

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Numbers: AM2016/23, AM2014/260, 274 and 278

Fair Work Act 2009

Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

Construction Awards

Building and Construction General On-Site Award 2010

[MA000020]

Joinery and Building Trades Award 2010

[MA000029]

Mobile Crane Hiring Award 2010

[MA000032]

4 yearly review of modern awards – award stage –Group 4C awards

**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION &
GENERAL DIVISION) RESPONSE TO MBA CORRESPONDENCE DATED 16TH
JANUARY 2018**

22nd January, 2018

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the Fair Work Act 2009 (the FW Act). In AM2016/23 a Full Bench is considering the Construction Awards as part of the Review, and on 19th December 2017 a conference was held before Deputy President Gostencnik to discuss allowances contained within the *Building and Construction General On-site Award 2010* (the Award).
2. During that conference there was a discussion as to whether or not the mobile cranes capacity adjustment formula (see clause 19.5 of the Award) was to be paid as an all purpose allowance.¹ There was also discussion as to the CFMEU's proposal to alter clause 19.5 so that the lift capacity reference to 100 tonnes would be increased to above 220 tonnes.²
3. The MBA sought an opportunity to put an alternate view to the CFMEU's proposal and were given until 15th January 2018 to put that view to the Commission. Any opposing parties to the MBA's view were given a further 7 days to respond.³ On 16th January 2018 the MBA sent correspondence to the Commission outlining the MBA's position on the mobile cranes capacity adjustment formula and from which it seems that the MBA is advocating an alternative view, i.e. the retention of the existing clause 19.5. This submission is made in response to that correspondence.

Response to MBA Position

4. The MBA have wrongly characterised the mobile cranes capacity adjustment formula as a disability allowance, whereas in fact the allowance contained within clause 19.5 is a skill related allowance paid for operating mobile cranes of increased size and complexity (e.g. larger mobile cranes are usually used to lift heavier loads to higher locations where the influence of wind is greater and lifts become more complex, see <https://www.liebherr.com/shared/media/mobile-and-crawler-cranes/brochures/wind-influences/liebherr-influence-of-wind-p403-e04-2017.pdf> for a more detailed explanation of wind calculations).
5. The mobile cranes capacity adjustment formula is used to calculate the minimum rate of pay to be paid to mobile crane operators. That is why the allowance is contained in clause 19 – Minimum wages and not in the clauses dealing with allowances.
6. The use of the mobile cranes capacity adjustment formula reflects the traditional way in which the minimum rates for mobile crane operators were set in a number of awards prior to the introduction of the modern award. The payment of an additional amount for operators of cranes above 100 tonnes method was used not only in the *National Building and Construction Industry Award 2000*⁴, but also in the *Mobile Crane Hiring Award 2002*⁵.

1 See PN118 to 139 of transcript

2 See PN120 to 140 and PN227 to 235 of transcript

3 See PN235 of transcript

⁴ See clause 18.1.3(a) of the *National Building and Construction Industry Award 2000*

https://www.fwc.gov.au/documents/consolidated_awards/ap/ap790741/asframe.html

⁵ See clauses 13.1.1(b) and 13.1.2(a)(iv) of the *Mobile Crane Hiring Award 2002*

https://www.fwc.gov.au/documents/consolidated_awards/ap/ap816842/asframe.html

7. With the introduction of modern awards the classification structures that now apply under the *Building and Construction General On-site Award 2010* and the *Mobile Crane Hiring Award 2010* (i.e. the modern awards that replaced the *National Building and Construction Industry Award 2000* and the *Mobile Crane Hiring Award 2002*) both recognise the higher skill levels required when operating mobile cranes of higher tonnages, as shown by the following table:

Mobile Crane Tonnage (T)	Classification Level - Building and Construction General On-site Award 2010	Minimum weekly Rate (not including industry allowance)	Mobile Crane Tonnage (T)	Classification Level – Mobile Crane Hiring Award 2010	Minimum weekly Rate (not including industry allowance)
Up to and not exceeding 15T	CW4	\$834.50	Up to 20T slew crane	MCE1	\$809.10
Over 10T but not exceeding 100 T	CW5	\$860.00	21T-60T slew crane	MCE2	\$834.40
In excess of 100T and not exceeding 180T	CW6	\$882.90	61T – 100T slew crane	MCE3	\$859.80
In excess of 180T	CW7	\$908.20	100T – 200T slew crane	MCE4	\$882.80
			201T- 300T slew crane	MCE5	\$927.50
			201T - 400T slew crane	MCE6	\$946.50
			401T or greater slew crane	MCE7	\$971.90

8. The above table demonstrates that it was always the intention of the AIRC Full Bench to include classification structures based on the tonnage of the mobile cranes being operated by an employee, and implicit in that is the recognition that the mobile cranes capacity adjustment formula was paid as an all purpose allowance. This intention is further recognised in the following paragraphs of the April 2009 AIRC Full Bench decision (2009AIRCFCB345) made in regard to the new classification structure for the *Mobile Crane Hiring Award 2010*:

“[117] Both the CFMEU and AiGroup/CICA have proposed a new qualification based classification structure in place of the 22 different classifications, encompassing mobile cranes (with differential rates in New South Wales), operators and mobile elevated work

platforms within the current structure. The new structures proposed seek to align the classification structure with current licensing requirements and incorporate equipment changes. We have decided to incorporate a new structure, directed to these ends, in the modern award.

[118] The CFMEU and AiGroup/CICA propose slightly different structures in relation to the groupings of employee functions and minimum rates. In relation to the groupings the major differences arise in respect of the level at which slew crane operators are placed and the splitting by the AiGroup/CICA of the rigger function into three levels based on the licenses required. We have adopted the position of the AiGroup/CICA in both respects. Their proposal in relation to slew crane operators better reflects the current award groupings and minimum wage levels. The recognition of licence requirements for riggers results in a more rational structure.”⁶

9. The CFMEU submits that on a proper consideration of previous awards and the decision of the AIRC Full Bench the only conclusion that can be reached is that the mobile cranes capacity adjustment formula is an all purpose allowance.
10. At the conference held on 19th December 2017, the CFMEU raised whether or not the current wording in the mobile cranes capacity adjustment formula clause was still appropriate. Following the conference the CFMEU filed a document on allowances⁷ in which the CFMEU proposed that the wording be changed so that it reads as follows:

Mobile cranes capacity adjustment formula

For each additional 40 tonnes over a maximum lifting capacity of 220 tonnes, an amount of 2.4% of the weekly standard rate must be added to the base rate for Level 7 (CW/EW7) and paid for all purposes of the award.

11. The effect of the proposed clause on the minimum classification wage rates applicable under the Award would be minimal, as the following table shows:

Mobile Crane Tonnage (T)	Classification Level - Building and Construction General On-site Award 2010	CFMEU Proposal - Minimum weekly Rate + Mobile Cranes Capacity Adjustment Formula (i.e. \$19.42 per each additional 40T) above CW7	Existing Award - Minimum Weekly rate based on CW5 rate + Mobile Cranes Capacity Adjustment Formula (i.e. \$19.42 per each additional 40T)
not exceeding 100 T	CW5	\$860.00	\$860.00
140T	CW6	\$882.90	\$879.42
200T	CW7	\$908.20	\$898.84
260T	CW7	\$927.62	\$937.68

⁶ <http://www.airc.gov.au/awardmod/databases/building/Decisions/2009aircfb345.htm>

⁷ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-draftaward-cfmeu-221217.pdf>

300T	CW7	947.04	\$957.10
400T	CW7	\$985.88	\$995.94

12. Adopting the CFMEU’s proposal would remove any ambiguity as to the correct minimum classification rate for operators of cranes below 220T. If the new provision came into effect from the first pay period commencing on or after 1st July 2018 (i.e. after the next Annual Wage Review), subject to the wage increase determined, it is highly likely that no employee would suffer a reduction in the applicable minimum wage rate.
13. There are two additional points in response to the MBA correspondence. Firstly the MBA refers to its application to vary clause 19.5. The MBA application at paragraph 8 of its 2nd December 2016 submission refers to its variation at item 30 of Attachment A which is to add the following:

“19.5.2 The weekly rate, inclusive of the mobile crane capacity adjustment formula, is calculated as an hourly rate in accordance with clause 13.2”
14. As clause 13.2 refers to the ordinary hourly rate for part-time employees it would appear that the MBA had previously accepted that the mobile cranes capacity adjustment formula was paid on an all purpose basis.
15. The second point is that the MBA is incorrect in its assertion that mobile crane operators can be engaged on a daily hire basis. Clause 11 of the Award clearly limits daily hire to tradespersons and labourers.
