

BEFORE THE FAIR WORK COMMISSION

s.156 - FAIR WORK ACT 2009

4 YEARLY REVIEW OF MODERN AWARDS

AM 2016/23 – CONSTRUCTION AWARDS -

SUBMISSION

MASTER BUILDERS AUSTRALIA

A. INTRODUCTION

1. This submission is filed by Master Builders Australia (**'Master Builders'**) pursuant to the Directions of 25 February 2018 and in response to the submissions at paragraphs [6] – [8] of the Construction, Forestry, Mining and Energy Union (**'CFMMEU'**) dated 7 December 2018.¹
2. Master Builders makes these submissions with respect to the *Joinery and Building Trades Award 2010* (**'Joinery Award'**) and the *Building and Construction (General) On-Site Award 2010* (**'On-Site Award'**) in which Master Builders maintains an interest.

B. BACKGROUND: CFMMEU'S CLAIM – LIVING AWAY FROM HOME, DISTANT WORK

3. The CFMMEU has raised an issue with respect to its claim to vary the Living Away from Home – distant work provisions within the On-Site Award, Joinery Award and *Mobile Crane Hiring Award 2010* (**'Mobile Cranes Award'**). The claim relates to earlier submissions of the CFMMEU where it sought to replace clause 24 of the On-Site Award in its entirety and replace it with new provisions and, "save for some exclusions and minor differences", sought the same amendments be made to the Joinery and Mobile Cranes Award.²
4. Included in the CFMMEU's claim were functional amendments to the Rest and Recreation (**'R&R'**) provisions (clause 24.7(f)) of the On-Site Award.³
5. In its decision of 26 September 2018, the Full Bench largely rejected the CFMMEU's proposed amendments to clause 24.7(f). However, it noted one element of the CFMMEU's proposition as having merit:

*"The CFMEU's claim that the time spent on travel to the employee's home for the purpose of a period of R&R and the return travel to the work site should not be included in the seven-day R&R period."*⁴

6. And further:

*"To the extent that clause 24.7(f)(i) does not place a reasonable restriction on this practice, we consider that it does not constitute part of a fair and relevant safety net and does not achieve the modern awards objective".*⁵

7. The Commission determined that clause 24.7(f) of the On-Site Award should be varied to provide for the limitation that at least five full days of the prescribed period of R&R be exclusive of travel

¹ *Submission of Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) – 4 Yearly Review of Modern Awards – award stage – Group 4C awards – AM2016/23, AM2014/260, 274 and 278, 25 February 2019.*

² *Submission of Construction, Forestry, Maritime and Energy Union (Construction & General Division) – 4 Yearly Review of Modern Awards – award stage – Group 4C awards - 9 December 2016 at para [8].*

³ *Ibid at para [14]*

⁴ *[2018] FWCFB 6018 at para [155]*

⁵ *Ibid*

time, as well as to accommodate one other amendment which would remove the distinction between modes of travel (with necessary consequential variations).⁶

8. The CFMMEU has argued that the amendments to the R&R provisions within the On-Site Award, as effected by the Full Bench decision,⁷ should also be applied to the relevant provisions within the Joinery and Mobile Cranes Awards. The CFMMEU's rationale for this proposition is based on the Commission determining to make other mirror changes to the construction awards at paragraphs [143], [146] and [153] of the decision as sought by the CFMMEU.⁸

C. MASTER BUILDERS' POSITION

9. Master Builders submits that the Union's assertion should be rejected.
10. The CFMMEU's proposition is that, because elements of its claim have been successful (to amend the R&R provisions within the On-Site Award), this justifies consequential changes being made to the Joinery and Mobile Cranes Awards.
11. Master Builders submits that, where the Commission has determined in the decision to apply common changes across the various construction awards, this intention has been expressly stated.
12. The paragraphs of the decision that address the provisions the CFMMEU now contend should be amended⁹ lack direct expression of any similar intention. Master Builders submits that the reasoning for this is apparent upon reading the decision; that is, those paragraphs of the Decision wherein the Full Bench has directly expressed changes that are to be affected across multiple awards¹⁰ amend provisions which mirror (at the least in function) those of similar effect within each Award.
13. Conversely, the R&R provisions under clause 24.5 of the Joinery Award function differently to clause 24.7 of the On-Site Award in that:
 - The entitlement to be able to return home at the weekend under clause 24.5(a)(vi) only arises after 3 months continuous services and every 4 months thereafter (as opposed to initially after 2 months and each 3 months of continuous service thereafter, under clause 24.7(f)(i) of the On-Site Award); and
 - Where air travel is the only practical means of travel, in accordance with clause 24.5(a)(vii) of the Joinery Award, the employee is entitled to return home at the weekend after 5 months of continuous service (as opposed to after 4 months under clause 24.7(f)(ii) of the On-Site Award), one day of which must be paid (as opposed to 2 day's paid leave under the same provision within the On-Site Award).
14. The differences in which the current R&R provisions function within the On-Site and Joinery Awards mean that it would be impossible for the mirror provisions to be applied without giving rise to substantive and unintended changes to the Joinery Award; namely, a substantial increase in entitlements for those employees covered by the Joinery Award.

D. OTHER RELEVANT CONSIDERATIONS

15. Master Builders filed claims to amend provisions within the Joinery Award in the casual and part-time common issue matter (2014/197) to reduce the minimum hours of engagement within the Joinery Award for casual employees (from 7.6 to 4 in-line with the vast majority of modern awards). This claim was denied and the Commission held at para [868] of [2017] FWCFB 3541:

“There was no evidence before us about the extent of casual employment in the joinery industry or the purposes for which casual employees are used (if at all) or which identified any particular difficulty with the operation of clause 12.3. We therefore cannot be satisfied that clause 12.3 as it currently stands is not meeting the modern awards objective. That the minimum engagement period is higher than that in many other awards is not by itself

⁶ *Ibid* at para [156].

⁷ *Ibid*

⁸ *Submission of Construction, Forestry, Maritime and Energy Union (Construction & General Division) – 4 Yearly Review of Modern Awards – award stage – Group 4C awards - 9 December 2016 at para [8].*

⁹ [2018] FWCFB 6018 at paras [155-156].

¹⁰ [2018] FWCFB 6018 at paras [143],[146] and [153].

demonstrative of the proposition that clause 12.3 cannot legitimately form part of a fair and relevant safety net of terms and conditions. The claim is therefore rejected.”

16. Similarly, the CFMMEU has not demonstrated that such a change is necessary. Indeed, they have noted previously¹¹ that:

- The Living Away from Home provisions within the Joinery Award provide for different entitlements and have done so since award modernisation; and
- The rates of Joinery Workers living away from home are minimal.

E. CONCLUSION

17. Master Builders submits that there are substantive differences in how the R&R provisions function within the On-Site and Joinery Award and therefore it cannot be assumed that the amendments as determined by the Commission to clause 24.7(f) of the On-Site Award should be applied to clauses 24.5(a)(vi) and (vii) of the Joinery Award on the basis that:

- The R&R provisions are enlivened in different circumstances (i.e. after longer lengths of continuous service) under the Joinery Award;
- The R&R provisions only provide for one day’s paid leave (as opposed to initially 2 days, under clause 24(f)(ii) of the On-Site Award);
- In circumstances where the Commission has resolved to make mirror changes across the construction awards it has clearly expressed this as its intention; and
- If applied to the Joinery Award, the amendments would change its construction which is beyond the scope of the Commission’s intention as expressed within the decision.¹²

MASTER BUILDERS AUSTRALIA

11 MARCH 2019

¹¹ *Submission of Construction, Forestry, Maritime and Energy Union (Construction & General Division) – 4 Yearly Review of Modern Awards – award stage – Group 4C awards - 9 December 2016 at para [155].*

¹² [2018] FWCFB 6018 at paras [155].