**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*

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# CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) REPLY SUBMISSION

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28th November, 2018


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**Introduction**

1. On 26th September 2018 the Fair Work Commission Full Bench issued a Decision ([2018] FWCFB 6019) (the decision) on the substantive matters under consideration regarding the Construction Awards as part of the 4 yearly review of modern awards. In paragraph [469] of the decision the Full Bench invited interested parties to file any written submissions, within 28 days of the decision, in relation to the matters identified in paragraphs [151]-[152], [244], [246], [372], [412]-[413] and [451].

2. Revised directions were published by the Full Bench on 8th November 2018 inviting interested parties to file written submissions in relation to the matters identified in paragraphs [151]-[152], [244], [246], [372], [412]-[413] and [451] by no later than 5.00pm on Wednesday 14th November 2018. Any submissions in reply were to be filed by no later than 5.00pm on 28th November 2018. This reply submission is made in accordance with those directions.

3. Submissions regarding the matters identified in paragraph [469] of the decision were filed by the CFMMEU (Construction & General Division) (CFMMEU C&G)[1] and the following parties:

   - AIG[2]
   - ABI/NSWBC[3]
   - AMWU[4]
   - AWU[5]
   - CEPU[6]
   - HIA[7]
   - MBA[8]

4. This reply submission is made in response to those submissions.

**Reply to Submissions of the AMWU, AWU and CEPU**

5. The CFMMEU C&G notes that the AMWU, AWU and CEPU submissions are supportive of its submission on the issue of allowances, therefore no reply is made to those submissions on that particular issue.

6. In regard to the submission of the AMWU, as the rates of pay of forepersons and supervisors in the metal and engineering sector are not generally within our interest no comment is made.

7. On the issue of an appropriate classification for persons conducting the testing of soil, concrete and aggregate at a construction site, the CFMMEU C&G agrees with the AMWU and the AWU that the CW/ECW 2 level is appropriate.

[1] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-cfmmeu-141118.pdf
[2] https://www.fwc.gov.au/sites/awardsmodernfouryr/am2016-23-sub-aig-151118.pdf
[3] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-abinswbc-141118.pdf
[4] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-ws-amwu-141118.pdf
[5] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-awu-151118.pdf
[6] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-cepu-141118.pdf
[7] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-hia-141118.pdf
[8] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-mba-141118.pdf

8. The submission of the CEPU also deals with the issue of utility locators. The CFMMEU C&G supports the submission that the skills identified by Mr Walsh are covered by the existing classification structure in the *Building and Construction General On-site Award 2010*.

9. The extract from the VAC Group Employees On-site Agreement 2016-2020, set out at pages 10-13 of Mr. Walsh's submission[9], show that the main requirements of the level 1 Trainee and level 2 Competent Utility Locator are the completion of the RIICCM202A training course and completion of the 5-day Staking U Locator training course. According to the Staking U web-site:

> "*We provide a 2 Day Course (Locator Awareness Course) and 5 Day Course (Utility Locator Training Course) for underground locating services, covering a range of topics, including:*
>
> - *Safety requirements and safe work practices*
> - *Dial Before You Dig plan-reading*
> - *Types of locating devices including EMI, (Electro Magnetic Induction) and GPR, (Ground Penetrating Radar)*
> - *Maximise locating accuracy*
> - *Recognise interference*
> - *Using traceable rodders and sondes*
> - *Solving common locating problems in congested areas*
> - *Non-destructive excavation equipment and techniques*
>
> *This nationally accredited training course delivers the unit of competency RIICCM202D "Identify Locate and Protect Underground Services". Site engineers, supervisors and safety advisers find this introduction to locating practices very beneficial.*
>
> *The Locator Awareness Course also forms the first two days of our 5-day Utility Locator Training Program. The Program includes a further 3 days of real-world field training, incorporating AS5488:2013 with live utility locating to provide more in-depth approaches to problem solving in the field. This program is aimed at learners who will be performing locating tasks in their day-to-day jobs*."[10]

10. The competency standard RIICCM202D - Identify, Locate and Protect Underground Services (which supersedes RIICCM202A), is part of the Resources and Infrastructure Industry Training Package which includes civil construction. The competency standard is included in the following civil construction qualifications[11]:

| |
|---|
| RII31615- Certificate III in Trenchless Technology |
| RII31215- Certificate III in Civil Foundations |
| RII30915- Certificate III in Civil Construction |

[9] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-individual-170317.pdf

[10] https://stakingu.com.au/staking-training-courses

[11] https://training.gov.au/Training/Details/RIICCM202D

| |
|---|
| RII30815- Certificate III in Civil Construction Plant Operations |
| RII20715- Certificate II in Civil Construction |

This clearly demonstrates that the work can be performed by employees at either the CW2 or CW3 level.

**Reply to the Employer Party Submissions**

11. The submissions of the employer parties address the issues of the living away from home clause, coverage and classifications, hours of work, allowances, and forepersons and supervisors.

Living Away From Home Clause

12. In regard to the living away from home clause both the AIG[12] and MBA[13] support the provisional view expressed by the Full Bench at paragraph [151]. As the CFMMEU (C&G) does not oppose the provisional view no further comment is required.

Coverage and Classifications

13. The issues of coverage and classifications arise in regard to the provisional view expressed by the Full bench in paragraphs [244] and [246]. The ABI/NSWBC, AIG and MBA have all made submissions on the issues of coverage and classifications.

14. The ABI/NSWBC submission was limited to the issue of award/classification coverage of employees engaged in the "testing of soil, concrete and aggregate". The ABI/NSWBC submitted that varying the classification structure in the *Building and Construction General On-site Award 2010* would be inconsistent with the modern awards objective as it would create confusion as to what award would apply. The AIG made a similar submission. The ABI/NSWBC, AIG and MBA all propose that clause 4.10(b)(v) be deleted.

15. The CFMMEU C&G opposes the deletion of 4.10(b)(v). The testing of concrete, particularly slump testing when concrete is delivered to a site, is an everyday activity in the building and construction industry. There is a specific construction industry competency standard, CPCCCO3053A - Slump test concrete[14], which is part of the Certificate III in Concreting. According to the unit of competency:

> **"***Unit Descriptor*
>
> *This unit of competency specifies the outcomes required to slump test concrete to ensure the mix is workable and complies with the delivery docket and specified order.*
>
> *The unit includes sampling and slump testing to a set range or tolerance. It may also include working with others and as a member of a team.*
>
> *Application of the Unit*

[12] https://www.fwc.gov.au/sites/awardsmodernfouryr/am2016-23-sub-aig-151118.pdf at p.2-3

[13] https://www.fwc.gov.au/sites/awardsmodernfouryr/am201623-sub-mba-141118.pdf at paragraphs 4-6

[14] https://training.gov.au/Training/Details/CPCCCO3053A

*This unit of competency supports the role of those who slump test concrete designated for use on residential, commercial or civil construction sites. The results of slump tests are used to confirm the appropriateness of the concrete for the concrete work planned.*

*……..*

*Elements and Performance Criteria*

*…….*

| | |
|---|---|
| *2 Test concrete slump measurement.* | *Sample of concrete is taken, using the correct sampling procedure, directly from the delivery truck's initial discharge.*<br><br>*Slumping cone is filled and compacted according to standard slump testing procedures.*<br><br>*Slumping cone is levelled off and surplus concrete is cleared from steel plate and slumping cone.*<br><br>*Slumping cone is raised without moving the sample.*<br><br>*Sample is measured for conformity with tolerance levels and resampling is conducted if sample is outside tolerance.*<br><br>*Collapsed or sheared samples are recorded."* |

16. As the above extract from the unit of competency demonstrates this is work that can only be undertaken on site when the concrete is delivered. This is supported by the following definition from Wikipedia:

> "*The concrete slump test measures the consistency of fresh concrete before it sets. It is performed to check the workability of freshly made concrete, and therefore the ease with which concrete flows. It can also be used as an indicator of an improperly mixed batch. The test is popular due to the simplicity of apparatus used and simple procedure. The slump test is used to ensure uniformity for different loads of concrete under field conditions*."[15]

17. The CFMMEU C&G therefore submits that clause 4.10(b)(v) should be retained as it is work is performed on-site by construction workers, and that the classification structure under the *Building and Construction General On-site Award 2010* should be varied accordingly.

[15] https://en.wikipedia.org/wiki/Concrete_slump_test

18. The AIG and MBA also made submissions on the issue of whether or not the award should be varied to include the work of a utility locator. Both the AIG and MBA oppose any variation and claim that the work is covered by the *Surveying Award 2010*.

19. The AIG submission ignores the submission of Mr Walsh, in particular the reference to the VAC Group Employees On-site Agreement 2016-2020 and the work to be performed by the level 1 Trainee and level 2 Competent Utility Locator (see paragraph 9 above). Nowhere is any mention made of the competency standards related to surveying. Indeed the AIG are incorrect in their assertion that the Certificate II in Surveying and Spatial Information Services could be applied to a utility location role. As the following table demonstrates there are no competencies specific to this role in the qualification[16]:

| | Essential |
|---|---|
| BSBSUS201- Participate in environmentally sustainable work practices | Elective |
| CPCCWHS1001- Prepare to work safely in the construction industry | Core |
| CPPCMN3006- Provide effective client service | Elective |
| CPPSIS2012- Assist in collecting basic spatial data | Core |
| CPPSIS2013- Store and retrieve basic spatial data | Core |
| CPPSIS2015- Assist with surveying and spatial field activities | Elective |
| CPPSIS2016- Assist with load transfers | Elective |
| CPPSIS3011- Produce basic maps | Core |
| ICTICT101- Operate a personal computer | Elective |
| ICTICT102- Operate word-processing applications | Elective |
| ICTICT105- Operate spreadsheet applications | Elective |
| ICTICT203- Operate application software packages | Elective |
| ICTICT210- Operate database applications | Elective |
| ICTICT211- Identify and use basic current industry specific technologies | Elective |
| RIISTD201D- Read and interpret maps | Elective |

[16] https://training.gov.au/Training/Details/CPP20116

20. This is also the case with the Certificate III in Surveying and Spatial Information Services.[17]

21. The MBA submission is somewhat confusing in that on the one hand that say that the work is covered by the *Surveying Award 2010*, but then refer to the competency standard RIICCM202D - Identify, locate and protect underground services, which is not part of the surveying qualifications. The MBA submit that this type of work (i.e. utility locator) usually requires completion of RIICCM202D, but this unit of competency is only included in the civil construction qualifications (as identified in paragraph 10 above).

22. The MBA submit that utility locating work is performed by specialised companies but, as the list of accredited "dbyd" (dial before you dig) companies[18] they refer to shows (as does the list of accredited Telstra companies listed in the submission of Mr. Walsh), many of these companies are earthmoving companies who would be covered by the *Building and Construction General On-site Award 2010.*

23. As for the rates of pay for this type of work the MBA's reliance on the indeed.com website can hardly be taken as reliable as it is based on "*9 salaries submitted anonymously to Indeed by Utility Line Locator employees, users, and collected from past and present job advertisements on Indeed in the past 36 months*".[19] It is submitted that the VAC Group Employees On-site Agreement 2016-2020 is more in line with market rates for this work, as a civil company in South Australia is currently offering casual positions at $25 - $34.99 per hour.[20]

24. As set out in paragraph 10 above, the work of a utility locator is identified in the certificate II and III level qualifications for civil construction work and it therefore falls within the CW2 and CW3 classifications.

25. A final point to be made on the classification structure is that the broadbanded award classifications listed under each of the classification levels in the *Building and Construction General On-site Award 2010*, should not be taken as the only authority as to whether or not the work falls within a classification. The broadbanded award classifications mainly arose from the introduction of the CW classification structure in the 1990's to align the then existing award classifications with the CW structure (although some broadbanded award classifications lists have been varied since then[21]). The indicative tasks for each CW classification should also be a factor in determining whether particular work is covered by the classifications in the *Building and Construction General On-site Award 2010.*

Hours of Work

26. The AIG, HIA and MBA all made submissions in response to the issues dealt with in paragraph [441] of the decision. On the issue of the daily maximum ordinary hours of casuals the AIG claim that the provisions "*could cause operational difficulties for employers and disrupt existing arrangements for many existing casual employees*"[22] but

[17] https://training.gov.au/Training/Details/CPP30216

[18] MBA. op cit., at paragraph 19

[19] https://au.indeed.com/salaries/Utility-Line-Locator-Salaries

[20] https://www.seek.com.au/job/37743877?type=standout

[21] https://www.fwc.gov.au/documents/documents/awardmod/var010110/pr516726.pdf

[22] AIG, op cit., at paragraph 25

provide no evidence on any existing arrangements to back up this claim. Similarly the AIG also claim that limiting the ordinary hours to eight per day would "*remove important flexibility for employers and employees. For example, it would curtail options for employees who wish to work greater hours over fewer days*"[23] but provide no evidence to support the claim.

27. The AIG then go on to falsely claim that whilst there is a span of hours contemplated in clause 33.1 of the *Building and Construction General On-site Award 2010, "it mandates that it is in accordance with an RDO scheme*". This is incorrect and misleading. Clause 31.1 is as follows:

> *33.* ***Ordinary hours of work***
>
> *33.1 Except as provided in clause 34—Shiftwork, the ordinary working hours will be 38 per week, worked between 7.00 am and 6.00 pm, Monday to Friday, in accordance with the following procedure.*
>
> *(a)* ***Hours of work and rostered days off***
>
> *(i) The ordinary working hours will be worked in a 20 day four week cycle, Monday to Friday inclusive, with eight hours worked for each of 19 days and with 0.4 of an hour on each of those days accruing towards the twentieth day, which will be taken as a paid day off. The twentieth day of that cycle will be known as the rostered day off (RDO), and will be taken as outlined in clauses 33.1(a)(i) to 33.1(a)(iii). Payment on such a rostered day off will include accrued entitlement to the allowances prescribed in clauses 25.2 to 25.7. A rostered day off will be taken on the fourth Monday in each four week cycle, except where it falls on a public holiday, in which case the next working day will be taken instead.*
>
> *(ii)* ***Agreement on alternate RDOs***
>
> *Where an employer and a majority of employees at an enterprise agree, another day may be substituted for the nominated industry rostered day off.*
>
> *(iii)* ***Agreement on banking of RDOs***
>
> *Where employees are employed on distant work covered by clause 24.1, an employer and a majority of those employees on distant work may agree to accrue up to five rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer.*
>
> *Where the majority of the employees request consultation with their representative(s), that consultation will take place at least five days prior to its introduction.*
>
> *Any agreed arrangement must provide that 13 rostered days are taken off by an employee for 12 months' continuous service.*
>
> *(iv) Each day of paid leave taken and a public holiday occurring during any cycle of four weeks will be regarded as a day worked for accrual purposes.*
>
> *(v) An employee who has not worked, or is not regarded by reason of clause 33.1(a)(iv) as having worked a complete 19-day four week cycle, will receive pro*

[23] Ibid at paragraph 29

*rata accrued entitlements for each day worked or regarded as having been worked in such cycle, payable for the rostered day off, or in the case of termination of employment, on termination.*

*(vi) Except where agreement has been reached in accordance with clauses 33.1(a)(ii) and 33.1(a)(iii), the prescribed rostered day off or any substituted day may be worked where it is required by the employer and such work is necessary:*

- *to allow other employees to be employed productively; or*
- *to carry out out-of-hours maintenance; or*
- *in the case of unforeseen delays to a particular project or a section of it or other reasons arising from unforeseen or emergency circumstances on a project;*

*in which case, in addition to accrued entitlements, the employee will be paid penalty rates and provisions as prescribed for Saturday work in clause 37—Penalty rates.*

*(vii**) **Agreement on working other than the rostered day off cycle***

*Where an employer and the majority of employees employed at a particular enterprise agree that due to the nature of an employer's operations it is not practicable for the foregoing four week cycle to operate, they may agree to an alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day.*

*(viii) **Early starts***

*The working day may start at 6.00 am or at any other time between that hour and 8.00 am and the working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period. The change to the start time requires agreement between the employer and the employees and their representative(s), if requested.*

*(b) **Hours of work—part-time employees***

*(i) Notwithstanding the provisions of this clause and clause 34—Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off, and further provided that such employee will not work on the rostered day off.*

*(ii) An employer and employee may agree that the part-time employee accrues time towards a rostered day off as provided by this clause and clause 34—Shiftwork. In such instances, the part-time employee will accrue pro rata entitlements to rostered days off in accordance with clause 33.1(a)(v).*

*(c) **Washing time***

*The employer will provide sufficient facilities for washing and five minutes will be allowed before lunch and before finishing time to enable employees to wash and put away gear.*

*(d) **Work in compressed air***

*The working hours and conditions of employees working in compressed air will be those as from time to time prescribed in the code of the Standards Association of Australia for work in compressed air, Part 1 Airlock Operations.*

*(e)* ***Hours—underground work***

*(i) Underground means in any trench, shaft, drive or tunnel more than 6.1 metres (20 feet) below the surface of the ground or any drive or tunnel over 4.6 metres (15 feet) in length or where the drive or tunnel is timbered irrespective of the depth, or any live sewer more than 2.4 metres (8 feet) below the surface of the ground. Nothing in this clause will entitle a person working in a trench by pot and shot method or otherwise at a depth less than 6.1 metres (20 feet) below the surface of the ground to be paid as a miner.*

*(ii) The hours of work of employees working underground and all dependent work above the ground will begin at the whistle and end at the surface. The hours of work for underground work will be 38 per week worked in accordance with the provisions of clauses 33.1(a)(i) and 33.1(a)(ii). Each day's work will include half an hour crib break and if two shifts are worked they will be worked between the hours of 6.00 am and midnight.*

*(iii) A week's work will be 30 hours per week, exclusive of crib time, except in the following cases:*

- *miners driving tunnels with a superficial area not exceeding 12.2 metres (40 feet);*
- *miners sinking shafts over 15.2 metres (50 feet) in depth; and*
- *persons packing and/or scabbling in dead ends and/or boodler working.*

(Underlining added)

28. As the parts underlined show the current clause clearly sets out that except as provided in clause 34- Shift Work, the ordinary hours are 38 hours per week, worked between 7.00 am.to 6.00 pm, Monday to Friday, in accordance with the procedures set out in paragraph (a) to (e). Paragraph (a) deals with hours of work and rostered days off which under sub-paragraph (i) sets out how the 20 day RDO cycle is to be worked and importantly in sub-paragraph (vii) allows for agreement between an employer and the majority of employees on an "**alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day**."

29. The current clause 33.1 specifically provides that there is a maximum of eight ordinary hours per day Monday to Friday, whether the hours are worked under an RDO system or a non-RDO system. The Full Bench in these proceedings has not changed this provision (see paragraph [412], in particular clauses 33.1(a) and 33.2).

30. In the alternative the AIG put forward a proposition that would allow the ordinary hours of casuals to be increased to 11 hours per day (i.e. within the total span of hours from 7.00 am to 6.00 pm)[24]. This is opposed as it would reduce the existing safety net, as under the current award a casual who works 11 hours in a day Monday to Friday (not being a public holiday) would be paid the equivalent of 15.75 ordinary hours pay (i.e. 8 hours at

[24] Ibid, at paragraph 31

125%, 2 hours at 175% and 1 hour at 225%), whereas under the AIG proposal they would only receive the equivalent of 13.75 ordinary hours pay (i.e. 11 hours at 125%). The CFMMEU C&G's position is supported by the Decision of SDP Watson in *Master Builders Australia Limited* ([2013] FWC 4576) which said in response to a proposed variation by the CCIWA:

> "*The variation sought by CCIWA extends well beyond the issue of accommodating the off shift within roster arrangements, resulting in a reduction in payment in respect of Monday to Friday hours and a diminution of the safety net reflected in the current terms of the Building On-site Award. The diminution of the safety net, by reducing overtime payments otherwise payable for daily hours beyond eight per day (where RDOs accrue), would impact directly upon employees to whom the Building On-site Award applies and indirectly in relation to agreement making, in that the reduced application of overtime payments could occur without compensating benefits which would otherwise be required for agreement approval in order to meet the better off overall test*."[25]

31. The HIA submission on the hours of work for casual employees expresses a preference for the position of the FWO that the maximum ordinary hours of casuals be determined on a weekly basis rather than a daily basis.[26] The HIA therefore appear to oppose the provisional view of the Full Bench.

32. The HIA however then refer to the decision in *Master Builders Australia Limited* ([2013] FWC 4576) and appear to accept that it is a "*settled matter that current clause 33 applies to casual employees and sets their ordinary hours of work*".[27] On this point the CFMMEU C&G agrees but submits that it is the whole of clause 33 that applies, not just the opening paragraph (see paragraph 29 above). The current clause 33 has a limit of 8 ordinary hours in a day, Monday to Friday. The clause proposed by the Full Bench for casual employees is not inconsistent with clause 33 and therefore no confusion will arise.

33. The MBA submission also deals with the hours of work for casual and part-time employees. The MBA claim that the maximum ordinary hours are established with reference to clause 33.1[28], but then conveniently ignore the provisions of clause 33.1(a)(vii) which set a maximum of 8 ordinary hours per day for employees who do not work the RDO roster system as set out in 33.1(a)(i). The MBA claim that the existing provision satisfies s.134(1)(a) and 134(da)(i) of the *Fair Work Act 2009* but do not say how, nor why they think the Full Bench finding at paragraph [407] is wrong.

34. The MBA make a generalised statement that setting the maximum (ordinary) daily hours for part-time and casual employees at 8 hours would have the effect of delivering an outcome that is inconsistent with s.134(d),(f) and (h), but the only justification they give is some concocted reference to a "level of rigidity" and the preposterous claim that the award span of ordinary hours should be the basis of ordinary hours for casual and part-time employees.[29] The MBA would appear to have no understanding of the purpose of setting a span of ordinary hours and its historical usage. More importantly the MBA fail to provide any justification as to why the maximum ordinary hours of part-time and

[25] [2013] FWC 4576 at [115]

[26] HIA, op cit., at paragraph 3.1.4 and 3.1.5

[27] Ibid., at paragraph 3.1.8

[28] MBA, op. cit., at paragraph 41

[29] Ibid, at paragraphs 48 and 49

casual employees should be different to those for daily hire and weekly hire employees under the *Building and Construction General On-site Award 2010*.

35. As for the MBA reference to the average weekly earnings of construction employees, this should be rejected as it is not relevant to award reliant workers, as the ABS state:

> "*AWE statistics represent average gross (before tax) earnings of employees and do not relate to average award rates or to the earnings of the 'average person'*."[30]

Also the figures are based on the total construction workforce not just those employed in classifications covered by the *Building and Construction General On-site Award 2010*, as according to the ABS "*the statistics in this release are classified to industry in accordance with the Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (cat. no. 1292.0)*"[31]

36. The CFMMEU C&G therefore submits that the Full Bench decision is correct in providing for a maximum of 8 ordinary hours per day for part-time and casual employees and the provisional view should stand.

37. In regard to the issue of payment for working RDO's in emergency circumstances, the only party to make a submission on this was the MBA. Indeed no other employer party took issue with the proposed clause 33.1(e)(ii).

38. The MBA submission is confusing in that it claims that the unions interpretation of clause 33.1(e)(ii) is incorrect. Apart from the fact that the CFMMEU C&G has not advanced any interpretation of the proposed clause 33.1(e)(ii), it is hard to see how the clause could possibly be misinterpreted. The CFMMEU C&G believes that what the MBA intended to refer to was the unions interpretation of the existing clause 33.1(a)(vi).

39. The MBA also claim that any notion that "*the Commission's initial provisional view of clause 33.1 would have resulted in a loss of entitlement is also incorrect*."[32] They base this claim on a fanciful and illogical interpretation of the words "*in addition to accrued entitlements*". The MBA assert that the words "*in addition to accrued entitlements*" in the existing clause 33.1(a)(vi) are linked to their use in clause 33.1(a)(i) which refers to "*accrued entitlement to the allowances in clause 25.2 to 25.7*."

40. This farfetched claim from the MBA conveniently ignores the fact that throughout the current clause 33.1 reference is made to accrual of hours towards the RDO:

- 33.1(a)(i) - "with 0.4 of an hour on each of those days accruing towards the twentieth day"
- 33.1(a)(iii) –"may agree to accrue up to 5 rostered days off for the purpose of creating a bank"
- 33.1(a)(iv) – "will be regarded as a day worked for accrual purposes"
- 33.1(a)(v) – "will receive pro rata accrued entitlements for each day worked or regarded as having been worked in such cycle, payable for the rostered day off, or in the case of termination of employment, on termination."

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30 http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6302.0Explanatory%20Notes1May%202018?OpenDocument at paragraph 36

31 Ibid at paragraph 13

32 MBA, op cit., at paragraph 33

41. Notwithstanding the different wording of "accrued **entitlement**" and "accrued **entitlements**" in the existing clause 33.1(a)(i) and (a)(vi), the reference to accrued entitlements in 33.1(a)(vi) was not meant to refer to the allowances in clauses 25.2 to 25.7 otherwise it would have plainly said so.

42. The MBA submission demonstrates a lack of industry knowledge on the operation of the 38 hour week and the RDO system. It is nothing more than a blatant attempt to rip-off workers and reduce their award safety net. There is a clear and logical reason why the workers are also entitled to their accrued RDO entitlement when an RDO is worked as the following calculations demonstrate:

- Under the RDO system a worker takes 13 RDO's for every 52 weeks worked
- There are 260 days (Monday to Friday) in a 52 week period (ignoring public holidays and any leave taken)
- In a non-RDO arrangement 7.6 ordinary hours are worked each day. In 52 weeks a worker would be paid for 1976 ordinary hours (i.e. 260 days x 7.6 hours)
- In an RDO arrangement 8 ordinary hours are worked each day with 0.4 of an hour each day accruing towards the RDO. In a 52 week period a worker would be paid for 1976 ordinary hours (i.e. 247 days x 8 hours, with the remaining 13 days taken as RDO's paid out of the 0.4 hour RDO accrual over each of the 247 days worked)
- If a worker was required to work on each of the 13 RDO's and paid Saturday penalty rates they would receive the equivalent of 195 ordinary hours pay (i.e. 13 x 2 hours x time and a half, plus 13 x 6 hours x double time).
- Under the CFMMEU C&G interpretation of clause 33.1(a)(vi), as reflected in the Full Bench proposed clause 33.1(e)(ii), a worker who works on all the RDO's would receive 2171 ordinary hours pay in a 52 week period (i.e. 1976 hours for the 247 days of 8 hours each that are worked (which includes the RDO accrual paid out on RDO's), plus the 195 ordinary hours pay for working overtime on the 13 RDO's)
- Under the MBA proposal a worker required to work on all the RDO's would only receive 2072.2 ordinary hours pay in a 52 week period (i.e. 1877.20 hours for the 247 days worked but paid at 7.6 ordinary hours each (i.e. 8 hours **less the 0.4 RDO accrual not paid out on RDO's**), plus the 195 ordinary hours pay for working overtime on the 13 RDO's)

Under the MBA proposal, workers would potentially lose the equivalent of 98.8 ordinary hours pay each year for hours they have already worked. This is nothing more than a blatant attempt at wage theft on a grand scale.

43. The CFMMEU C&G interpretation of clause 33.1(a)(vi), and the calculation set out above, are consistent with the decision of Commissioner Ryan in *Acrow Formwork and Scaffolding Pty Ltd re Acrow Formwork and Scaffolding Pty Ltd (Hallam) Enterprise Agreement 2011-2015* ([2011] FWAA 5443) which, although dealing with the cashing out of accrued RDO's, said,

> *"[2] The Agreement contains a provision which permits employees to accrue Rostered Days Off (RDO's) in accordance with clause 33.1(a)(i) of the Building and Construction General On-Site Award 2010 (the Award).*

*[3] The Agreement also permits employees to accrue RDO's and to then cash out up to 12 RDO's in a year.*

*[4] The accrual and cashing out of RDO's raises an important issue in relation to the Better Off Overall Test.*

*[5] RDO's are intended to provide employees with the opportunity of having additional leisure time each month. The RDO provisions of the Award permit an employee to work 19 days a month at 8 hours a day instead of working 20 days at 7.6 hours a day. The accrual of RDO's does provide a real benefit to employees. The potential of accruing RDO's so as to enable an employee to take a block of 12 workdays on full pay may significantly enhance the value of RDO's to an employee. For some employees a block of RDO's may have greater value than single RDO's.*

*[6] The cashing out of RDO's provides a cash benefit to employees but in doing so the cashing out of RDO's has the effect of increasing the working time of an employee.*

*[7] A full time employee working a period of 48 weeks (with no Public Holidays) without an RDO system would work 240 days at 7.6 hours a day equalling 1824 hours.*

*[8] The same employee working an RDO system which permitted an accrual of up to 12 RDO's would have the employee work the required 1824 hours in 228 days at 8 hours per day, followed by 12 days off work and on full pay (the 12 accrued RDO's).*

*[9] Where the same employee is entitled under the terms of the Agreement to cash out the 12 accrued RDO's then in the same 48 week period the employee will have worked 240 days at 8 hours a day totalling 1920 hours. As the employee is only required to work 1824 hours then the consequence flowing from the cashing out of the 12 accrued RDO's is that the employee has worked 96 additional hours. This 96 hours is effectively overtime.*

*[10] If an employee was paid at the ordinary rate of pay for both the RDO's cashed out and the additional hours worked when the accrued RDO's were cashed out, it would appear that the employee would be in a less advantageous position than if cashing out were not permitted.*

*[11] If an employee was paid at the ordinary rate of pay for the RDO's cashed out and at the overtime rate for the additional hours worked when the accrued RDO's were cashed out it would appear that the employee would be in the same position as if cashing out were not permitted. The same applies if an employee was paid at the overtime rate of pay for the RDO's cashed out and at the ordinary time rate for the additional hours worked when the accrued RDO's were cashed out*."

44. The MBA proposed amendment to clause 33.1(e)(ii) should therefore be rejected and the revised clause set out in paragraph [412] of the Full Bench decision be included in the *Building and Construction General On-site Award 2010*.

Allowances

45. The AIG, HIA and MBA all made brief submissions on allowances. The AIG[33], HIA[34] and MBA[35] all state that they are not opposed to the quantum of the sectoral industry

[33] AIG, op cit., at paragraph 22

allowances as proposed by the Full Bench. The CFMMEU C&G in its 14th November 2018 written submission[36] substantially dealt with the issues of the sectoral industry allowances and the quantum, and continues to rely on those submissions.

46. The HIA has also taken issue with the proposed definition of residential building and construction[37] as set out in paragraph [368] of the decision. The HIA propose that the term "*single occupancy*" should be removed from the proposed definition, and that the definition of "*multi-storey building*" should be consistent with the current definition contained in clause 21.4(c) of the *Building and Construction General On-site Award 2010*.[38] The HIA proposes an alternate definition that says, "*Residential Building and Construction means the activities undertaken in clause 4.3(a) for a residential purpose*."[39]

47. As set out in its 14th November 2010 submission the CFMMEU C&G opposes having a separate industry allowance for residential building and construction and continues to rely on that submission.

48. If the Full Bench is not receptive to the CFMMEU C&G submission and decides to retain a separate industry allowance for the residential building and construction industry then the CFMMEU C&G supports the definition proposed by the Full Bench. The CFMMEU C&G opposes the alternate definition proposed by the HIA.

49. Contrary to the HIA submission the industry does understand the term single occupancy. This was confirmed by DP Gostencnik at the conference held on 19th December 2017.[40] The removal of this term, as proposed by the HIA, would open up the definition to include multi-unit/ multi townhouse commercial developments including the construction of aged care facilities. Many of these projects are constructed and project managed by large multinational companies such as Multiplex[41] and Lendlease[42]. These are hardly the small business residential companies constructing a stand-alone house in the suburbs as contemplated by the Full Bench.

50. On a similar vein the alternate definition proposed by the HIA does not include the words "*that is not a multistorey building*" opening up the application of a lesser industry allowance to projects including the building of high-rise residential unit buildings common to the major cities across Australia. There is no significant difference to the work performed in building a multistorey office block compared to building a multistorey unit building. The HIA alternate definition should therefore be rejected.

51. The CFMMEU C&G however does agree with the HIA that there should be a consistent definition of a multistorey building, and that the definitions set out in clause 21.4(c) should apply.

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[34] HIA, op cit at paragraph 2.1.9

[35] MBA, op cit., at paragraph 25

[36] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-sub-cfmmeu-141118.pdf

[37] HIA, op cit., at section 2.1

[38] Ibid at paragraph 2.1.7

[39] Ibid, at paragraph 2.1.8

[40] At PN253 of transcript

[41] https://www.multiplex.global/multiplex-completes-stage-one-of-paddington-aged-care-project/

[42] https://www.agedcareguide.com.au/talking-aged-care/lendlease-returns-to-aged-care-sector

Forepersons and Supervisors

52. The AIG and MBA have made brief submission on the restructuring of clause 43 – forepersons and Supervisors. As set out in paragraph 6 above, forepersons and supervisors in the metal and engineering sector are not generally within our interest and therefore no comment is made.