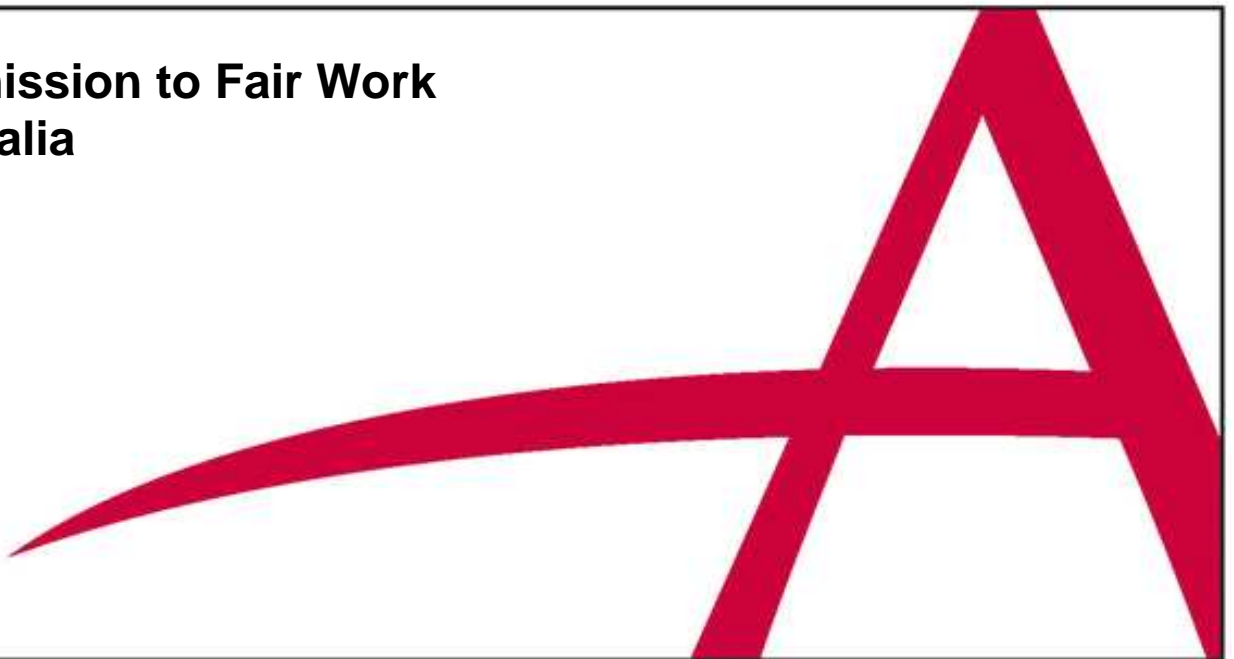


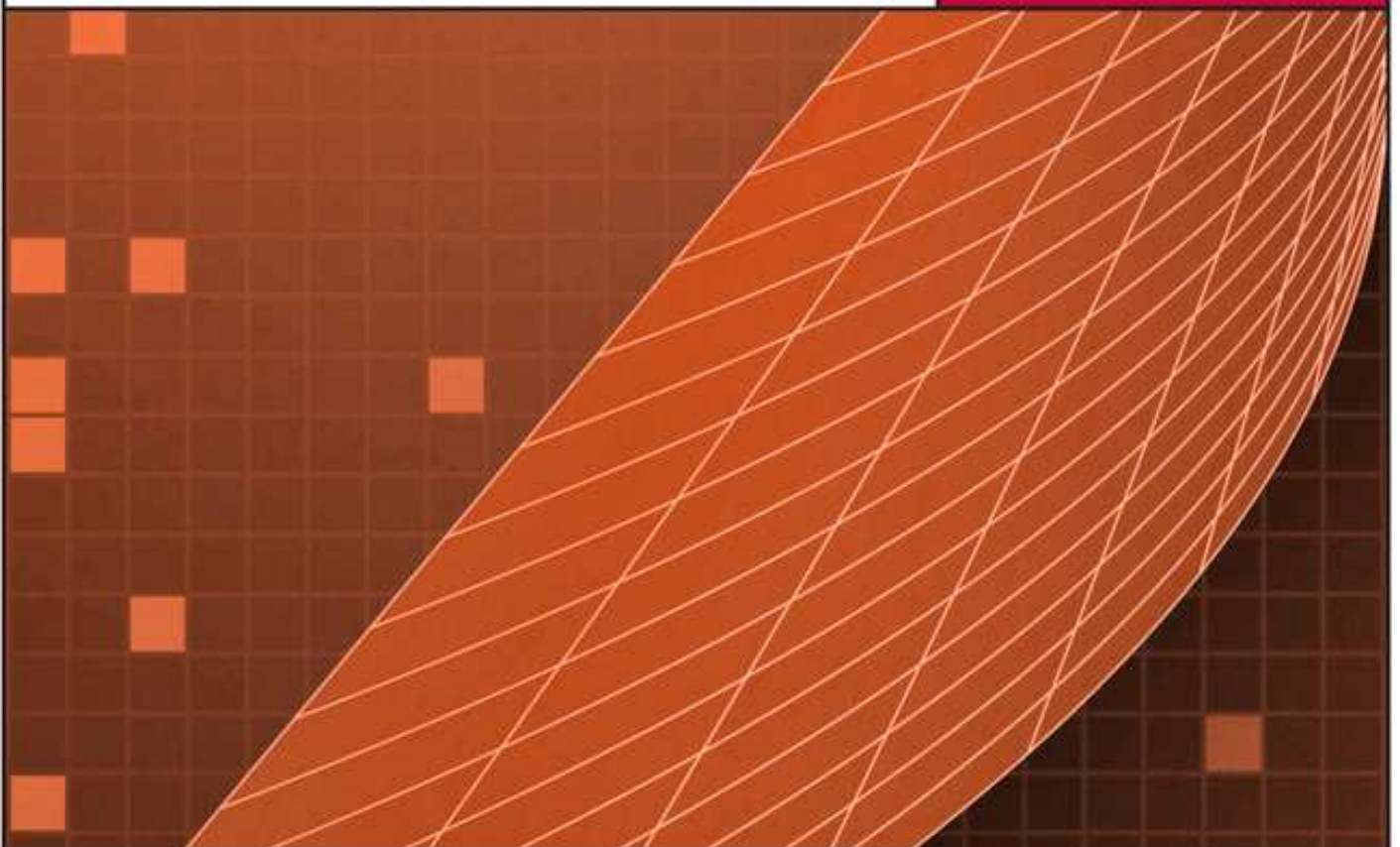
**Submission to Fair Work
Australia**



**AM2010/125 – APPLICATION BY THE CONSTRUCTION,
FORESTRY, MINING AND ENERGY UNION (CFMEU) TO VARY THE
*MOBILE CRANE HIRING AWARD 2010***

 **AUSTRALIAN INDUSTRY GROUP**

23 September 2010



1. INTRODUCTION AND CONTEXT TO SUBMISSION

1. The Australian Industry Group (“**Ai Group**”) opposes the application filed by the Construction, Forestry, Mining and Energy Union (“**CFMEU**”) with Fair Work Australia (the “**Application**”) on 15 July 2010 to vary the *Mobile Crane Hiring Award 2010* [MA000032] (the “**Award**”).
2. In its application the CFMEU seeks to vary the Award in two respects:
 - (a) to insert a new subclause – proposed subclause 9.7 – to provide employees to whom the Award applies with an entitlement to “Dispute Resolution Procedure Training Leave”; and
 - (b) to vary subclause 13.2 in relation to the method of calculation of the “all purpose industry allowance”.
3. Ai Group, which has numerous members in the mobile crane hiring industry, opposes the Application on the basis that:
 - (a) in respect of proposed clause 9.7:
 - the Award does not contain an “error”;
 - the CFMEU has failed to establish that the variation would otherwise be necessary in order to achieve the modern awards objective; and
 - in the circumstances, allowing the variation would lead to a re-opening of the Award content and lead to unfairness for employers.
 - (b) in respect of proposed new clause 13.2:
 - the variation sought is itself ambiguous.

4. Ai Group further submits that in the event Fair Work Australia is inclined to make a determination allowing either or both variations, it would not be appropriate for such variation(s) to operate retrospectively.
5. Further detail in relation to Ai Group's position with respect to the Application is set out below.

2. CONSIDERATION OF STATUTORY PROVISIONS RELEVANT TO APPLICATION

6. At the outset, it is noted that the Application appeared to seek a variation to the Award for the purpose of removing a perceived ambiguity or uncertainty, or to correct a perceived error, pursuant to section 160 of the *Fair Work Act 2009* (Cth) ("**Act**"). Section 160 of the Act provides:

**Section 160 Variation of Modern Award to Remove Ambiguity or
Uncertainty or Correct Error**

160(1) *FWA may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.*

160(2) *FWA may make the determination:*

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by a modern award.

7. However, the Written Submissions of the CFMEU in Support of the Application dated 9 September 2010 ("**CFMEU Submissions**") then identify the Application as being made pursuant to section 158 of the Act, although at [12] proceed in reliance on section 160 of the Act.
8. Section 158 of the Act concerns applications under section 157 of the Act. Section 157 of the Act deals with variation of modern awards if necessary to achieve the modern awards objective, as follows:

Section 157 FWA may vary etc. modern awards if necessary to achieve modern awards objective

157(1) FWA may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

157(2) FWA may make a determination varying modern award minimum wages if FWA is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and
- (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As FWA is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

157(3) FWA may make a determination or modern award under this section:

- (a) on its own initiative; or
- (b) on application under section 158.

9. For this reason, Ai Group's submission addresses the Application having regard to the requirements of both Section 157(1) and 160(1) of the Act.

3. DISPUTE RESOLUTION PROCEDURE TRAINING LEAVE

10. The CFMEU relies on the decision of the Full Bench in AM2009/162 *Application by Master Builders Australia Ltd to vary the Building and Construction General On-site Award 2010 [2009] AIRCFB 989* (“**AM2009/162**”) in support of the inclusion of a provision dealing with Dispute Resolution Procedure Training Leave in the Award. AM2009/162 concerned an application by Master Builders Australia Ltd (“**MBA**”) to delete the dispute resolution training leave clause in the *Building and Construction General On-site Award 2010* (“**BCGOS Award**”). The Full Bench were not persuaded to remove the provision from the BCGOS Award for the reasons that:
- (a) it was included in the BCGOS Award on the basis that it reflected the terms of the *National Building and Construction Industry Award 2000*; and
 - (b) had been amended appropriately for inclusion in the BCGOS Award¹.
11. Ai Group submits that AM2009/162 can be distinguished from the present Application in a number of key respects.

Dispute Resolution has already been considered by the Full Bench

12. Firstly, AM2009/162 was an application to remove a clause dealing with dispute resolution training leave in circumstances where it had been deliberately included in the BCGOS Award by the Full Bench. In particular, in the Full Bench’s Decision regarding Stage Two of the Award Modernisation Process² (“**Stage Two Decision**”) it was stated with respect to dispute resolution training leave in the BCGOS Award:

*We have added a dispute resolution procedure training leave provision, on the basis that it is a prevailing industry standard.*³

13. In comparison, Ai Group submits that the clause in the Award dealing with dispute resolution:
- (a) was the subject of consideration by the Full Bench; and
 - (b) following consideration, the Full Bench omitted dispute resolution procedure training leave.
14. Specifically, during the initial phases of Stage Two of the award modernisation process (within which the mobile crane hiring industry was dealt), the CFMEU and Ai Group, in conjunction with the Crane Industry Council of Australia (“CICA”) put forward two separate versions of draft modern awards for the mobile crane hiring industry.
15. The draft modern award prepared by the CFMEU was submitted on 20 January 2009 and contained the following clause (as sub-clause 9.9):
- 9.9** *Each duly appointed union representative shall be granted up to five days paid leave per year to undertake training that will assist them in their settlement of disputes role. The time of taking such leave shall be agreed with the union so as to minimise any adverse affect on the employers' operations.*
16. The draft modern award prepared by Ai Group / CICA was submitted on 21 January 2009 and inserted the model dispute resolution procedure clause adopted by the Australian Industrial Relations Commission (excluding dispute resolution training leave). It is clear from the submission subsequently filed by Ai Group / CICA in relation to the draft modern award for the mobile crane hiring industry that it had adopted the view that the former disputes procedure clause contained in the *Mobile Crane Hiring Award 2002* ought to be deleted and replaced with the Commission’s standard clause⁴.

17. In the Stage Two Decision, the Commission stated (at [115]):

“We have utilised the dispute resolution clause which appears in modern awards generally in place of the clause from the Mobile Crane Hiring Award...”.

18. On the basis of the above, it would appear that the Full Bench had specifically considered the issue of the appropriate dispute resolution clause to be included in the Award, and adopted an approach consistent with that advanced by Ai Group / CICA. Ai Group submits that, in the circumstances, this does not amount to an error or omission by the Commission for the purpose of section 160 of the Act.

19. In any event, for the inclusion of Dispute Resolution Procedure Training Leave in the Award during the Stage Two proceedings to have been consistent with the Full Bench’s position on Dispute Resolution Procedure Training Leave, it would have been necessary that the entitlement be established as a prevailing industry standard⁵.

20. During Stage Two of the Award Modernisation Process the CFMEU did not put forward any information in support of trade union training leave being a prevailing industry standard.

21. The CFMEU Submissions also do not address this issue, other than to identify that trade union training leave was contained in the *Mobile Crane Hiring Award 2002*.

22. Further, Ai Group submits that the fact that Dispute Resolution Procedure Training Leave appears in the BCGOS Award should not be determinative of the question of whether such leave is a “prevailing industry standard”, simply because mobile cranes are utilised in the building and construction industry. As was outlined in extensive submissions made by Ai Group / CICA in Stage Two of the Award Modernisation process⁶, mobile crane hiring operators also undertake work in a myriad of other industries, and should itself be considered

a separate industry and not simply a sub-set of the building and construction industry.

23. It is also noted that many other modern awards do not include an entitlement to Dispute Resolution Procedure Training Leave, and the entitlement should not be accepted as a universal or necessary feature of modern awards.
24. The absence of evidence before the Full Bench during the Stage Two negotiations of Dispute Resolution Procedure Training Leave being a “prevailing industry standard” does not constitute an “error” in the Award that should properly form the basis of an application to vary pursuant to section 160 of the Act.
25. In so far as the issue of Dispute Resolution Procedure Training may have been overlooked by the CFMEU during the Stage Two award modernisation proceedings, the Commission published modern awards following a timetabled process whereby interested parties (including the CFMEU) had the opportunity to make extensive written submissions and participate in public consultation before the Commission. The CFMEU was an active participant in that process. To now “re-open” the issue of Dispute Resolution Procedure Training Leave would cause prejudice to other parties, in circumstances where the issue was considered by the Full Bench and further, where employers, faced with major compliance and implementation tasks involving modern awards, would need to undertake additional compliance activities.
26. Given that there were numerous prior opportunities for the CFMEU to make submissions during the award modernisation proceedings, Ai Group submits there are no exceptional circumstances to warrant the variation under section 157 of the Act, and nor does the failure of the CFMEU to advance this issue during the Stage Two award modernisation proceedings amount to an error in the Award for the purpose of section 160 of the Act.

Application is made under a different legislative scheme

27. The second key respect in which AM2009/162 can be distinguished from the present Application is that AM2009/162 concerned an application to vary the BCGOS Award pursuant to section 576H of the *Workplace Relations Act 1996* (Cth) (“**WR Act**”). Section 576H of the WR Act provided:

Section 576H Commission may Vary Modern Awards

The Commission may make an order varying a modern award if the variation is consistent with the award modernisation request to which the modern award relates.

28. It is noted that the CFMEU Submission relies (at Ground 5) on an assertion that the Application is consistent with the Award Modernisation Request made by the Minister for Employment and Workplace Relations as amended on 26 August 2009.
29. The provisions of the WR Act allowing for variation of modern awards have now been superseded by the regime for variation of modern awards contained in Division 5 of Part 2-3 of the Act. Accordingly, Ground 5 of the CFMEU Submission is not directly relevant to the determination of the present Application.
30. In so far as the Award Modernisation Request may have any bearing on the question of whether the making of the Award so as to exclude Dispute Resolution Procedure Training Leave amounts to an “error” for the purpose of section 160 of the Act, it is submitted that this is not the case. Existing Clause 9 of the Award is consistent with paragraph 11A of the Award Modernisation Request (consolidated to 9 November 2009), which deals with dispute settlement processes in modern awards, and relevantly states:

11A *The Commission should ensure that each modern award includes a clause that sets out a process or process to ensure the settlement of disputes in relation to matters arising under the award. The Commission should ensure*

the process or processes are suitable for the settling of disputes in relation to matters arising under the NES for employees to whom awards apply. In drafting this clause the Commission may have regard to any method of dispute resolution that it considers appropriate.

31. Under Division 5 of Part 2-3 of the Act, in order to succeed it must be demonstrated that either:
 - (a) if the variation is made pursuant to section 157(1) of the Act, that the variation sought is necessary to achieve the modern awards objective; or
 - (b) if the variation is made pursuant to section 160(1) of the Act, that there exists an ambiguity or uncertainty in the Award, or an error to be corrected.

32. Fair Work Australia's consideration of section 157(1) of the Act to date supports the conclusion that the requirement that a variation is necessary to meet the modern award objective involves more than a finding that it is consistent with the objective; it must be established that the objective is not able to be achieved unless the variation is made⁷.

33. Section 134(2) of the Act makes it clear that even though section 160 of the Act concerns the correction of ambiguity, uncertainty, or error in a modern award, the modern awards objective still applies to the exercise of Fair Work Australia's modern award powers under Part 2-3 of the Act.

34. It is submitted that the CFMEU has failed to either establish that the variation is necessary to achieve the modern awards objective, or is consistent with the modern awards objective.

Any variation should not operate retrospectively

35. In the event Fair Work Australia is inclined to make a determination allowing the variation concerning Dispute Resolution Procedure Training Leave, Ai Group submits that the variation should not operate until 1 January 2011. The reasons for this are:
- (a) proposed clause 9.7 provides for five paid days' leave *per year*. As the Application is not set down for hearing until 11 October 2010, in the event clause 9.7 were to operate from the date of the Determination, it would be open to employees to seek to take this entitlement during 2010. In the absence of this provision having been a part of the Award throughout the earlier parts of 2010, employers would only have around 11 weeks to accommodate the annual training requirement as opposed to 12 months. It is submitted that this would constitute a significant hardship on employers; and
 - (b) the CFMEU has not established that there exist exceptional circumstances for the making of a retrospective variation pursuant to section 165(2) of the Act.

4. INDUSTRY ALLOWANCE

36. Ai Group acknowledges the CFMEU Submissions outlined at [7] – [10] inclusive may form a basis on which it is open to Fair Work Australia to determine the Award contains an error in respect of the calculation of industry allowance.
37. However, Ai Group objects to the form of variation sought by the CFMEU to address this issue, and submits that the proposed amendment sought by the CFMEU outlined at 3(2) of the Application, namely that clause 13.2 be deleted and in its place inserted the following:

13.2.1 *All employees will be paid an all-purpose industry allowance of 5.7% of the standard rate per week (ie. 5.7% of the standard hourly rate multiplied by 38) in addition to the minimum classification rates set out in clause 13.*

is ambiguous.

38. Ai Group submits that the Award could instead be more clearly varied in any of the following ways:

(a) by deleting clause 13.2 and replacing it with the following:

13.2.1 *All employees will be paid an all-purpose industry allowance per week, calculated as follows:*

5.7% x (standard rate x 38) in addition to the minimum classification rates set out in clause 13.

or, in the alternative

(b) by:

(i) deleting clause 13.2 and replacing it with the following:

13.2 *All employees will be paid an all-purpose industry allowance of 5.7% of the standard weekly rate per week in addition to the minimum classification rates set out in clause 13.*

and

(ii) amending by definition of “standard rate” in clause 3.1 of the Award by adding the additional wording as identified in bold /underline below:

*standard rate means 1/38th of the minimum weekly wage for a mobile crane employee (MCE) level 1 in clause 13 – wage rates, **and standard weekly rate means the minimum weekly wage for a mobile crane employee (MCE) level 1 in clause 13 – wage rates.***

or, in the alternative:

(c) by deleting clause 13.2 and replacing it with the following:

13.2 All employees will be paid an all-purpose industry allowance per week of 216.6% of the standard rate in addition to the minimum classification rates set out in clause 13.

39. Irrespective of the manner in which the Award may be varied to address the perceived error, it is important that any determination to correct the error not be retrospective.
40. In this respect, section 165(2) of the Act permits a determination made pursuant to section 160 of the Act to come into operation on a day earlier than the date of the determination, where Fair Work Australia is satisfied that there are exceptional circumstances that justify specifying an earlier day. Ai Group submits that there are no special circumstances, and nor has the CFMEU identified any special circumstances, that may warrant a retrospective determination.
41. To amend the Award retrospectively may have a significant adverse impact on employers, given:
- (a) Clause 13.2 of the Award as currently drafted only requires payment of an industry allowance of an amount equating to \$1.00 per week. The error is not apparent on the face of the Award and only once regard is had to the Stage Two Decision. The Award was first published containing the industry allowance in its present form in April 2009. Employers therefore would have planned the implementation of the Award, and minimum rates in the Award, on this basis; and

- (b) The difference between the industry allowance expressed as a percentage of the daily standard rate, as opposed to the weekly standard rate, amounts to a monetary difference \$36.82 per week (being the difference between \$1.00 (rounded to the nearest cent) compared to \$37.82 (rounded to the nearest cent)). This is a significant amount and would impose a considerable back-pay burden on employers. This is particularly so given Ai Group's understanding that many larger employers in the mobile crane hiring industry would likely be covered by registered agreements, whereas primarily small employers would engage employees directly on the terms and conditions of the Award. Smaller businesses would naturally have less capacity to readily address the backpay obligation created by a retrospective variation to the Award.

5. SUMMARY AND CONCLUSION

42. For the reasons outlined above, Ai Group submits that:

- (a) that part of the Application that concerns Dispute Resolution Procedure Training should be dismissed; and
- (b) in the event Fair Work Australia is satisfied that an error has occurred with respect to the amount of industry allowance under the Award, the form of the amendment to clause 13.2 as proposed by the CFMEU should not be adopted. Ai Group has proposed several alternative forms of variations that would address the issue.
- (c) Further, any determination made by Fair Work Australia should operate from a date no earlier than the date of its determination of the Application.

The Australian Industry Group

23 September 2010

¹ [2009] AIRCFB 989 at [13]

² [2009] AIRCFB 345

³ [2009] AIRCFB 345 at [73]

⁴ Submissions and Draft Award Provisions in relation to the Mobile Crane Hiring Industry prepared by The Australian Industry Group and Crane Industry Council of Australia, filed with the Australian Industrial Relations Commission on 13 February 2009

⁵ [2008] AIRCFB 1000 at [46]

⁶ Submissions and Draft Award Provisions in relation to the Mobile Crane Hiring Industry submitted by The Australian Industry Group and Crane Industry Council of Australia to the Australian Industrial Relations Commission on 13 February 2009.

⁷ Eg. AM2010/19 and 20, Applications to vary the *General Retail Industry Award 2010* and *Cleaning Services Award 2010*, at [10]; AM2010/33, Application to vary the *General Retail Award 2010*. at [13].