Ref Transcript 210313AM201248, 21 March 2013, at PN 2849.
[19] Master Builders Australia submission, AM2012/48, 25 October 2012, at para 5

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construction traineeships, as well as increase the monetary values for the stages of progression.[20]

8.2 It is relevant to note the Statement, dated 6 July 2016, in the 'common issue' NTW matter wherein the Commission proposed to remove the existing NTW Schedule from all modern awards, save the *Miscellaneous Award 2010* ('the Miscellaneous Award'). The Commission's proposal included inserting a standard NTW Schedule into the Miscellaneous Award and amending all modern awards to make reference to the schedule contained in that award.[21] Master Builders supports this approach proposed by the Commission, with regard to the Construction Awards, and has made submissions endorsing same.[22]

8.3 In the Statement, the Commission highlighted that during the priority award stage of the award modernisation process, the award modernisation Full Bench proposed that the terms of the *National Training Wage Award 2000* be re-drafted and included as a schedule in each modern award.[23]

8.4 The Commission, however, made the observation that (post award-modernisation) a number of variations to the NTW Schedule remained and that a standard NTW Schedule, likely to be subject to plain-language re-drafting, would have advantages for employees, employers and training providers alike.[24]

8.5 Interested parties were then invited to make submissions on any technical variations which should be made to the proposed standard NTW Schedule or if, in the alternative, they objected to the Schedule being included in any modern award.[25]

8.6 The CFMEU filed submissions in the common issue NTW matter, opposing the inclusion of the proposed standard NTW Schedule in the Construction Awards.[26]

8.7 In its submissions filed in both the common issue NTW Schedule and award-specific proceedings the CFMEU claimed that its proposal, and objection to the inclusion of the standard NTW Schedule in the Construction Awards, is largely based on its desire to retain competency-based wage progression for trainees.[27]

[20] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 183
[21] [2016] FWC 4495 at para [5]
[22] Master Builders Australia submission, AM2016/23, 2 December 2016 at para 15.3
[23] [2016] FWC 4495 at para [7]
[24] Ibid at paras [8] and [9]
[25] Ibid at para [24]
[26] Construction Forestry, Mining and Energy Union submission, AM2016/17, 28 July 2016 at para 18.
[27] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 187

8.8 Master Builders, however, maintains its broader policy position that time-based, rather than competency-based, progression is preferred insofar as it delivers stronger training and productivity outcomes for the building and construction sector.

8.9 While arguments exist to the contrary of the above view, they do not account for the inherent risk associated with the awarding of competencies in circumstances that are premature. The potential consequence of such a risk is that individuals may be awarded competency without having the skills necessary to undertake particular types of work, thereby creating a significant risk given the nature of work undertaken in the construction industry.

8.10 In its submission in the NTW common issue matter, the CFMEU also made the assertion that the only wage provisions from the NTW Schedule that would have any application to the On-Site Award are the AQF Certificate Level 4 and school-based traineeship rates.[28] This contention is misguided as AQF Certificate Level I-III traineeships are in fact highly utilised in the building and construction sector.

8.11 The proposed standard NTW schedule would likely deliver improved training and productivity outcomes to our industry. It would also remove the moral hazard that inherently exists whereby competencies are awarded in circumstances where they have yet to be appropriately achieved.

9 Clause 33 – Hours of work

9.1 The CFMEU claim a variation to clause 33.1 with the effect that the ordinary hours of work for casuals would be determined with reference to those existing for daily and weekly hire employees.[29]

9.2 In seeking this variation, the CFMEU has argued that the existing provision is ambiguous and makes reference to correspondence from the Fair Work Ombudsman ('FWO').[30]

9.3 Master Builders rejects that clause 33.1 requires further clarification. Amongst industry participants, there is no confusion and the application of relevant provisions is well understood.

9.4 Clause 33.1 of the On-Site Award currently states:

[28] Construction Forestry, Mining and Energy Union submission, AM2016/17 at para 10
[29] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 191.
[30] Ibid at para 192

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'Except as provided in clause 34 – Shiftwork, the ordinary working hours will be 38 per week, worked between 7:00am and 6:00pm, Monday to Friday, in accordance with the following procedure.'

9.5 The above clause provides that where a full-time daily or weekly hire employee, apprentice or casual works more than 8 hours per day, 40 hours per week or outside the hours of 7:00am and 6:00pm Monday to Friday, they will be entitled to overtime loadings (under clauses 36 and 37) unless they are engaged as shiftworkers, to whom different loadings apply (under clause 34).

9.6 Clause 33, also includes provisions which prescribe RDO and early start arrangements, as well as those which provide for washing time when working in a compressed air environment. Of particular note is clause 33.1(b) which provides:

(b) 'Hours of work – part-time employees

Notwithstanding the provisions of this clause and clause 34 – Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off, and further provided that such employee will not work on the rostered day off'.

9.7 The inclusion of the provision above highlighting the distinct arrangements for part-time employees, within the On-Site Award, clearly demonstrates that part-time employees are the only exception to those covered by clause 33.1 (a position observed in the CFMEU's own submission).[31]

9.8 This proposition is also reinforced under the clause 14, Casual employment. Relevantly clauses 14.5, 14.6 and 14.7 state:

'14.5 *A casual employee must be paid a casual loading of 25% for ordinary hours as provided for under this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, community service leave, notice of termination and redundancy benefits and public holidays not worked.'*

14.6 *A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 36 – Overtime, and 37 Penalty rates, provided that:*

(a) *where the relevant penalty rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate prescribed for the employee's classification; and*

[31] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 191.

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(b) *where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary time hourly rate prescribed for the employee's classification.*

14.7 *A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary time hourly rate prescribed for the employee's classification.'*

9.9 The reference, within clause 14.5, to the ordinary hours for casual employees is clearly made with mention to clause 33.1 and the ordinary hours of work as prescribed therein.

9.10 Further, it is not appropriate to simply rely upon one item of correspondence from the FWO to the Commission in March 2015.[32] At best, that correspondence makes reference to provisions that *'may be a source of uncertainty for workplace participants*' (a position with which Master Builders does not agree) and this is not sufficient to justify such a significant alteration to the Award.

9.11 The CFMEU claim, if it is merely to address a '*source of uncertainty'* that *'may'* exist, would add provisions that are already set out at clauses 33.1 and 14.6. This is unnecessary and likely to cause even confusion to award users in circumstances where it does not currently exist.

10 Clause 24 – Living away from home – distant work

10.1 Master Builders oppose this substantive CFMEU claim and submit that it should not be granted by the Commission.

10.2 The claim is significant in terms of creating an array of additional obligations on employers who engage workers in circumstances involving distant work. It is claimed the proposed clause clarifies existing entitlements and better reflects current travel practices and costs of accommodation and meals.

10.3 Each individual aspect of the proposed clause and the reason why the relevant claims should be rejected is set out below.

Mental health and remote work

10.4 The CFMEU claim that the proposed changes are in response to "recent evidence" that working for long periods away from home has a detrimental health and safety impact on

[32] Correspondence from the Fair Work Ombudsman, Award Stage, Groups 3 and 4 Modern Awards, 2 March 2015 at page 2 - https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014217andors-corr-fwo-020315.pdf

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those employees. That proposed evidence included a House of Representatives Standing Committee report ('the Report') released in February 2013.

10.5 The Report largely focussed on the impacts of fly-in, fly-out ('FIFO') and drive-in, drive-out ('DIDO') mining workers engaged in remote areas and not workers covered, in the majority, by the On-Site Award. [33]

10.6 Clause 24.1(a) of the On-Site Award states that:

> *'the clause operates when an employee is employed on construction work at such a distance from the employee's usual place of residence or any separately maintained residence that the employee cannot reasonably return to that place each night..'*

10.7 The concept of distant work is not limited to work in remote areas; rather, it includes work undertaken at such a distance as to make it unreasonable to expect employees to return home to their normal place of residence each night. The findings within the Report are focussed on FIFO workers and centred on those sectors in which such practices are common, such as mining, oil and gas. They are largely irrelevant to the building and construction sector.

10.8 In 2015 the Government released its response to the Report, supporting some, but not all of its recommendations. Although noted, the Government did not agree with the recommendation that a comprehensive study into the health effects of FIFO and DIDO workers and lifestyle factors should be undertaken as a matter of priority.

10.9 The probative value placed by the CFMEU on the Report, quoted extensively throughout its submission, is questionable and in our submission does not necessitate the substantive and significant changes sought to the Living away from home allowance ('LAFHA') within the Construction Awards.

False address

10.10 The proposed clause includes a provision that expressly prohibits employers from applying undue influence upon employees to provide a false address, presumably to avoid paying the LAFHA.

10.11 The proposal is opposed on the basis that:

[33] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 126.

- The FW Act already contains a series of provisions that provide courses of action for employees to seek relief and prevent the application of undue influence where it so happens;
- There is no need to include an express provision in a Modern Award instrument requiring those it covers to not engage in a particular discrete form of illegal conduct. The provision of a false address is fraud and a criminal offence. Encouraging employees to engage in fraudulent behaviour by any party is also a criminal activity and should be condemned and referred to law enforcement authorities wherever it occurs;
- The granting of such a provision would necessarily require other provisions within Modern Awards involving any matter where employees and employers may agree on certain matters to also include such a provision where it involves the triggering of, or eligibility for, any monetary entitlement;
- The variation is not necessary to meet the Modern Awards Objective.

Allowances

10.12 The proposed clause also applies a significant increase in monetary allowances payable for distant work, to the extent that they almost double the existing amounts.

10.13 This aspect is opposed on the basis that:

- There is no substantiation for the increase proposed and no formula or rationale provided behind their calculation;
- There is no evidence that the current method to determine allowances within the Award is deficient or requires variation;
- It would represent an unreasonable and unjustified increase to the safety net.

10.14 At paragraph 15 of its submission the CFMEU argue that variations are necessary to reflect current work practices.[34] This view should be rejected as the nature of distant work is such that there can be no 'current work practices' that commonly exist – each project is inherently different.

[34] Construction Forestry, Mining and Energy Union submission, AM2016/23, 9 December 2016 at para 15

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Additional facilities

10.15 The CFMEU claim includes measures that would require employers to provide additional facilities to employees engaged in distant work. These include matters such as the requirement for single rooms, en-suites and communications facilities.

10.16 These measures should also be rejected for a number of reasons including that they would:

- mandate the provision of facilities that would impose significant increase to operational costs;
- require those facilities to be provided by all employers to all employees engaged in distant work regardless of the circumstances and whether or not they were necessary;
- mandate obligations on employers to provide for matters to employees that go above and beyond a fair and relevant minimum safety net and are, in particular, contradictory to section 134(1)(f) of the FW Act;
- seek to deal with matters that are already conventionally dealt via other methods, including enterprise agreements and other project specific arrangements.

10.17 The claim fails to comprehend that not all construction projects are operated by tier one contractors and of an infinite scale to justify such a significant cost and practical impost.

10.18 The proposed provisions would have the effect of forcing employers who may be undertaking construction work of a relatively minor nature, in an otherwise suitable location (such as a regional town) to provide a standard of amenity to employees that would be entirely impractical and impose such a significant cost that compliance with the Award would be nearly impossible to achieve.

10.19 For example, one measure claimed would require employers to provide communication facilities including email and internet access, and mobile phone coverage or other radio or telephone contact where mobile coverage is unavailable at a site where they reside when undertaking distant work. Such a measure is unreasonable as it would be read to require employers to have a purpose-built communications tower erected close to or on the site, irrespective of the size of the

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project or the location that could cost tens of thousands of dollars to construct. Further, there are mobile phone 'black spots' that exist throughout many parts of Australia (including in some metropolitan areas) or areas where coverage is intermittent. These are matters over which employers do not have control yet they would determine obligations that will apply to them that could cause a significant operational cost.

10.20 These claims and new obligations would create a burden on businesses and adversely affect productivity. The CFMEU also provide no cogent reasoning as to why the above variations to the Construction Awards are necessary and how they equate to a minimum safety net of award provisions.

Taxis as a travel expense

10.21 The CFMEU's proposed variations also require that taxis now be prescribed as an option for forward/return journeys in circumstances where an employee is required to travel from the employee's usual place of residence to a distant job.

10.22 The existing provision within this clause already provides for the option of bus, economy air, and rail travel. The CFMEU's variation is unnecessary given the suite of travel options currently available to employees and in most circumstances, where an employee is required to travel to a distant job, taxis are likely to be the least practical and cost-efficient form of transport.

Paid Rest and Recreation leave

10.23 New provisions have been proposed which require paid "rest and recreation" leave depending on the length of the employee's continuous service (this is instead of the existing clause which simply provides for an employee's travel costs to return home).

10.24 This is a substantive change and significant increase in existing entitlements under the award.

10.25 The new provisions provide for a period of 7 days unpaid rest and recreation leave at the employee's usual place of residence after each continuous 3 week period away from home. The proposed variations would also generate a new entitlement for all employees of an additional 2 days of paid rest and recreation leave after 12 weeks continuous service.

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10.26 These variations do not reflect what could be considered a fair and relevant minimum safety net and would impose an unreasonable financial burden on business if it were to be applied.

10.27 Not all construction projects are of such a scale to sustain such a significant entitlement. Many construction projects, attracting employees who reside considerable distances from the construction site, are of a small to medium scale.

11 Submissions in reply to other union parties

11.1 This section of deals with Master Builders' position in relation to the claims from other union parties.

AMWU – clause 43.2– Forepersons and Supervisors

11.2 The Australian Manufacturing Workers' Union ('AMWU') seek to amend clause 43.2 to correct a drafting error made during the award modernisation process. The AMWU's proposed variation would extend the entitlements and conditions, currently excluded under clause 43.2(b) to Forepersons and Supervisors, which it argues is in conflict with clause 43.5 of the On-Site Award.

11.3 In its submission, the AMWU annexed a draft determination, at Attachment A, which it claims remedies the issue described therein.

11.4 Master Builders does not oppose the AMWU's draft determination.

AWU – Schedule B.2.2(d) – Classification schedule

11.5 The Australian Workers Union (AWU) seek to vary Schedule B.2.2(d) to include a new classification of "Tester – soil, concrete or aggregate" under the CW2 classifications of the On-Site Award. The basis of the AWU's claim is that CW2, within the On-Site Award, is the most appropriate classification for those workers, as described within the proposed variation.

11.6 The AWU has also argued that the variation is made in response to a decision handed down by the Full Bench in *The Australian Workers' Union v Coffey* Information *Pty Limited*.[35] As already highlighted in paragraphs 4.7 and 4.8 of this submission, the Full Bench held in *Coffey* that the *Manufacturing and Associated Industries and*

[35] [2013] FWCFB 2894

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Occupations Award 2013 ('the Manufacturing Award') was the most appropriate award to cover workers engaged in geotechnical testing and analysis on site.

11.7 The finding of the Full Bench was summarised at paragraph [19] of the decision, where it held:

> *'In our view, the geotechnical analysis conducted by the technicians covered by the Agreement involving collecting samples and applying tests in the laboratory is properly described as scientific work and analytical work of a technical nature in connection with physical testing processes. We reject the AWU's contention that the work cannot be described as scientific work. In our view conducting tests in a laboratory is inherently work of a scientific nature and is within normal conceptions of that term. We also find that the work is analytical and involves physical testing processes. In our view, for these reasons, the work of the Coffey technicians falls within the description of technical workers in the Manufacturing Award'.*

11.8 And at paragraph [24]:

> *'We are unable to conclude that the classifications in the On-Site Award are more appropriate to the classifications in the Manufacturing Award. The Manufacturing Award contains classifications which specifically cover laboratory work and the work of technical workers. The Manufacturing Award covers such employees on a very wide occupational basis. Less qualified employees are nevertheless covered by general semi-skilled classifications.'*

11.9 And further at paragraph [25]:

> *'The On-Site Award applies very widely to employers in the construction industry. The classifications are of a very general nature. They contain no specific mention of laboratory or testing work although the definition of the civil construction industry does. The technicians work on such projects as the company may be contracted to provide its specialist services from time to time. Long term employees will usually perform their work in a base lab or at multiple locations. Most of the work is performed at base labs. In our view a classification structure designed for workers in the construction industry cannot be considered more appropriate than the technical stream in the Manufacturing Award'.*

11.10 The decision of the Full Bench in *Coffey* (dismissed on appeal from the AWU), clearly established that the Manufacturing Award was the most appropriate instrument to cover soil testing technicians working from time-to-time on a construction site.

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11.11 The AWU's proposal, if granted, would be in direct contrast to the decision of the Full Bench, create greater uncertainty for employers and employees, give rise to potential for conflict in award coverage and increased disputation.

11.12 Master Builders opposes any variation to existing Schedule B.2.2 of the On-Site Award.

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