STRONGER TOGETHER
NATIONAL OFFICE
Level 1, 16-20 Good Street Granville NSW 2142
T: (02) 8005 3333
E: members@nat.awu.net.au
W: www.awu.net.au
Daniel Walton National Secretary
THE AUSTRALIAN WORKERS' UNION
ABN 28 853 022 982

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 – 4 yearly review of modern awards – Construction Awards

AM2016/23

OUTLINE OF REPLY SUBMISSIONS FOR THE AUSTRALIAN WORKERS' UNION

BACKGROUND

1. The Australian Workers' Union (**"AWU"**) relies on the submissions below in reply to the following material recently filed by employer organisations as part of the ongoing 4-yearly review of Construction Awards:

    - submission of Master Builders Australia (**"MBA"**) dated 14 November 2018;
    - submission of the Australian Industry Group (**"AIG"**) dated 14 November 2018;
    - submission of Australian Business Industrial (**"ABI"**) and the New South Wales Business Chamber (**"NSWBC"**) dated 14 November 2018; and
    - submission of the Housing Industry Association (**"HIA"**) dated 14 November 2018.

2. The issues dealt with in the AWU's reply submissions are:

    - award coverage for testing work;
    - hours of work;
    - allowances; and
    - utility locators.

TESTING WORK

Deleting clause 4.10(b)(v)

3. Unsurprisingly, MBA, AIG, ABI and NSWBC have opportunistically taken the Fair Work Commission's invitation[1] to argue clause 4.10(b)(v) of the *Building and Construction General On-site Award 2010* ("**On-site Award**") should be deleted.

4. The explanation for this position is simple – the conditions for employees in the On-site Award are superior to those in the other potentially relevant award, the *Manufacturing and Associated Industries and Occupations Award 2010* (**"Manufacturing Award**").

5. The Full Bench should not delete clause 4.10(b)(v) of the On-site Award on the material presently before it. The Full Bench has already determined not to grant the AWU's claim on the basis that an application to alter modern award coverage must demonstrate that the existing award coverage does not meet the modern awards objective. None of the brief submissions filed by employer groups purport to satisfy this requirement.

6. Further, and contrary to the submission from ABI and NSWBC, award coverage for testing work was not "settled by the Coffey Decision".[2]

7. The Coffey litigation was necessarily confined to an assessment of the operations of Coffey Information Pty Ltd ("**Coffey**"). For example, the Full Bench which heard the AWU's appeal in the Coffey litigation stated:

   > *The technicians work on such projects as the company may be contracted to provide its specialist services from time to time. Long term employees will usually perform their work in a base lab or at multiple locations. Most of the work is performed at base labs.*[3]

8. These factual findings were critical to the decision at first instance and on appeal. It cannot be assumed that the same factual findings would be made in relation to the operations of other employers who perform testing work on construction sites.

9. Importantly, the Full Bench in the Coffey litigation did not determine the "very general"[4] classifications in the On-site Award could not capture work

---

[1] *4 yearly review of modern awards – Construction awards* [2018] FWCFB 6019 at [244].
[2] ABI and NSWBC submission – page 1.
[3] *The Australian Workers' Union v Coffey Information Services* [2013] FWCFB 2894 at [25].
[4] Ibid at [25].

performed by Coffey's technicians. It merely determined the technical stream in the Manufacturing Award was more appropriate for the Coffey technicians.[5]

10. It is certainly arguable that testing work is already captured by the CW2 classification in the On-site Award given indicative tasks for this level include[6]:

    …

    - *measures accurately using specialised equipment*

    …

    - *uses measuring and levelling instruments...*

11. Testing work is required on all major construction projects and Coffey by no means has a monopoly over the industry. It is conceivable other employers would not have base labs and would undertake all relevant testing work on construction sites.

12. In these circumstances, it is certainly possible that the On-site Award currently covers employees performing testing work on construction sites for employers other than Coffey.

13. The Full Bench should not risk altering this situation and hence reducing current safety net conditions for employees covered by the On-site Award in circumstances whereby the employer parties have presented no evidence to demonstrate why this should occur and did not even suggest that clause 4.10(b)(v) should be deleted prior to the Full Bench's invitation.

14. The Full Bench could not safely conclude on the material before it that clause 4.10(b)(v) "serves no utility" and it could not be satisfied that deleting this sub-clause would not disturb the coverage of the On-site Award.

Inserting reference to testing work in the classification structure

15. The AWU maintains that reference to testing work should be inserted into Schedule B.2.2(d) of the On-site Award and relies on its previously filed material in support of CW2 being the appropriate classification.

16. No employer group has argued CW2 is not the appropriate classification for testing work undertaken on a construction site.

---

[5] *The Australian Workers' Union v Coffey Information Services* [2013] FWCFB 2894 at [22] to [26].

[6] See Schedule B.2.2(c) of the On-site Award.

17. Given the Full Bench's concerns about disturbing existing coverage arrangements[7], it appears open to the Full Bench to vary the classification structure in the manner sought by the AWU[8] and to state in its decision that the amendment is not intended to expand the coverage of the On-site Award.

HOURS OF WORK

<u>Maximum daily hours for casual employees</u>

18. MBA, AIG and HIA have all expressed opposition to the Full Bench's proposed amendment to clarify that the maximum daily ordinary hours for casual and part-time employees are eight hours per day.[9]

19. The AWU supports the Full Bench's proposed amendment and considers it merely clarifies the operation of the current award.

20. Senior Deputy President Watson confirmed that ordinary hours of work cannot exceed eight per day for any category of employees during the transitional review of modern awards:

> ***[274]*** *The HIA has not established a need for clarification of the overtime provisions. The proposed clause 36.2(b) simply reflects what is clear from clause 33.1 of the Building On-site Award, which specifies that except for shiftwork the ordinary hours are "38 per week, worked between 7.00 am and 6.00 pm, Monday to Friday"; clause 33.1(a)(i), which provides that when working the RDO roster cycle the ordinary working hours are eight hours per day; clause 33.1(a)(vii), which provides that if a non RDO cycle is worked, "no more than eight ordinary hours are worked in any one day"; and clauses 34.1(e) and 34.2(c), which specify that the ordinary hours for shiftworkers are eight hours per day. The variation proposed will not be made.*[10]

21. It is unclear why the Fair Work Ombudsman has suggested the effect of the current provision is unclear when the issue was specifically resolved during the transitional review of modern awards.

22. In any event, there is no evidence before the Full Bench which could justify a different approach to setting maximum daily ordinary hours for full-time, part-time and casual employees.

---

[7] *4 yearly review of modern awards – Construction awards* [2018] FWCFB 6019 at [244].
[8] A draft determination is attached to the submission filed by the AWU on 2 December 2016 – see here: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-awu-021216.pdf
[9] *4 yearly review of modern awards – Construction awards* [2018] FWCFB 6019 at [411](2).
[10] *Master Builders Australia Limited* [2013] FWC 4576 at [274].

23. This means the current daily maximum of eight hours, which at the very least applies to full-time employees and shift workers, should apply to all categories of employment.

Compensation for working on an RDO

24. Remarkably, the MBA is still arguing that an employee who is directed to work on their RDO should be compensated merely by the payment of Saturday penalty rates for the hours worked.

25. The MBA submission does not appear to be grasp that an employee has already worked the hours necessary to accrue an RDO and has not been paid for these hours.

26. As outlined in the AWU's previous submission dated 15 September 2017, under a standard RDO system, an employee works eight ordinary hours and is paid for only 7.6 hours with the remaining 0.4 hours accruing towards a paid RDO. After 19 days of working under this arrangement, an employee has accrued 7.6 hours and can have a paid day off.

27. Assuming an employee's ordinary hourly rate is $30, under the MBA's proposal an employee can be directed to work on their RDO in return for being paid at time and half for the first two hours and then double time. An employee working 7.6 hours on an RDO would be paid:

    2 hours x $45 + 5.6 hours x $60 = $426

    According to the MBA, this would be the complete compensation for the employee and another RDO would not be provided.

28. This means an employee is paid a total of $426 for the 7.6 hours they worked to accrue the RDO and for the 7.6 hours they worked on the RDO. This equates to $426 for 15.2 hours of work at a rate of $28.03 per hour i.e. below the employee's ordinary hourly rate.

29. The absurdity of that outcome is obvious. The amendments proposed by the MBA should be rejected by the Full Bench.

ALLOWANCES

30. In relation to the Full Bench's decision to abolish various disability allowances and provide an enhanced industry allowance, the MBA, AIG and HIA have expressed support for the Full Bench's provisional figures of 4% of the weekly

standard rate per week for the residential construction sector and 5% for other sectors.

31. This support is unsurprising given these figures would result in a cost saving for all employers in the residential construction sector and the overwhelming majority of employers in other sectors.

32. The AWU's primary concern is the civil construction sector and it maintains that an increase of the industry allowance to 5% of the weekly standard rate per week is manifestly inadequate compensation for the loss of an array of existing allowances that apply to work in conditions regularly encountered by AWU members.

33. The AWU continues to rely on its submissions and evidence filed on 15 November 2018 and the material filed by the Construction, Forestry, Maritime, Mining and Energy Union (**"CFMMEU**") on 14 November 2018 in support of a greater increase to the industry allowance/s.

34. The cross-examination of witnesses as foreshadowed by various employer groups is not a concern for the AWU and given the significance of this change the AWU strongly opposes the proposition advanced by various employer groups that it should be denied an opportunity to lead evidence about the quantum of the increase.

UTILITY LOCATORS

35. The AWU supports and adopts the submissions of the CFMMEU and the CEPU to the effect that an amendment to the On-site Award is not required in relation to the work of a 'utility locator'.

STEPHEN CRAWFORD
SENIOR NATIONAL LEGAL OFFICER

28 NOVEMBER 2018