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Dear Associate

4 YEARLY REVIEW OF MODERN AWARDS - CONSTRUCTION AWARDS AM2016/23

This submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). We confirm that we act on behalf of ABI and NSWBC in respect of the above matter.

On 25 February 2019, the Commission issued Directions for the filing of written submissions in relation to paragraphs [6] to [8] of the submission of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) dated 7 December 2018. Item [1] of the Directions require the parties to file submissions by no later than 5.00pm on Monday, 11 March 2019.

This brief submission is filed in accordance with item [1] of the Directions.

Paragraphs [6] to [8] of the CFMMEU submission relates to the decision of the Fair Work Commission (**Commission**) to vary the rest and recreation provisions in clause 24.7(f) the *Building and Construction General On-site Award 2010 (Building Award)*. Based on the draft determinations issued by the Commission, it appears that this change to the Building Award will not be:

1. replicated in the *Joinery and Building Trades Award 2010 (Joinery Award)* by replacing clauses 24.5(a)(vi) and 24.5(a)(viii) of the Joinery Award with the new clause 24.7(f) in the Building Award; and
2. inserted into the *Mobile Crane Hiring Award 2010 (Mobile Crane Award)*.

The CFMMEU appears to contend that the amended clause 24.7(f) of the Building Award should be inserted into the Joinery Award (by way of amendment) and the Mobile Crane Award (by insertion of a new clause) because:

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1. in paragraph [86] of its decision dated 26 September 2018¹ (hereafter referred to as ‘**the Decision**’), the Commission acknowledges that in relation to the CFMMEU’s living away from home claim, it seeks to insert the same provisions into the Joinery Award and Mobile Crane Award as those contained in the Building Award;
2. the changes approved by the Commission to the living away from home allowance in the Building Award, Joinery Award and Mobile Crane Award, as per paragraph [143] of the Decision, is evidence of an intention that all amendments to clause 24 of the Building Award which have been approved by the Commission will result in corresponding changes to the Joinery Award and Mobile Crane Award (e.g. the insertion of a rest and recreation clause which mirrors the new clause 24.7(f) of the Building Award);
3. the changes approved by the Commission to the standard of accommodation when an employee is living away from home apply to the Building Award, Joinery Award and Mobile Crane Award, as per paragraph [146] of the Decision. By this change applying to each modern award, it is evidence of an intention that all amendments to clause 24 of the Building Award which have been approved by the Commission will result in corresponding changes to the Joinery Award and Mobile Crane Award; and
4. the changes approved by the Commission in relation to modes of travel apply to the Building Award, Joinery Award and Mobile Crane Award, as per paragraph [153] of the Decision. By this change applying to each modern award, it is evidence of an intention that all amendments to clause 24 of the Building Award which have been approved by the Commission will result in corresponding changes to the Joinery Award and Mobile Crane Award.

In regards to these matters, our clients respond as follows:

1. acknowledgement by the Commission that the CFMMEU seeks to replicate² clause 24 of the Building Award in the Joinery Award and the Mobile Crane, is not a concession that any variation to clause 24 of the Building Award automatically requires a corresponding amendment to the Joinery Award or the Mobile Cranes Award;
2. it is evident from the wording used by the Commission at paragraph [143] of the Decision that the changes to the living away from home allowance in the Building Award is intended to also apply to the Joinery Award and Mobile Crane Award³;
3. it is evident from the wording used by the Commission at paragraph [146] of the Decision that the changes to the standard of accommodation in the Building Award is intended to also apply to the Joinery Award and Mobile Crane Award⁴;

¹ [2018] FWCFB 6019

² It is noted that replication of this clause is subject to minor variations between each modern award.

³ “*The Building Award will therefore be varied in terms of the proposed clause 24.3(a) contained in the August 2017 Statement, and equivalent variations will be made to the Joinery Award and the Mobile Crane Award*” (*our emphasis*).

⁴ “*Corresponding variations will be made to the Joinery Award and the Mobile Crane Award*” (*our emphasis*).



4. it is evident from the wording used by the Commission at paragraph [153] of the Decision that the changes to modes of transport in the Building Award is intended to also apply to the Joinery Award. Paragraph [153] of the Decision does not specifically reference the Mobile Crane Award and therefore it can be concluded that this particular amendment does not apply to the Mobile Crane Award⁵;
5. paragraph [156] of the Decision does not reference that the change to rest and recreation leave in the Building Award will also apply to the Joinery Award and the Mobile Crane Award⁶;
6. given the matters outlined in paragraph 4 above (which concerns paragraph [153] of the Decision) and paragraph 5 above (which concerns paragraph [156] of the Decision), there is no basis to conclude it was the intention of the Commission that all amendments to clause 24 of Building Award would also be made to the Joinery Award and the Mobile Crane Award;
7. the Commission made it clear in the Decision when certain entitlements amended under clause 24 of the Building Award would apply to either the Joinery Award or Mobile Crane Award, or both. It cannot be said that in relation to the change proposed to clause 24.7(f) of the Building Award, this change was also intended by the Commission to apply to the Joinery Award and/or the Mobile Crane Award; and
8. there is not, at present, a rest and recreation clause in the Mobile Crane Award.

Having regard to the above, ABI and NSWBC submit that the Draft Determinations for each modern award, namely the Building Award, Joinery Award and Mobile Crane Award, should be made in accordance with the terms proposed by the Commission. Such Draft Determinations are consistent with the Decision of the Commission.

If you have any queries in relation to the above, please contact Lilian Zhou on (07) 3218 0901 or at lilian.zhou@ablawyers.com.au.

Yours sincerely

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⁵ "...Clause 24.7(a) of the Building Award will be varied accordingly, and an equivalent variation will be made to the Joinery Award" (*our emphasis*).

⁶ "Accordingly clause 24.7(f) will be varied to provide as follows..."