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

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON OBJECTIONS TO PROPOSED EVIDENCE

29th March, 2017

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Objections to Proposed Evidence by the CFMEU

1. It is convenient to deal with the objections to the proposed evidence of the employer organisations under subject headings as many of the objections fall into the same category.

Proposed Opinion/Conclusion/Speculation Evidence

David Solomon: Paragraphs 6, 8, 9, 10, 11 (1st sentence)

Cameron Spence: Paragraphs 5, 8, 9, 11, 12, 13, 14, 15 (2nd sentence), 16, 18 (1st and 2nd sentences), 20, 28 (2nd sentence), 30, 31, 34, 35, 36

Peter Glover: Paragraphs 4 (1st sentence), 5, 6 (2nd sentence), 8, 9, 10, 11, 12, 14, 15, 18, 20, 23, 24, 25, 26 (2nd sentence), 27, 28, 29 (2nd sentence), 30, 31, 33, 34, 35, 37, 38 (2nd sentence), 39, 40 (2nd sentence), 41, 42 43, 44, 45, 46, 47, 48

Robert Wilson: Paragraphs 7, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

Unidentified MBA Witness: Paragraphs 10, 11, 12, 13 (2nd sentence), 14, 15, 16, 17, 18 (3rd sentence), 19, 23, 24, 31

Rick Sassin: Paragraph 9

Huan Do: Paragraph 9

David Castledine (Junior Rates): Paragraphs 10

David Castledine (Industry Specific Redundancy Scheme): Paragraphs 9, 10

David O'Connor (Junior Rates): Paragraphs 9, 10, 11, 13 (1st sentence), 14, 15, 16, 17, 18

David O'Connor (Industry Specific Redundancy Scheme): Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

John Hovey (Junior Rates): Paragraphs 8, 9, 10, 11, 12

John Hovey (Industry Specific Redundancy Scheme): Paragraphs 7 (last sentence), 8 93rd and 4th sentences), 9, 10

Peter Middleton: Paragraphs 10, 11, 12, 13, 14 (1st sentence), 15, 16, 17

2. The CFMEU objects to this proposed evidence of employer witnesses because they are opinions, conclusions and/or speculation.

3. These witnesses fall into the same category as the witnesses considered by the Full Bench in *Four yearly review of modern awards* [2015] FWCFB 3406 which said:

> ***"[52]*** *The statements of Mr Stuart Lamont, Ms Nicki Passanisi, Ms Joyce Lawson, Mr David Murrie and Mr Antonio D'Arienzo (tendered by the Accommodation Association of Australia and Restaurant & Catering Australia) were in the form of a common template and all asserted that:*
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> - *annual leave liability and excessive accrual of leave is an ongoing issue for their respective companies;*
> - *they believe that the cashing out of annual leave would be beneficial for their companies and employees; and*
> - *they support the applications by their respective organisations.*
>
> ***[53]*** *Evidence of this character is of very little assistance. It is plainly in a template form and expresses the witnesses' belief as to the benefits of a cashing out provision, but not the factual basis for that belief. Statements by five employers that they support the claims made by their association on their behalf adds nothing to the substance of the arguments advanced in support of the employer claims.*
>
> ***[54]*** *A similar observation may be made about much of Mr Geoffrey Charles Thomas' statement. Mr Thomas' statement was largely in the form of a submission in support of the claims sought by the Employer Group. He expressed a range of opinions said to be based on his "experience as outlined in paragraph 1" of his statement, as follows:*
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> *"I make this statement based on my experience as an industrial relations practitioner in the Departments of Navy (1973 to 1975) and Defence (1975 to 1985), the Australian Nuclear Science and Technology Organisation (1988 to 1996) and the Master Builders Association of New South Wales (1998 to 2013)."*[i]
>
> ***[55]*** *This statement does not qualify Mr Thomas as an expert, in the sense of qualifying him to give opinion evidence."*

4. There appears to be some attempt to portray some of the proposed witnesses from employer organisations as experts. However, like Mr Thomas in the abovementioned decision, none of the witnesses from the employer organisations can be categorised as experts based on mere experience with their employer organisation.

5. Moreover, the witness evidence is not impartial and the opinion evidence is presented in a way that does not, even on a hearsay basis, adequately set out the factual bases for the opinions proffered.

6. In *Hail Creek Coal Pty Ltd and Construction, Forestry, Mining and Energy Union re Hail Creek Preference of Employment Order 2003 - re Applications for relief from clause 4 of the Hail Creek Preference of Employment Order 2003* - PR948938 [2004] AIRC 670 the Full Bench found (at [195]:

> *"The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about their reliability. For an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence. Further, the degree to which an expert is objective and impartial will impact on the evaluation of the probative value of the expert evidence."*

7. A similar approach was taken by Lawler VP in *Finance Sector Union of Australia v Comsec Trading Limited and Others* - PR960317 [2005] AIRC 637 (at [63] and [64]):

> *"CommSec placed particular emphasis on the evidence of Dr John Hewson. Dr Hewson is undoubtedly an exceptionally highly qualified and eminent expert. He has held positions in the Reserve Bank and the International Monetary Fund, he has worked as a domestic and international financial consultant, he worked as an advisor to Federal Treasurers and to Prime Minister Fraser, he had a close involvement in the establishment and early implementation of the Campbell inquiry into Australia's financial system, he has been the shadow Minister for Finance and the shadow Treasurer. He has worked as a senior academic in economics with a focus on the financial system. He is presently Dean of the Macquarie Graduate School of Management. Finally, he has extensive experience as an investment banker.*
>
> *However, I am compelled to place a reduced weight on his evidence in this matter. The style of both his primary report and his report in reply is one of advocacy. This, of course, is not the role of an expert witness and may lead to a reduction in the weight to be attached to the expert's evidence. Portions of the report of Prof Walker tendered by the FSU suffer from a similar defect although this is somewhat understandable since Prof Walker was seeking to reply to Dr Hewson. Dr Hewson's reports contain a number of key assertions of conclusion that do not specify the facts he has assumed and the reasoning process by which he arrives at the conclusion. This is also apt to reduce the weight that can properly be attributed to those conclusions."*

8. Clearly the proposed witnesses are not impartial. In *Re Crown Employees Wages Staff (Rates of Pay) Award 2011 & Ors* (No 3) [2013] NSWIRComm 109 Boland P found in relation to an "expert" called from a Government Department as follows (at [103]):

"I turn to the evidence regarding fiscal and economic conditions. The Secretary relied mainly on the evidence of Ms Mrakovcic. Ms Mrakovcic was well qualified, possessed a strong background in senior positions in the Commonwealth Treasury and was obviously a highly competent economist. However, she is also a senior NSW Treasury Officer and so, in that respect, unlike the unions' witness, Mr Robinson, Ms Mrakovcic cannot be regarded as independent, nor can her evidence be treated as impartial."

9. The above witnesses are presented unashamedly as advocates. The Commission should not have to speculate as to how the witnesses were affected by their vested interests in the result of the case and what were the factual bases for the opinions expressed.

Proposed hearsay evidence of views of members of employer organisations

David Solomon: Paragraphs 11 (second sentence)

Cameron Spence: Paragraphs 6, 10, 17, 18 (3rd sentence), 21, 28 (1st sentence), 32

Peter Glover: Paragraphs 4 (2nd sentence), 29 (1st sentence), 38 (1st sentence)

Robert Wilson: Paragraphs 12, 14, 17,

Rick Sassin: Paragraphs 10, 13, 14, 16

Huan Do: Paragraphs 9, 10, 11, 12, 13, 14, 15

Kristie Burt: Paragraphs 15, 16, 17, 18, 20, 21

David Castledine (Junior Rates): Paragraphs 6, 7

David Castledine (Industry Specific Redundancy Scheme): Paragraphs 5, 6

10. This evidence is also opinion evidence made even more objectionable by the fact that it is presented on a hearsay basis.
11. The evidence is also irrelevant because it does no more than present the views of unidentified members of employer organisations. Unlike other provisions of the FW Act (s 226 and s 243 for example), there is no legislative mandate to take into account the views of employers or employees in conducting a modern award review.
12. Further, there is no need for the Commission to receive evidence as to the views of members of registered organisations who are presumed to represent their

members. The Full Bench in *Pryor and Another v Coal & Allied Operations Pty Ltd:* (1997) 78 IR 300 at 305 said:

> *"We have come to the conclusion that the FreightCorp employees were not denied natural justice. This is because, in our view, the PTU, in the proceedings before Harrison SDP, was representing not only itself but also the FreightCorp employees, its members. The following circumstances support this view:*
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> ...
>
> ***3. that, in proceedings before the Commission, an organisation is normally regarded as representing its members and their interests;***

<u>Proposed survey evidence of members of employer organisations</u>

<u>David Castledine (Junior Rates): Paragraphs 8, 9</u>

<u>David Castledine (Industry Specific Redundancy Scheme): Paragraphs 7, 8</u>

<u>Kirsten Lewis: Whole Statement</u>

13. The survey evidence of the CCF presented by Mr Castledine comes within the same category as the evidence of members of employer organisations discussed above. It merely presents the views of CCF members and is subject to the same objection, namely it is opinion evidence made even more objectionable by the fact that it is presented on a hearsay basis.
14. The CCF survey should be rejected as it fails any test of falling within the realm of probative evidence. Circulating an email asking if employers support a particular proposition is nothing more than push polling and does not fall into the category of reliable survey evidence.
15. The survey should be given no weight as it is based on a number of false propositions as to the existence of junior rates and the alleged effect of the absence of junior rates. Further, only 16.4% of its members responded to the email and over 60% are from one State (i.e. NSW).
16. The HIA Survey which is the subject of the statement of Kirsten Lewis is also unreliable and of no statistical value. The statement of Kirsten Lewis at paragraph 12 says that the survey was sent to 23,810 HIA members. Of those 23,810 members, only 290 responded, i.e. only 1.2% of their members responded.

17. There are further reasons for the rejection of the HIA survey as evidence.

18. First the employees of 36 of the 290 respondents were covered by awards other than the *Building and Construction General On-site Award 2010* or the *Joinery and Building Trades Award 2010*, and 39 respondents only identified the *Joinery and Building Trades Award 2010* as applying to their employees. It is not clear which awards covered another 37 of the respondents as they indicated that either more than one award applied, or no award was identified.

19. Secondly, a number of the introductory paragraphs to the questions are wrong, e.g. the paragraph on Agreement/Awards (after question 7) makes no mention of the National Employment Standards and the 2nd paragraph under Hours of Work is incorrect as clause 33.1(a)(vii) of the *Building and Construction General On-site Award 2010* allows for a non-RDO system to be worked.

20. Thirdly, a significant failure of the survey is that it did not ask more detailed questions on the employees of the employers, e.g.

    - how many of their employees were covered by each of the awards;
    - what classifications their employees were employed under for each award (particularly how many of the employees were apprentices or trainees); or
    - how many were full-time, part-time or casual.

21. Fourthly, the survey does not identify the particular businesses that responded and responses from a number of companies are contradictory.

22. The recent *Penalty Rates Decision* ([2017] FWCFB 1001) confirmed that surveys of the type provided in these proceedings are not determinative and can be given little weight,

> *"[366] The BCCI submission also set out some comments by local businesses about the impact of the current Sunday and public holiday penalty rates. These businesses are only identified in a generic way, 'a café restaurant', 'a clothing retailer' etc., rather than identifying the specific business. BCCI submits that this material 'is not intended as evidence, but is reflective of the general views of many of our members on the impact of weekend and public holiday penalty rates on local businesses, employees and the broader community'.*

[367] We have had regard to this material but accord it little weight as the relevant businesses were not identified and hence there was no opportunity to test the views expressed."

23. The *Penalty Rates Decision* also considered the proper process for survey data collection (see [1087] to [1096]), concluding that

> *"[1097] ……. the assessment of survey evidence is not necessarily a binary task – that is, such evidence is not simply accepted or rejected. Most survey evidence has methodological limitations – be it sample related the nature of the questions put or the response rate. The central issue is the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data.*
>
> *[1098] Given the limitations in the Jetty Survey and the Benchmarking survey, and consistent with the view expressed by the Productivity Commission, we propose to treat the data from these surveys as suggestive or anecdotal, rather than definitive. We expressly reject the proposition advanced by RCI that the results of the Jetty Survey can be extrapolated to all businesses covered by the Restaurant Award and that an estimate can be made of the aggregate employment effects of reducing penalty rates*."

23. The *Penalty Rates Decision* also made the following observations on membership surveys,

> *"[1571] As we have explained earlier, and as described in the annual Wage Review 2012-2013 decision, if survey material such as this is to be regarded as definitive we need to be confident that it is a reliable representation of the target population, in this case, retail businesses. In particular:*
>
> > *'If a membership list is used as the basis for a survey, then it is essential that those that respond are properly representative of the entire membership base (e.g. by firm size, form of ownership, industry sector, geographical location). Where thi is not the case, then the responses become more like case studies or anecdotes – accounts of the situation of those who did respond, but not to be taken as*

representative of the survey population (e.g. the membership) as a whole.'

[1572] We are not satisfied that the Retail survey can properly be said to be representative of all retail businesses. While providing the survey to all members of employer groups would maximise the total number of responses, the number of businesses that responded to the survey is relatively low. This could lead to biased results as the sample may not represent the retail business population."

Proposed evidence of understanding of provisions of an award, decision and other documents

Cameron Spence: Paragraphs 19, 22, 23, 25, 26, 27, 33, 34

Peter Glover: Paragraphs 16, 17, 21, 22, 32,47

Unidentified MBA Witness: Paragraphs 9

24. This proposed evidence relates to the understanding of the witness of the provisions of an award, decision or other documents.
25. The provisions of an award, decision or document speak for themselves and should be relied upon rather than the understanding of a witness of those provisions.
26. This is not a mere technical objection as the proposed evidence misrepresents particular provisions.
27. Cameron Spence at paragraphs 19 refers to the recent decision on TOIL (the *Award Flexibility Decision* ([2015] FWCFB 4466)), and misrepresents the findings of that Full Bench made at paragraphs [296] to [307]. At paragraphs 22, 23, 25 and 26 Mr Spence refers to rostered days off and misrepresents the nominated industry rostered day off which is clearly the days identified in clause 33.1(a)(i). In paragraph 27 Mr Spence refers to banking of RDO's being restricted to the majority of employees of a particular classification when there is no such restriction. In paragraphs 33 and 34 Spence refers to clause 33.1(a)(vi) and totally ignores the words "Except where agreement has been reached in accordance with clauses 33.1(a)(ii) and 33.1(a)(ii)" at the beginning of that clause.

28. Peter Glover at paragraphs 16 and 17 refers to the payment of the fares and travel allowance under clause 25 of the current award and previous awards. Mr Glover in paragraph 17 misrepresents the provisions of previous awards as under the NBCIA 2000 the 50km radius only applied to metropolitan areas in Victoria, Western Australia and Queensland. In South Australia and Tasmania a 30km radius applied and in NSW county boundaries were used for Cumberland, Northumberland and Camden. In the *Building and Construction Industry (ACT) Award 2002* the only radial area mentioned was a 30km area and in the *Building and Construction Industry (Northern Territory) Award 2002* a 32km radius applied. In paragraphs 21 and 22 Mr Glover refers to a decision of SDP Watson in [2013] FWC 7478 and misrepresents the findings of the Senior Deputy President at paragraphs [30] to [33] of that decision. At paragraph 32 Mr Glover misrepresents the review of the National Training Wage Schedule that the Commission is undertaking in AM2016/17. At paragraph 47 Mr Glover misrepresents the coverage provisions of the *Joinery and Building Trades Award 2010* and ignores the exclusion in the definition of Joinery Work to on-site work and the exclusion in clause 4.1(d).

29. The unidentified MBA witness at paragraph 9 refers to the allowances contained in the On-site Award and misrepresents the source of these allowances. As identified in the *Award Flexibility Decision* some 55 Federal and State awards were considered by the AIRC Award Modernisation Full Bench.

Proposed hearsay evidence as to why members of HIA did not give evidence

Rick Sassin: Paragraphs 17, 18

Huan Do: Paragraphs 16, 17

30. The HIA proposes to lead identical hearsay evidence from two witnesses as to unidentified members not being willing to give evidence for fear of drawing union attention.

31. This evidence is irrelevant and prejudicial and should not be admitted as a matter of equity and good conscience.

Evidence that is otherwise irrelevant

Robert Wilson: Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

Unidentified MBA Witness: Paragraphs 20, 21, 22, 30 31

Cameron Spence: Paragraphs 9, 10, 11, 12, 13, 14, 15, 16

Peter Glover: Paragraphs 32, 33, 34

32. The evidence of Robert Wilson and the unidentified MBA witness which addresses apprentices is irrelevant because this is not a matter before the Full Bench.
33. The evidence of Cameron Spence and the unidentified MBA witness which addresses payment of wages is irrelevant because this is not a matter before the Full Bench as identified in the Commission's Issues Document.
34. The evidence of Peter Glover which addresses the national training wage is irrelevant because this is not a matter before the Full Bench as identified in the Commission's Issues Document.

Redacted Statement of Unidentified MBA witness

35. This statement should not be admitted because it has been presented in a redacted form without any order from the Commission that it can be redacted. In addition, some of the redactions such as paragraphs 20 and 26 to 29 have been done in a form and are so extensive that they render the contents meaningless.