

# CFMEU

## CONSTRUCTION

### IN THE FAIR WORK COMMISSION

**Matter Number:** AM2019/17

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards—*Construction Awards***  
**(AM2019/17)**

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**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) IN RESPONSE TO HIA AND MBA SUBMISSIONS ON DRAFT VARIATION DETERMINATIONS**

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28<sup>th</sup> October 2020

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1. On 7<sup>th</sup> October 2020 the Full Bench issued a Statement ([2020] FWCFB 5353) concerning the finalisation of the exposure drafts and variation determinations for the group of awards collectively referred to as the Construction Awards. In the Statement the Full Bench directed parties to comment on the contents of the draft variation determinations by 4pm Thursday, 22<sup>nd</sup> October 2020.
2. Draft determinations for the Construction Awards were issued on 8<sup>th</sup> October 2020. The CFMMEU (Construction and General Division) (CFMMEU C&G) filed a brief submission on 22<sup>nd</sup> October 2020 which identified minor grammatical or drafting errors. Similar submissions were made by the Australian Business Industrial and NSW Business Chamber Ltd,<sup>1</sup> AIG<sup>2</sup>, AMWU,<sup>3</sup> and AWU<sup>4</sup>.
3. On the 26<sup>th</sup> October 2020 the HIA filed a submission<sup>5</sup> in response to the Statement and it would appear the undated MBA submission<sup>6</sup> was filed on 27<sup>th</sup> October 2020. Both the HIA and MBA submissions are different to those made by the other parties in that they both deal with more than minor grammatical or drafting errors. The HIA and MBA submissions also seek substantial changes to award clauses determined and varied by the 5-member Construction Awards Full Bench.
4. The HIA and MBA both seek changes to clause 26.4 - Distant work payment, and the MBA seek a change to clause 16.11 - Other conditions for working ordinary hours, in the *Building and Construction General On-site Award 2010*. The proposed changes would substantially affect the entitlements of workers already determined by the Construction Awards Full Bench and which have been in force since 1<sup>st</sup> July 2020.
5. The CFMMEU C&G makes this brief submission in opposition to what the HIA and MBA seek in regard to those two clauses, and submits that the parts of the HIA and MBA submissions that deal with these matters are an abuse of process and should be disregarded by this Full Bench tasked with finalising the exposure drafts and variation determinations.

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<sup>1</sup><https://www.fwc.gov.au/sites/awardsmodernfouryr/am201917-260-274-280-sub-abinswbc-221020.pdf>

<sup>2</sup><https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-sub-aig-271020.pdf>

<sup>3</sup><https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-sub-amwu-261020.pdf>

<sup>4</sup><https://www.fwc.gov.au/sites/awardsmodernfouryr/am201917-260-sub-awu-221020.pdf>

<sup>5</sup><https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-20-29-sub-hia-261020.pdf>

<sup>6</sup><https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201917-sub-mba-271020.pdf>

6. Clause 26 - Travelling time entitlements, was determined by the Construction Awards Full Bench in its September 2018 Decision<sup>7</sup> and largely reflected the clause sought by the HIA. It should be noted that the whole clause was replaced by that decision. The Construction Awards Full Bench also published a draft variation<sup>8</sup> dealing with this clause on 23<sup>rd</sup> November 2018 and, by directions also issued on 23<sup>rd</sup> November 2018<sup>9</sup>, invited parties to comment.
7. The Construction Awards Full Bench came to a provisional view on replacing the whole of the ordinary hours of work clause in its August 2017 Statement<sup>10</sup>. In the September 2018 Decision<sup>11</sup> the Full Bench made further changes to its proposed clause and gave the parties 28 days to make comment.
8. In the December 2019 Decision<sup>12</sup> the Construction Awards Full Bench considered the submissions that had been made and decided to “*issue a single variation determination for each award which incorporates all the variations arising from the September 2018 Decision, the October 2019 Decision and this decision. Each determination will have an operative date of 1 July 2020.*”<sup>13</sup> The determination varying both of the clauses that the HIA and MBA now seek to change was published on 20<sup>th</sup> March 2020 and came into operation on 1<sup>st</sup> July 2020.<sup>14</sup>
9. Given the level of scrutiny by all the parties, including the MBA and HIA, on the proposed variations to the clauses contained in the *Building and Construction General On-site Award 2010*, all parties were fully aware of the consequences of the clauses decided on by the Full Bench at the time the decisions were made. Moreover, the Construction Awards Full Bench gave ample opportunity to parties to comment on the draft determinations arising from its decisions. The MBA and HIA decided not to make any submissions on the specific issues that they now raise.
10. The Construction Awards Full Bench decisions resulted in changes that were in a number of cases either beneficial or detrimental to employees or employers. Some of the changes made by the Construction Awards Full Bench which were detrimental to employees were the

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<sup>7</sup> [2018] FWCFB 6019

<sup>8</sup> See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-260-draftdet-231118.pdf> and

<sup>9</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201623-dirs-231118.pdf>

<sup>10</sup> <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb4239.htm>

<sup>11</sup> <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb6019.htm>

<sup>12</sup> [2019] FWCFB 8564

<sup>13</sup> *Ibid* at paragraph [97]

<sup>14</sup> <https://www.fwc.gov.au/documents/awardsandorders/html/pr715725.htm>

removal of the fares allowance on RDO's and removal of the fixed industry RDO each month. The Construction Awards Full Bench was therefore not re-writing clauses to maintain the status quo but deciding on new award entitlements. The new award clauses decided on by the Construction Awards Full Bench have replaced in totality the old clauses.

11. What the HIA and MBA now seek is for another Full Bench to overturn parts of the decision of the 5-member Constructions Awards Full Bench which they do not like. As the matters have already been determined, the award clauses as varied by the Construction Awards Full Bench should stand. If the MBA and HIA seek to make further changes to the award, outside of the 4 yearly review, then they should be required to make an application to vary the award in accordance with the requirements of the FW Act.

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