

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submissions
Construction Awards
(AM2016/23)

28 November 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

CONSTRUCTION AWARDS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission in reply to the submissions filed in relation to the Full Bench Decision of 26 September 2018¹ (**Decision**) by the:
 - a) Australian Workers Union (**AWU**);
 - b) Australian Manufacturing Workers Union (**AMWU**);
 - c) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**); and
 - d) Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (**CFMMEU**).

2. ALLOWANCES

AWU

2. The AWU submits that the proposal in the civil construction industry for deleting all the disability allowances and replacing them with an enhanced allowance of 5% is unfair. It relies on the evidence of 6 officials from NSW, Victoria, Tasmania and Queensland.
3. The evidence at best can be described as anecdotal, general and with little detail to displace the Commissions determination of 5%.
4. The decision identifies:

It is obviously not possible in undertaking the exercise we propose to ensure that no employee will be worse off in any circumstance. Nor is it possible to ensure that some employees will not be better off than under the current system.

¹ [2018] FWCFB 6019.

Our general objective is to simplify the current system on the basis that it will generally be cost neutral for workforces over the longer term.²

5. Within this context, the evidence provides no further support than that some employees will be worse off. This is a difficulty already contemplated by the Full Bench when making its finding of 5%. Similarly, undoubtedly some employers will be worse off.
6. The AWU has provided no cogent or empirical evidence as to the extent of the alleged loss. The evidence supplied lacks any particularity of such matters.
7. In relation to the evidence provided by the AWU, we draw the Commission's attention to following:

Nicolas Blackford

- a) Mr Blackford's evidence is derived from his duties representing members in the civil construction industry working for employers who are covered by enterprise agreements.³
- b) His view of the "0.4% increase" being "severely inadequate" carries little weight within the context of his evidence.⁴
- c) At Paragraph 8 of his statement, he fails to identify any detail as to the type of employee or class of employee and which allowances may apply. Clearly, all the allowances listed in paragraph 8 would not apply to one employee for every hour they work.

Sean Burke

- a) Mr Burke's evidence suffers from same flaws as Mr Blackford. His evidence is derived from his duties representing members in the civil construction industry working for employers who are covered by

² Paragraph 369 of the Decision

³ Paragraph 2 Witness Statement of Nicolas Blackford dated 14 November 2018

⁴ Paragraph 7 Witness Statement of Nicolas Blackford dated 14 November 2018

enterprise agreements.⁵

- b) At paragraph 9, whilst he identifies work that he states AWU members “regularly perform”, he also adds in paragraph 10 that “several of these allowances can be applicable for an employee during a single pay period”. The general and generic nature of the evidence takes the matter nowhere.
- c) This statement does not provide any cogent evidence to support the AWU’s submission.

Anthony Callinan

- a) Mr Callinan’s evidence is derived from his duties representing members working for employers who are covered by enterprise agreements.⁶
- b) At paragraph 9, he states that he believes that the amount proposed by the Commission is “insufficient compensation” and will result in workers being substantially financially disadvantaged”. This assertion is unsupported by any supporting evidence or detailed facts.
- c) For example, at paragraph 11, he does accept that some “allowances may only be applicable for a small proportion of the working hours” for some employees, and others may receive these allowances for the majority of the time. There are no specific details to support his statement that the decision will result in “workers in the industry being substantially financially disadvantaged”.

Paul Cradden

- a) Mr Cradden’s statement is similar to those mentioned above, in that it lacks sufficient detail and is mainly derived from his duties relating to members covered by enterprise agreements.

⁵ Paragraph 3 Witness Statement of Sean Burke dated 12 November 2018

⁶ Paragraph 3-4 of Anthony Callinan’s statement dated 14 November 2018

- b) He merely states that his view is that the increase in the industry allowance by 0.4% is deficient but he does not provide any further information to support that assertion.
- c) He otherwise states that AWU members regularly perform work covered by the allowances set out in paragraph 8. Like the others as set out above, he does not provide any details to be able to meaningfully ascertain how many of those allowances apply to a particular class of employees, and in what manner and proportion they are applied.

Ronnie Hayden

- a) Mr Hayden's evidence similarly lacks sufficient detail and is mainly derived from his duties relating to members covered by enterprise agreements.
- b) At Paragraph 8, his assertions regarding the "significant negative effect" of the proposed 5% enhanced allowance is unsupported.
- c) As his evidence is derived from agreement-covered employees, his assertions of loss suffered by employees may not eventuate as those employee's terms may not be impacted. If his real concern is the impact on benchmarking for agreement negotiation, such a reason is insufficient to support his statement that the "proposal would have a significant negative effect"⁷.

Kade Wakefield

- a) Mr Wakefield evidence similarly lacks sufficient detail and is mainly derived from his duties relating to members covered by enterprise agreements.
- b) His evidence about significant loss is particularly focused on a "more than likely" ..." negative flow on effect to enterprise agreements. There is no supporting information to evidence the assertion. Therefore, the

⁷ Paragraph 8, witness statement of Ronnie Hayden

evidence is no more than – whilst there may be agreements, that incorporate the Award terms, there are also agreements that do not. For example, the Ventia Pty Ltd Ichthys Onshore Construction Enterprise Agreement [2018] FWCA 6748, indicates that such an agreement is a standalone one and the only allowances to be paid to the employees are as stated in the agreement.⁸

- c) It is also noted that the allowances that are included in the agreement do not include the allowances stated in paragraph 9. We note that this is one example and there may be some agreements that incorporate the award allowance terms.
8. The AWU has failed to provide any relevant evidence to support its submission that the Full Bench proposal is “manifestly unfair and would result in a significant reduction to the current safety net of terms and conditions for the overwhelming majority of AWU members working in the civil construction industry”.

CFMMEU & (AMWU and CEPU) Submissions

9. The AMWU and CEPU have supported and/or relied on the CFMMEU submissions. Ai Group’s reply to the CFMMEU position should be taken as our reply to the AMWU and CEPU submissions in this regard.
10. The CFMMEU’s proposal is for:
- a) an industry rate 6.6% of the standard rate to apply to all building and construction work (except special building and construction work);
 - b) an industry rate of 14.2% of the standard rate to apply to special building and construction work; and
 - c) the enhancement of the multistorey allowance to include the height work and towers work and plant room.

⁸ Clause 3(e) and Clause 19

11. The CFMMEU assertions as to the impact of the enhanced industry allowances of 4% for the Residential Building and Construction Sector and 5 % for all other Building Work is not based on any evidence as to the work patterns or the allowances that are paid to employees.
12. The exercise to identify the loss, is based on assumptions taken at their highest as to the allowances which would apply to certain limited work types and extrapolating the outcomes for other work types.
13. The calculations do not identify how they have factored in what allowances actually apply to the work undertaken by the various groups of employees. As these allowances are paid for all hours worked whilst others are for the hours where the employee is undertaking the work related to the disability, such analysis needs to be undertaken with a level of particularity across the industry. There is no evidence that the CFMMEU has undertaken this exercise, nor have any of the other supporting union parties.
14. The CFMMEU position is not based on any credible analysis as to the impact of the Full Bench Decision. It has made assumptions unsupported by fact. It has also ignored the rationale applied by the Full Bench, namely that this a process where “no employee will be worse off in any circumstance”.
15. The CFMMEU proposals are the opposite. Notwithstanding the Full Bench decision regarding fares and allowances, the CFMMEU seeks to ensure that the relevant amount is compensated through their proposed enhanced industry allowances. Their proposals are excessive and will have the effect of increasing costs for employers.
16. The CFMEU had raised a concern about the multistorey allowance and have proposed an alternative to include the towers and heights allowance into the multi storey allowance. It appears that the issue the CFMMEU seeks to rectify is the fact that not all buildings will consist of storeys. Their solution seems to be to simply preserve the existing disability allowances by incorporating them

into the multistorey allowance.

17. Ai Group's primary position regarding the multistorey allowance is for it to remain as intended. As an alternative If the Commission decides that there is a need for the inclusion of considerations such as structures that do not contain a storey, then we would have no objection to the HIA's proposal filed on the 9th November 2018.
18. To accept the CFMMEU's proposals, would result in no employee being worse off and many being much better off. This naturally means that many employers in this sector will be worse off. As an example, traffic controllers may receive the industry and special allowance but are unlikely to receive most of the other disability allowances, if at all. The CFMMEU's proposal would see an employer in the sector paying an extra 2 % of the standard weekly rate per employee.
19. Ai Group relies on its submissions filed in this matter and seeks that the CFMMEU and Joint Union proposal be rejected.

3. COVERAGE AND CLASSIFICATION: TESTING WORK⁹

AWU Submission

20. The AWU is seeking to reagitate its claim which the Full bench has already determined:

"Whilst it is open for the AWU or any party to make an application varying current modern award coverage of a particular area of employment, any such application must demonstrate that the existing award coverage of that employment does not meet the modern awards objective so that it is necessary to alter the coverage in order for the modern awards objective to be achieved. The AWU's case before us did not attempt to demonstrate this in respect of Coffey's materials testing employees, and cannot be granted on that basis"¹⁰

21. There is no case advanced by the AWU or any other union to demonstrate that the amendment proposed is necessary "*in order for the modern awards objective to be achieved.*" No further explanation has been provided to support

⁹ Paragraph 239-244 of the Decision

¹⁰ Paragraph 242 of the Decision

the insertion of testing work into the Construction Level 2 Classification of the Award.

AMWU Submission

22. The AMWU's proposition should be rejected. Their reliance on the "technical Field" definition as defined in B.1.13 is clearly not intended to capture the work of soil, concrete and aggregate testing.
23. As paragraph 45 of the submission identifies, the work of soil testers is covered by the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*. To extrapolate that its inclusion in the technical field of that award, should be sufficient to have it included as part of the Technical Field of the Building Award is erroneous.
24. The AMWU's proposal is likely to add confusion about the coverage of both awards. It also seeks to alter the coverage of the Building Award without any evidence to support that this is *necessary to do in order for the modern awards objective to be achieved*.
25. There is no submission that the removal of subclause 4.10(b)(v) would create any detriment. The Manufacturing Award clearly has coverage for such work. As this Award has both industry and occupational coverage, it is the more appropriate Award to apply to such work.
26. Ai Group otherwise relies on its submission filed in this matter. The Full Bench should reject the AMWU and AWU proposed amendments and instead remove paragraph 10.4(b)(v).

4. FOREPERSONS AND SUPERVISORS¹¹

27. Ai Group relies on its submission filed in this matter.
28. The AMWU's suggested method for setting minimum wages for forepersons and general forepersons is to apply the terms of clause 24.1(g) of the

¹¹ Paragraphs 451 of the Decision

Manufacturing Award.

29. The AMWU's proposition only extracts the minimum hours wage component. It omits that the rates in the Building Award recognises that forepersons and supervisors are typically paid a salary and do not typically receive overtime, shift or weekend penalties.
30. Ai Group strongly submits that the more appropriate option is as suggested in our submission filed in this matter.¹²

¹² Paragraphs 32-34.