

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/260 Building and Construction General On-site Award
2010 and AM2016/23 Construction Awards



Submission of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The AMWU makes the following submission in accordance with the Directions of the Full Bench issued on 8 November 2018.¹

Background

2. On 26 September 2018 the Fair Work Commission Construction Award Full Bench issued a Decision (4 Yearly Review of Modern Awards – Construction Awards [2018] FWCFB 6019 **(the Decision)**.
3. On 14 November 2018 various industry parties, including the AMWU, made submissions in response to the Decision.
4. This reply submission of 28 November 2018 will respond to the submissions of the following organisations:
 - The Australian Business Industrial and the New South Wales Business Chamber **(ABI)**.
 - The Housing Industry Association **(HIA)**
 - Master Builders Australia **(MBA)**.
 - The Australian Industry Group **(AiG)**

Response to ABI Submission

Testers of Soil, Aggregate and Concrete

5. At paragraph [244] of the Decision, the Full Bench invited comment from the parties as to whether 10.4(b)(v) should be removed, or alternatively, whether a variation should be made to the classification structure to provide a minimum rate of pay.
6. The AMWU submitted that a new classification should be inserted and provided a draft determination in support.²
7. The ABI have submitted that the Building Award should not be varied to provide

¹ [Directions of 8 November 2018 in AM2016/23](#).

² [AMWU Submission of 14 November 2018](#) Appendix A.

a minimum rate of pay for employees covered by 10.4(b)(v) and that further 10.4(b)(v) should be deleted.³

8. The ABI submission states that removing 4.10(b)(v) would cause “*the issue of award coverage to be settled.*”⁴ This is curious because earlier in their submission, ABI state that the issue of coverage is already settled by the Coffey Decision.⁵
9. In fact, *Coffey* did not settle the issue of award coverage. As the Full Bench makes clear at [242]:

*“It can be seen that a critical aspect of the Full Bench’s reasoning in support of the conclusion that the classifications in the Manufacturing Award were more appropriate than those in the Building Award was that the latter award did not contain any classification that specifically mentioned laboratory or testing work.”*⁶

10. In this context, clause 4.10(b)(v) should not be removed purely because the ABI (and other employer interests) express a preference for the testers of soil, aggregate and concrete be covered by the occupational coverage of the Manufacturing Award rather than the Building Award.
11. The ABI submission further argues that a variation (such as that proposed by the AMWU in 14 November Submission) would cause:

“Confusion as to whether employees undertaking testing work are covered by the Building Award or the Manufacturing Award, with this issue already settled by the Coffey Decision.

Increased complexity for workplaces to determine correct award coverage Award Coverage for employees undertaking testing work being complex, difficult to understand and unstable.

Unnecessary overlap of modern awards

³ [Submission of Australian Business Industrial and the New South Wales Business Chamber Ltd 14 November 2018.](#)

⁴ Ibid (at page 2).

⁵ Ibid (at Page 1).

⁶ 4 Yearly Review of Modern Awards – Construction Awards [2018] FWCFB 6019 [242].

An increased regulatory burden placed on businesses.”⁷

12. In response to this submission, the AMWU relies on its submissions of 14 November 2018, and further submits that:

- contrary to the ABI submission, no such confusion would ensue if the Building Award were to be varied to include a minimum rate of pay for employees covered by clause 10.4(b)(v) such as proposed by the AMWU.
- This is so, because the interaction rules that govern the interaction between the coverage of the Manufacturing Award and the coverage of the Building Award would still apply.
- The AMWU’s proposed variation would make the award easier to understand and apply for both employers and employees, because it will provide for a classification which clearly is applicable to employees performing testing work on-site.
- There is no unnecessary overlap of modern awards, because employees performing testing work on a construction site are more properly covered under the industry coverage of the building award than under the occupational coverage provided in the Manufacturing Award.
- The ABI have not adduced any evidence in support; nor extrapolated on their claim that the proposed variation would provide for an increased regulatory burden for business.

Response to HIA Submission

Allowances

13. In response to the Full Bench’s provisional Decision to rationalize 52 allowances into two, the HIA have submitted that they support the provisional view, but that the term ‘single occupancy’ should not be part of a proposed definition of the residential building and construction sector for the purposes of defining the

⁷ [Submission of Australian Business Industrial and the New South Wales Business Chamber Ltd 14 November 2018.](#)

proposed allowances.⁸

14. The AMWU's position with respect to allowances is as previously outlined in our submission of 14 November 2018. Simply put the AMWU opposes the rationalization of the allowances into two allowances of 4% for residential and 5% for all other construction work, further submits that the CFMMEU proposal⁹ represents the minimum of what a rolled-up rate should provide for.
15. The AMWU otherwise relies on its submissions of 14 November 2018 and supports the submissions of the CFMMEU.

Ordinary Hours of Work

16. At paragraph [407] of the Decision, the Full Bench states:

*"clause 33 in its current form does not provide for any maximum number of daily ordinary hours for casual employees (after which overtime penalty rates would be payable). Nor does it do so for part-time employees. In this respect also, the clause is not a fair and relevant standard, having regard in particular to the needs of the low paid (s.134(1)(a)) and the need to provide additional remuneration for employees working overtime (s.134(1)(da)(i) of the Act)."*¹⁰

17. At [412] a proposed new clause 33.1 is provided, which, amongst other matters, expressly provides that the hours of work of a casual employee are a daily maximum of eight hours.¹¹
18. In response, to the proposed new clause 33.1 the HIA submit that they are "concerned that establishing that the ordinary hours of work for a casual must not exceed 8 hours per day has the potential to cause confusion in light of the decision in Master Builders Australia, and the current operation of clause 33."¹²
19. Contrary to the submission of the HIA, the AMWU submits that the current operation of clause 33.1 is such that it limits the daily maximum number of

⁸ [Submission of Housing Industry Association of 14 November](#) [2.1.2-2.1.9].

⁹ [Submission of the Construction, Forestry, Mining, Maritime and Energy Union 14 November 2018 Appendix 1.](#)

¹⁰ 4 yearly review of modern awards – Construction Awards [2018] FWCFB 6019 [407].

¹¹ Ibid [412].

¹² [Submission of Housing Industry Association of 14 November](#) [3.1.9].

ordinary hours for casuals at eight. This is so because the clause, read as a whole, provides for a maximum of eight ordinary hours per day and there is otherwise nothing in clause 33.1 which excludes casual employees from the operation of that maximum.

20. The AMWU supports the Commission's proposed variation to clause 33.1 on the basis that by confirming that the daily ordinary hours of work for a casual are a maximum of eight, it correctly and expressly confirms the existing operation of the clause.

Response to MBA Submission

Testing of Soil, Aggregate and Concrete

21. The MBA submit that clause 4.10(b)(v) should be removed on the basis that they have not been able to find a member who engages employees under that clause, and that work of that nature is usually undertaken off site.¹³
22. The AMWU in response submits that this does not establish that clause 4.10(b)(v) should be removed.
23. The AMWU otherwise repeats its submissions made at [5]-[12] made in response to the submissions of ABI.

Allowances

24. The MBA submits that it is "not opposed to the quantum of the proposed sectoral allowances."
25. There is nothing for the AMWU to say in response to this, other than that the AMWU continues to rely on, and press, our submission of 14 November 2018 and support the submissions of the CFFMEU in this matter.

Ordinary Hours of Work

26. Similarly to the HIA, the MBA also appear to oppose the proposed variation to clause 33.1. The MBA submit that the reference to eight hours in the existing clause 33.1 only exists in the context of RDO arrangements, and that therefore it

¹³ [Submission of Master Builders Australia of 14 November 2018](#) [8].

cannot apply to casuals.¹⁴

27. The AMWU does not agree with this reasoning, and in any case, the restriction to eight ordinary hours per day is limited to an RDO arrangement. The restriction applies equally where an RDO system is not maintained.¹⁵

28. The AMWU otherwise repeats its submissions at [16] to [20] made in response to the HIA.

Forepersons and Supervisors

29. At paragraphs [53] to [59] MBA respond to the provisional view of the Full Bench that it is necessary to restructure and simplify clause 43.2 so that the clause does no more than set properly fixed minimum rates.¹⁶

30. The MBA urge the Commission to have regard to the history of clause 43.2 and in particular the approach reflected in clause 43.2(b).¹⁷

31. The AMWU agrees that Commission should be informed by the historical context of awards when making decisions. Such an approach is entirely appropriate, and indeed the AMWU has previously made extensive submissions on the historical background of clause 43.2 of the current Building Award.¹⁸

32. However, to the extent that the MBA submission is advocating for a retention of offsetting and employees being excluded from award benefits such as overtime penalties, the AMWU opposes that submission.

33. There is little more to be said about the MBA submission given it does not articulate a clear proposal to resolve the issues affecting clause 43.2.

Response to AiG Submission

Testing of Soil, Aggregate and Concrete

34. The AiG submit that 10.4(b)(v) should be removed. No reason is provided to support this position other than that a variation to the classification structure of

¹⁴ [Submission of Master Builders Australia of 14 November 2018](#) [45].

¹⁵ Building and Construction General On-Site Award 2010 Clause 33.1(a)(vii).

¹⁶ 4 yearly review of modern awards – Construction Awards [2018] FWCFB 6019 [451].

¹⁷ [Submission of Master Builders Australia of 14 November 2018](#) [59].

¹⁸ [Submission of the AMWU of 9 December 2016](#).

the Building Award would “create confusion.”¹⁹

35. The AMWU rejects this submission for the reasons articulated in paragraphs [5] to [12] of this submission responding to the submissions of ABI.

Allowances

36. The AiG submit that they are not opposed to the quantum of the proposed allowances.²⁰
37. There is nothing for the AMWU to say in response to this, other than that the AMWU continues to rely on and press, our submission of 14 November 2018 and support the submissions of the CFMMEU in this matter.

Ordinary Hours of Work

38. The AiG also oppose a variation to the Building Award to clarify the maximum daily ordinary hours of casual employees.²¹
39. The AiG further state that:

“if the Commission is minded to impose maximum ordinary hours of work for casual employees, the maximum daily hours should be structured to meet the requirements of the span of hours between 7.00am and 6.00pm on Monday to Friday. This would mean that the maximum daily ordinary hours a casual employee could be rostered to work would be 11 hours.”²²

40. This proposal is totally absurd. The span of hours operates to enforce a permissible time period where ordinary hours may be worked. A cap on daily ordinary hours is an entirely different matter, and the Ai Group have not provided any cogent reasons as to why casuals should be allowed to work an unlimited number of ordinary hours within the spread, when the daily ordinary hours for all other employees are a maximum of eight per day.
41. Such a proposal is totally at odds with the concept of a fair and relevant safety

¹⁹ [Submission of the Australian Industry Group of 14 November 2018](#) [9].

²⁰ Ibid [22].

²¹ Ibid [23].

²² Ibid [31].

net.

42. The AMWU otherwise repeats its submissions in paragraphs [16] to [20] and [26]-[28] made in response to the submissions of the HIA and the MBA.

Forepersons and Supervisors

43. At [451] of the Decision, the Full Bench propose to restructure clause 43.2 (which deals with the wages of forepersons and supervisors in the metal and engineering sector) so as ensure that the clause “*does no more than set properly fixed minimum rates.*”²³
44. The AiG have indicated their opposition to the proposal of the Bench to restructure clause 43.²⁴ Instead, the AiG further suggests an amendment to clause 43.2 to insert the words “minimum” and “award” so that the clause provides:

Foreperson/supervisor

*“The average of the weekly **minimum** wage rates for 38 ordinary hours of work, including **award** payments applicable from time to time to the tradespersons (excluding leading hands) supervised by a foreperson/supervisor plus \$148.16, or \$899.30, whichever is the greater.”*

*The average of the weekly **minimum** wage rates for 38 ordinary hours of work, including **award** payments applicable from time to time to the adult employees (excluding leading hands) plus \$113.70, or \$974.90, whichever is the greater, provided that where only juniors and/or apprentices are supervised, the minimum wage rate to be paid is \$974.90 per week.*

General foreperson/supervisor

*The highest **minimum** weekly wage rate paid for 38 ordinary hours of work to a foreperson/supervisor supervised by a general foreperson/supervisor plus \$151.04, or \$875.00, whichever is the greater.*

*The highest **minimum** weekly wage rate paid for 38 ordinary hours of work*

²³ 4 yearly review of modern awards – Construction Awards [2018] FWCFB 6019 [451].

²⁴ [Submission of the Australian Industry Group of 14 November 2018](#) [32].

*to a foreperson/supervisor supervised by a general foreperson/supervisor plus \$113.70, or \$954.30, whichever is the greater.*²⁵

45. Respectfully, the AiG proposal does little to engage with the observations of the Full Bench. Relevantly, the Full Bench found at [450] that clause 43:

*“as it stands does not meet the modern award objective at least because it fails to set a simple and easy to understand standard for compliance.”*²⁶

46. The Full Bench also found that:

*“It is difficult to identify what offsetting advantage such employees receive under the clause to justify the loss of these entitlements, since presumably the additional remuneration referred to in clause 43.2(a) is to take account of the additional work value involved in supervisory duties rather than to “buy out” the benefits specified in clause 43.2(b).”*²⁷

47. The AiG proposal largely maintains the status quo, which has already been found by the Full Bench to “fail to set a simple and easy to understand standard for compliance.”²⁸

48. Furthermore, the Ai Group proposal purports to maintain the system of offsetting, with employees under this clause will continue to be excluded from overtime payments and other award benefits. The Ai Group have further submitted that it is essential that clause 43.5 remains and that the purpose of clause 43.5 is to ensure that:

*“forepersons and supervisors are not disadvantaged in an **overall sense** when compared to other employees covered by the building award.”*²⁹

49. This submission appears to infer that some level of disadvantage is contemplated, which is not appropriate for a modern award.

50. Furthermore, it is difficult to see how AiG’s submission and proposed amendments to 43.2 remedy the deficiencies of that clause considering that their

²⁵ Ibid [34].

²⁶ 4 yearly review of modern awards – Construction Awards [2018] FWCFB 6019 [450].

²⁷ Ibid [449].

²⁸ Ibid [450].

²⁹ [Submission of the Australian Industry Group of 14 November 2018](#) [33].

proposal appears to:

- Maintain a complex method of calculating the wages of forepersons and supervisors;
- Purport to provide for offsetting and excludes award payments such as overtime penalties; and
- Not provide for properly fixed minimum rates.

51. At the very least, the Ai Group proposal still does more than “*set properly fixed minimum rates*” which contrary to what the AMWU understood to be the purpose of the proposed restructure of 43.2. The Ai Group proposal should not be entertained on that basis alone.

52. The AMWU instead submits that clause 43.2 should be restructured as per our previous submission of 14 of November.³⁰

END

28 November 2018

³⁰ [Submission of the Australian Manufacturing Workers' Union 14 November 2018](#) [42].