

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/260 Building and Construction General On-site Award 2010

Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)



Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) about the Airconditioning and Refrigeration Allowances

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submission to the Fair Work Commission about the Air-Conditioning and Refrigeration Allowances (A&R Allowances) in response to directions given by Deputy President Gostencnik on transcript at the Conference he conducted on 25 January 2018.¹
2. This Submission is intended to consolidate and address in one document, the various issues raised by the parties, over the course of conferences conducted by the Commission, private conferences between the parties and in written submissions lodged by the parties since the end of 2017.
3. The AMWU's submissions from 20 December 2017 and 22 January 2018 have been consolidated into this submission.
4. The matters to be addressed include:
 - a. A proposed draft determination;
 - b. The relevant history of the A&R Allowances;
 - c. The relevant history of the daily hire rate calculation clause;
 - d. The relevant history of the A&R Allowances for casuals; and
 - e. Response to the MBA's submissions.

The proposed draft determination

5. The AMWU proposes a draft determination, which is attached to this submission at Attachment A.
6. The AMWU proposed that the following words be added to clause 21.11 to clarify that the A&R Allowances are paid for all purposes.

“This amount will be will be regarded as part of the ordinary time hourly rate for all purposes of the award.”
7. It is intended that the use of ordinary time hourly rate, which have a relationship to overtime, which is currently referenced in the overtime clauses. If there are subsequent changes made to the Exposure Draft which change this relationship, the AMWU would propose that this clause should also change in accordance with the changes made to the overtime clauses.
8. The AMWU is not aware of any air-conditioning trades or refrigeration mechanics being daily hire workers. However, out of abundance of caution, the AMWU also proposes that “clause 21.11—Air-conditioning industry and refrigeration industry allowances;” be added to the relevant list in clause 19.3(a)(ii). Clause 19.3(a)(ii) is

¹ https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/20180125_am201623.htm

the clause which gives an indication of how to calculate the hourly rate for daily hire workers.

Relevant Air-conditioning and Refrigeration allowances history

9. Prior to the Modern Building and Construction General On-site Award 2010 (Modern Building Award), the A&R Allowances were present within the National Metal and Engineering On-site Construction Industry Award 2002 AP816828CRV² (MECA) at clause 18.6. Relevantly, clause 18 contained a heading and an introductory clause at 18.1 as follows:

“18. ALLOWANCES - ALL STATES AND ACT

All purpose payments

18.1 The amounts prescribed in this clause, with the exception of clause 18.11 and 18.12, shall be paid for all purposes of this award.”

10. The heading “All purpose payments” gives a clear indication that the clause contains all purpose payments. The specific words of the clause 18.1 also give a clear indication that only 18.11 and 18.12 would not be paid for all purposes of the award.

11. The A&R Allowances then arise within clause 18 at clause 18.6 as follows:

“18.6 Air conditioning industry and refrigeration industry allowances

18.6.1 In addition to the award wage prescribed in 16.1, an air-conditioning tradesman (as defined) and a refrigeration mechanic (as defined) shall be paid an allowance at the rate of \$50.18 per week as compensation for the various disabilities and peculiarities associated with on-site air-conditioning work (as defined) or on-site refrigeration work (as defined).

18.6.2 An employee in receipt of this allowance shall not be entitled to the provisions of 22.1, 22.3, 22.4, 22.5, 22.6, 22.7, 22.8, 22.9 and 22.13.”

12. This clause 18.6 has effectively been imported in the Modern Building Award at clause 21.11 as follows:

“21.11 Air-conditioning industry and refrigeration industry allowances

(a) In addition to the appropriate minimum wage prescribed in clause 19.1, an air-conditioning tradesperson and a refrigeration mechanic must be paid a weekly allowance of 7.9% of the weekly standard rate as compensation for the various disabilities and peculiarities associated with on-site air-conditioning work or on-site refrigeration work.

² [AP816828CRV - National Metal and Engineering On-site Construction Industry Award 2002](#)

(b) An employee in receipt of this allowance will not be entitled to special rates in:

clause 22.2(a)—Insulation;

clause 22.2(b)—Hot work;

clause 22.2(c)—Cold work;

clause 22.2(d)—Confined space;

clause 22.2(g)—Wet work;

clause 22.2(h)—Dirty work;

clause 22.2(l)—Asbestos eradication; and

clause 22.2(q)—Height work.”

13. These imported words achieve substantially the same effect – except the impact of clause 18.1 providing that the allowance was paid for all purposes was not imported.
14. The history clearly indicates that the A&R Allowances should be paid for all purposes.
15. In addition to this history, the hourly rate calculation for weekly hire employees in the Modern Award at clause 19.3(b) clearly contemplates that the allowance is paid for all purposes. This is further evidence that the intention in making the modern award was for the A&R allowances to be all purpose.

The relevant history of the daily hire hourly rate calculation clause

16. The current daily hire hourly rate calculation clause is as follows:

“19.3 Hourly rate calculation

(a) Daily hire employees—follow the job loading

(i) The calculation of the hourly rate will take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.

[19.3(a)(ii) substituted by PR998600, PR516726 ppc 10Nov11]

(ii) For this purpose the hourly rate, calculated to the nearest cent (less than half a cent to be disregarded), will be calculated by multiplying the sum of the appropriate amounts prescribed in:

- clause 19.1—Minimum wages;
- clause 21.2—Industry allowance;

and where applicable,

- clause 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance,

by 52 over 50.4 (52/50.4) rounded to the nearest cent, adding to that subtotal the amount prescribed in clause 21.1—Special allowance, and dividing the total by 38.

Provided that in the case of a carpenter-diver, the divisor will be 31, and for refractory bricklayers and their assistants the allowance contained in clause 21.8—Refractory bricklaying allowance, will be added to the hourly rate.”

17. There is no mention of the A&R Allowances in this clause which applies to *daily hire*. Although, as mentioned earlier, the A&R allowances is included in the calculation for hourly rates for *weekly hire employees*.
18. If we trace back to the pre-Modern Award applying to Airconditioning and refrigeration mechanics, which was the MECA, there was no clause providing for daily hire, and so there was no equivalent clause for calculating the hourly rate for daily hire.
19. The genesis of the daily hire mode of employment came from the National Building and Construction Industry Award 2000 (AP790741CRV),³ (Building Award 2000) which contained a clause 13.2 Daily hire – tradesperson and labourers and a clause 18.3 hourly rate calculation for follow the job loading.
20. When the two awards came together, the daily hire clause drafted for the Modern Award didn't take into account the A&R allowances in the hourly rate calculation for daily hire because it is taken from the Building Award 2000 which doesn't contain classifications covering Airconditioning and refrigeration mechanics.
21. This appears to be an oversight, which the AMWU has addressed in its draft determination, allowing for a consistent application of the A&R Allowances as all purpose.

The relevant history of the A&R Allowances for casuals

22. There is no evidence from the history which indicates that casuals did not receive the A&R allowances. There was casual employment under both the Building Award 2000 and the MECA. The A&R Allowances came from the MECA and there was nothing in that clause which excluded casuals from receiving the A&R allowances.
23. In the MECA clause 12.2.1 expressly provided that all conditions except a few express ones are applicable to casuals. The clause read as follows:

³ [AP790741CRV – National Building and Construction Industry Award 2000](#)

“12.2.1 A casual employee is one engaged and paid in accordance with the provisions of this clause. A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Award except annual leave, personal leave, parental leave, jury service, public holidays and redundancy.”⁴ (emphasis added)

24. The Building Award 2000, although not directly relevant, since it did not apply to airconditioning and refrigeration mechanics also contained a similar clause 13.4.1:

“13.4.1 A casual employee is one engaged and paid in accordance with the provisions of this clause. A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Award except annual leave, personal leave, parental leave, jury service, public holidays and redundancy.”⁵

25. It is unclear what the basis is for the MBA’s assertion which they made on transcript as follows:

“PN122

MS SOSTARKO: Yes, and we raise a concern around casuals as well, your Honour, in terms of the fact that because it's a weekly rate, and how you calculate that rate, and whether or not MECA actually intended it to be covered by casuals is another issue in itself. Hence, our position is that the parties - and there is nothing in any of the decisions of the Full Bench in relation to this.”

26. It is apparent that the MECA only included a clause at clause 16 for weekly wages. That was because Awards were and now continue to be based around the weekly wage worker as the standard and the norm. The fact there was only a weekly wage clause in the MECA didn’t mean that casuals did not get paid.

Responses to MBA raised matters

Disability allowances can be all purpose allowances

27. The MBA’s primary assertion is that a disability allowance which is paid in lieu of other disability allowances that are not all purposes, cannot be paid for all purposes.
28. This is not a principle that is supported by the facts. Currently, there exists in the Building and Construction General On-site Award 2010 a number of disability allowances that are paid for all purposes, such as:
- a. Clause 21.2 Industry allowance;
 - b. Clause 21.3 Underground allowance;

⁴ [AP816828CRV - National Metal and Engineering On-site Construction Industry Award 2002](#) at clause 12.2.1

⁵ [AP790741CRV - National Building and Construction Industry Award 2000](#) at clause 13.4.1

- c. Clause 21.8 Refractory bricklaying allowance
 - d. Clause 42 Lift industry allowance
29. Looking closely at the Refractory bricklaying allowance and the Lift industry allowance, they contain a very similar structure to the A&R allowances. Both of them contain a subclause which indicates that they are paid in lieu of some or all of the special rates at clause 22. The special rates are the disability allowances, which also goes against the MBA's proposed general principle.
 30. Another factor to take into account, is that there is nothing to suggest that the A&R allowances is only paid in lieu of disability allowances. While someone who received payment of the A&R allowance is rendered not eligible certain special rates, this doesn't mean that the A&R allowances are only the zero sum of those special rates.
 31. The clause stipulates that a worker entitled to the A&R allowances is not entitled to a series of allowances, but there is nothing to suggest that those allowances which the worker is not entitled to are the only matters which are compensated for by the A&R allowances.
 32. The A&R allowances clause specifically states that:

“...an air-conditioning tradesperson and a refrigeration mechanic must be paid a weekly allowance of 7.9% of the weekly standard rate as compensation for the various disabilities and peculiarities associated with on-site air-conditioning work or on-site refrigeration work.” (emphasis added)
 33. There are other peculiarities associated with the work which are compensated in addition to disabilities.

MBA's source of authority doesn't support their position

34. The MBA's correspondence cited a Full Bench decision from the 2012 Review, which the MBA says supports their view that the air-conditioning and refrigeration allowance is a disability allowance and should not be paid for all purposes of the Award. The full context of the paragraph from the 2012 Review decision [2012] FWAFB 10080⁶ referenced by the MBA is as follows:

“Clauses 21.2: Industry allowance; 21.3(a): Underground allowance; 21.4: Multistorey allowance; 21.7: Carpenter-diver allowance; 21.8: Refractory bricklaying allowance; 21.9: Cofferdam worker; 21.11: Air-conditioning industry and refrigeration industry allowance; 22.2(a): Insulation; 22.2(b): Hot work; 22.2(c): Cold work; 22.2(d): Confined space; 22.2(e): Swing scaffold; 22.2(f): Explosive powered tools; 22.2(g): Wet work; 22.2(h): Dirty work; 22.2(i): Toxic substances; 22.2(j): Fumes; 22.2(k) and (l): Asbestos and Asbestos eradication; 22.2(m): Furnace work; 22.2(n): Acid work; 22.2(o): Heavy blocks; 22.2(p): Bitumen work; 22.2(q): Height work;

⁶ <https://www.fwc.gov.au/documents/decisionsigned/html/2012fwafb10080.htm>

22.2(r): Suspended perimeter work platform; 22.2(s): Employee carrying fuels, oils and greases; 22.3(a): Towers allowance; 22.3(b): Cleaning down brickwork; 22.3(c): Bagging; 22.3(d): Plaster or composition spray; 22.3(e): Slushing; 22.3(f): Dry polishing of tiles; 22.3(g): Cutting tiles; 22.3(i): Roof repairs; 22.3(l): Brewery cylinders—painters; 22.3(n): Spray application—painters; 22.3(o): Pneumatic tool operation; 22.3(p): Bricklayer operating cutting machine; 22.3(q): Hydraulic hammer; 22.3(r): Waste disposal; 22.4(a): Pipe enamelling; 22.4(b): Powdered lime dust; 22.4(c): Sand blasting; 22.4(d): Live sewer work; 22.4(e): Timbering; 22.4(f): Special work; 22.4(g): Compressed air work; 22.4(h): Cutting stone

[72] We are satisfied that each clause is about allowances, including disabilities associated with the performance of particular tasks or work in particular conditions or locations (s.139(1)(g)(iii)). The proposition alluded to by the MBA that such allowances sanction work in unsafe conditions, is inconsistent with employer obligations under OHS legislation and is untenable. The allowances are paid to compensate for the disability associated with the work in particular conditions, which work is presumed safe but subject to disabilities nonetheless, in circumstances where the disabilities/conditions are not otherwise taken into account through the rates of pay provided in the modern award.”⁷

35. The full context of the decision was about an MBA claim that the relevant clauses could not be included in Modern Awards because they were inconsistent with employer obligations under OHS legislation. The Full Bench was simply stating that they were “satisfied” that there was a relevant section of the legislation which allowed for the inclusion of the particular term in the Modern Award. The relevant section being s.139(1)(g)(iii), which allows for allowances, including for disabilities associated with the performance of particular tasks or work in particular conditions or locations.”
36. There is nothing to suggest that the Full Bench considered whether or not all three parts of s.139(1)(g)(i), (ii) and (iii) could have empowered the Commission to include the A&R allowances. It wasn’t argued in those proceedings whether or not that could have been the case as it wasn’t relevant to the issue at hand.

There shouldn’t be arbitrary deadlines for uncovering ambiguities or issues in the Award

37. The MBA say that there has been ample opportunity for this issue to be raised, and no one has done so. The MBA’s suggested principle would cast aside any issues which are uncovered during the review. The MBA also say that its been 8 years since the Award was made with ample opportunity for anyone to raise the issue. The MBA’s argument is a gross mischaracterisation of history. Particularly, where this review commenced 4 years after the Award was made and the Building Award commenced in Stage 4.

⁷ <https://www.fwc.gov.au/documents/decisionssigned/html/2012fwafb10080.htm>

38. This particular ambiguity with the A&R allowance was identified as a result of a conference, conducted by the Commission as part of this 4 yearly review, with the intention of clarifying which allowances were all purpose and which were not. It was only through this discussion that it became clear that the parties had a different understanding or expectation of the clause.
39. Upon reviewing the clause and its history in the present 4 yearly review the AMWU became aware that the Employer Association's held a view that the plain reading of the clause was that it was not paid for all purposes of the Award.
40. The AMWU is not aware of this specific issue being agitated or uncovered before the present review.
41. In any event, this is the first full scale review since the Award was made.
42. It is relevant to note, that at the conference where the ambiguity was discussed the AiGroup indicated at the conference that they did not oppose the clause being paid for all purposes given the history identified, but supported the award being clarified to make it clearer. The AMWU understands from a private conference between the parties in late December, that the AiGroup may not agree with the form of the AMWU's proposed variation to address the ambiguity.

Conclusion

43. The history of the entitlement going back to MECA indicates that it was clearly intended to be paid for all purposes.
44. As the entitlement was put in an award which included other categories of employment such as daily hire the additional amendments were not taken into account.
45. It was always intended that the A&R allowances applied to casuals when it existed in the MECA. There's nothing to suggest that it doesn't presently.
46. There's nothing which would indicate disability allowances cannot be paid for all purposes. In fact, there are examples of other all purposes allowances which appear to be in some part paid for disabilities and which are also paid as an alternative to other disabilities allowances.
47. This being the first proper full scale review of the Modern Award since its making, it is appropriate to address issues which have arisen or which are drawn to the attention of the parties and the Commission in the course of the review and which have not as yet been ventilated in the 2012 review.

End

7 February 2018

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3 Division 4 – 4 Yearly Review of Modern Awards

s.156(2)(b)(i)

Building and Construction General On-site Award 2010 (MA000020)

Building, metal and civil construction industries

AM2014/260 Building and Construction General On-site Award

VICE PRESIDENT

SYDNEY, X XXX 2018

Review of modern awards to be conducted.

- [1] Further to the decision and reasons for decision <<decision reference>> in AM2014/260, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Building and Construction General On-site Award 2010 be varied as follows.

Clause 21.11

- [2] Delete current clause 21.11 and replace with the following clause at 21.11:

“21.11 Air-conditioning industry and refrigeration industry allowances

(a) In addition to the appropriate minimum wage prescribed in clause 19.1, an air-conditioning tradesperson and a refrigeration mechanic must be paid a weekly allowance of 7.9% of the weekly standard rate as compensation for the various disabilities and peculiarities associated with on-site air-conditioning work or on-site refrigeration work. This amount will be regarded as part of the ordinary time hourly rate for all purposes of the award.

(b) An employee in receipt of this allowance will not be entitled to special rates in:

clause 22.2(a)—Insulation;

clause 22.2(b)—Hot work;

clause 22.2(c)—Cold work;

clause 22.2(d)—Confined space;

clause 22.2(g)—Wet work;

clause 22.2(h)—Dirty work;

clause 22.2(l)—Asbestos eradication; and

clause 22.2(q)—Height work.”

- [3] In clause 19.3(a)(ii), add the following words to the list of clauses referred to after the words “where applicable”:

“clause 21.11—Air-conditioning industry and refrigeration industry allowances;”

- [4] This determination will operate on and from 1 XXX 2018.

VICE PRESIDENT