

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)



"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) Submission in reply to MBA

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 brief Submission in response to the Master Builders' Association (MBA) Correspondence 16 January 2018.
2. The submission addresses the MBA correspondence arguments about the air-conditioning and refrigeration industry allowances (A&R allowances).
3. The AMWU continues to rely upon its submissions lodged 21 December 2017 about the A&R allowances.¹

Disability allowances can be all purpose allowances

4. The MBA's primary assertion is that an allowance which is paid in lieu of disability allowances that are not all purpose, cannot be paid for all purposes.
5. There is nothing to suggest that the A&R allowances is only paid in lieu of disability allowances. 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.
6. 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 associate with on-site air-conditioning work or on-site refrigeration work.” (emphasis added)
7. 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

8. 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 10080² 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

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623--sub-amwu-211217.pdf>

² <https://www.fwc.gov.au/documents/decisionssigned/html/2012fwafb10080.htm>

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; 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.”³

9. 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.”
10. 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.

The historical genesis of the Award points to the A&R allowance being all purpose

11. As identified in the AMWU’s submission 21 December 2017, the National Metal and Engineering On-site Construction Award 2002 (MECA 2002), clearly stipulated that the A&R allowances would be paid for all purposes of the Award.

³ <https://www.fwc.gov.au/documents/decisionssigned/html/2012fwafb10080.htm>

12. In translating the clause across from the MECA 2002, the Australian Industrial Relations Commission did not also translate the introductory clauses which identified which clauses would be all purpose and which would not.

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

13. 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.
14. 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.
15. 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.
16. The AMWU is not aware of this specific issue being agitated or uncovered before the present review.
17. In any event, this is the first full scale review since the Award was made.
18. 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.

End

22 January 2017