

Master Builders Australia

Submission to the Fair Work Commission

on

4 Yearly Review of Modern Awards –

*Casual Employment (AM2014/197) and Part-time
Employment (AM2014/196)*

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1 Introduction

- 1.1 This submission is made by Master Builders Australia (Master Builders).
- 1.2 Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890. Master Builders' members are the nine Master Builder State and Territory associations.
- 1.3 Over the past 120 years the association has grown to represent over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.

2 Summary of this Submission and Background

- 2.1 It is noted from the outset that the two awards of primary concern to Master Builders, being the *Building and Construction General On-site Award 2010* (On-site Award) and the *Joinery and Building Trades Award 2010* (Joinery Award) (together, the Building Awards) are not subject to the substantive variations sought by the Australian Council of Trade Unions (ACTU). These variations are opposed and we endorse the position of the Australian Chamber of Commerce and Industry (ACCI) in this respect.
- 2.2 From Master Builders' perspective, there are two specific issues relating to the Building Awards. These are (a) an unresolved controversy regarding the application of the 25% casual loading in the On-site Award; and (b) an anomaly with the minimum engagement provisions within the Joinery Award.
- 2.3 In respect of these two issues, Master Builders submits:
- 2.3.1 The controversy regarding the application of the 25% casual loading in the On-site Award be resolved by the making of a determination clarifying the ordinary hourly rate to which the loading applies; and
- 2.3.2 That the Joinery Award should be varied to reduce the existing 7.6 hour per day minimum engagement period to a four hour minimum engagement period.

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2.4 Master Builders has previously outlined the content of determinations that give effect to the above position.¹ Draft determinations attached hereto at **Attachment A** and **Attachment B**.

2.5 The substance of this submission concerns itself with the issues noted above.

3 Application of Casual Loadings to Classifications of Work in the On-site Award

3.1 Master Builders notes a controversy regarding the application of the casual loading within the On-site Award. That controversy is, in summary, whether or not the casual loading should be calculated with reference to the hourly rate payable to Daily Hire employees (that includes a ‘follow the job’ loading) or with reference to the hourly rate payable to Weekly Hire employees (that does not include a ‘follow the job’ loading).

3.2 This issue has been raised by the parties in earlier proceedings before the Commission. Master Builders applied to Fair Work Australia (now FWC) to clarify the calculation of casual loadings during the Modern Awards Review 2012. The CFMEU also sought changes to the casual provisions in this regard.

3.3 In that matter, the Commission per SDP Watson said:

There exists a broader debate as to any overlap of the factors contemplated by the ‘follow the job’ loading and the casual loading, as reflected in the submissions of the MBA and refuted by the CFMEU. That question was not fully ventilated in the current proceedings and no basis was established for considering that issue for the purposes of the 2012 Review.²

3.4 The issue was further raised before a Full Bench in the recent absorption and casual loading case³. In its decision, the Full Bench noted:

¹ Master Builders Australia Submission to Fair Work Commission on Four Yearly Review of Modern Awards – Casual Employment (AM2014/197) and Part-time Employment (AM2014/196) – Draft Determinations 17 July 2015

² [2013] FWC 4576 at para 188

³ [2015] FWCFB 6656

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[111] In respect of the specific controversy concerning the On-Site Award, we note that the MBA and HIA have lodged applications to resolve that controversy in the proceedings before the Full Bench dealing with the issues of part-time and casual employment. We consider that those applications constitute the appropriate vehicle by which that very specific issue may be resolved.

- 3.5 As detailed in earlier matters, Master Builders submits that the casual loading should be calculated with reference to the ordinary hourly rate for Weekly Hire employees⁴ (with applicable allowances) and not that payable to Daily Hire employees. This would alleviate confusion and provide necessary clarity.

Overview of Relevant Provisions in the On-site Award

- 3.6 To support this submission, it is appropriate to provide an overview of the relevant provisions in the On-site Award.

- 3.7 Clause 10.1 of the On-Site Award states that employees under that Award will be employed as one of the four categories:

- Daily Hire – as defined in clause 11;
- Full-time weekly hire – defined in clause 12;
- Part-time weekly hire – defined in clause 13; and
- Casual – defined clause 14.

- 3.8 As noted earlier, the issue at hand relates to the hourly rate payable for employees engaged under the category of Daily Hire.

- 3.9 Daily Hire engagement is a traditional form of employment in the building and construction industry. It is specifically recognised in the FW Act⁵.

⁴ Refer to clause 19.3(b) of the *Building and Construction General On-site Award 2010*

⁵ *Subsection 123(3)(b), which excludes Daily Hire employees from the notice of termination provisions of the FW Act (see also clause 16.1 of the award); and*

Subsection 534(1)(e), which exempts employers of Daily Hire employees from the obligation to notify Centrelink and relevant employee associations (unions) where an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature.

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3.10 Daily Hire employment has been characterised as necessary by the Australian Government in the following way:

In the building and construction industry, the nature of the work, with complex interdependencies on other projects, impact of wet weather, short term cyclical influences, makes daily hire employment contracts a necessary form of employment.⁶

3.11 Daily Hire is, in essence, a distinct form of employment where employees are engaged by the day. Daily Hire employees have entitlements that are the same as full-time and part-time employees, including access to annual, personal and parental leave as well as redundancy pay.⁷

3.12 Daily Hire employees are, however, not entitled to the notice of termination provisions of the On-Site Award.⁸ Either the employer or employee can end a contract of Daily Hire employment with only one day of notice.⁹ This is what makes it ‘Daily Hire’.

3.13 A feature unique to Daily Hire employees is their entitlement to a ‘follow the job’ loading. ‘Follow the job’ loading is an amount included in a Daily Hire Employee’s hourly rate of pay. This amount is compensation for the time these employees are not working between jobs. Subclause 19.3(a)(i) of the On-site Award states that the ‘follow the job’ loading is designed to account solely for the ‘*incidence of loss of wages for periods of unemployment between jobs*’ (for Daily Hire employees). The method of calculation is set out at subclause 19.3 (a) (ii).

3.14 In terms of permanent full-time and permanent part-time employees, the On-site Award refers to them as Weekly Hire employees. They are employed on either a permanent full-time or permanent part-time basis.

⁶ *Re Construction, Forestry, Mining and Energy Union* [2002] AIRC 1412 (unreported, Whelan C, 20 November 2002, PR924875).

⁷ Clauses 17, 38 and 39 of the *Building and Construction General On-site Award 2010*

⁸ *Ibid* at clause 16.1

⁹ *Ibid* at clause 11.1

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- 3.15 Casual employment is where employees do not have regular or systematic hours of work or an expectation of continuing work.¹⁰
- 3.16 Because casuals do not receive the same entitlements as other employees, they are compensated with a casual loading of 25%.¹¹ This loading applies during ordinary hours i.e. 38 hours per week between 7.00 am and 6.00 pm Monday to Friday.¹² Where a casual works overtime (i.e. more than ordinary hours) or on weekends or public holidays, they must be paid a 25% loading in addition to the overtime, weekend and public holiday loadings.¹³
- 3.17 Despite these definitions, there remains some confusion in differentiating classifications of workers and their entitlements under the On-site Award.

History

- 3.18 To understand the nature of this confusion, regard should be given to the history of the On-site Award and the variations made to it. It is relevant to summarise certain key historical events.
- 3.19 The main predecessor of the current modern On-site Award was the *National Building and Construction Industry Award 2000* (NBCIA). It is the principal instrument from which the Modern Award instrument was derived.
- 3.20 In earlier forms, the NBCIA provided that employees engaged as casuals could not work for more than four days. After that time, they were regarded as permanent employees.¹⁴ This provision was subsequently altered to provide for the engagement of casual employees for up to six weeks before being considered permanent.¹⁵ Later, when the Modern Award was crafted, the

¹⁰ Ibid at clause 14

¹¹ Ibid at clause 14.5

¹² Ibid at clause 33.1

¹³ Ibid at clauses 14.6 and 14.7

¹⁴ Clause 8.18 of the *Building Construction Employees' and Builders Labourers' Award 1982*

¹⁵ Clause 13.4.3 of the *National Building and Construction Industry Award 2010*

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provision was replaced with the existing casual conversion clause that is triggered after a six month period.¹⁶

- 3.21 Permanent employment under the NBCIA originally had limitations that were dependent upon the type of work being performed. These limitations restricted the way an employee could be permanently engaged.
- 3.22 Typically, only Operators were able to be engaged as permanent employees by the week and this was described as Weekly Hire.¹⁷ The Award contained wage rates for Operators that were set out with reference to amounts payable ‘per week’.¹⁸
- 3.23 Other occupational categories, being tradespeople and labourers, were only able to be engaged as Daily Hire.¹⁹ The Award set out a method for calculating an hourly rate for Daily Hire workers (which included a ‘follow the job’ loading²⁰) and contained wage rates expressed as ‘per hour’ amounts.
- 3.24 In practical terms, this meant that a labourer or tradesperson engaged on a site for more than six weeks as a casual had to be engaged as a Daily Hire worker thereafter, and operators engaged for more than six weeks on a casual basis had to be engaged as a permanent Weekly Hire worker.
- 3.25 A related consequence involved the calculation of the rate payable to casual employees. As labourers and tradespeople could only be employed on a Daily Hire basis, paid a rate ‘per hour’ which included the ‘follow the job’ loading, this became the rate to which the casual loading was applied and was reflected in related award provisions.²¹ There was, technically, no other rate to which it could be applied.

¹⁶ Clause 14.8 of the *Building and Construction General On-site Award 2010*

¹⁷ Clause 13 of the *National Building and Construction Industry Award 2010*

¹⁸ Ibid at clause 18

¹⁹ Ibid at clause 18.3.1(b)

²⁰ Ibid at clause 18.3.1(b)

²¹ Clause 18.3.1 of the *National Building and Construction Industry Award 2000*

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- 3.26 Notably, however, the casual rate for Operators was calculated with reference to an ordinary hourly rate obtained by dividing the Weekly Hire rate by 38.²² The casual loading would be applied to the resulting hourly rate, which did not include a ‘follow the job’ loading.
- 3.27 The Modern On-site Award replaced the above structure. The effect of the Modern On-site Award was to allow all occupational categories to be engaged as either Weekly Hire or Daily Hire. As a result, the restriction to engaging tradespeople and labourers on a Daily Hire basis only was removed allowing those occupational categories to be employed as permanent Weekly Hire. Daily Hire provisions were retained as an “optional” form of engagement.²³
- 3.28 The ability to engage and pay permanent labourers and tradespeople on a permanent Weekly Hire basis had other relevant effects. The method by which an ordinary hourly rate for these occupations was determined reverted to the ‘conventional’ approach - dividing the weekly rate (which did not contain a ‘follow the job’ loading) by 38. This method existed in the NCBIA but was previously restricted to Operators (as they were the only occupational category who could be engaged on a Weekly Hire basis).²⁴
- 3.29 The ‘follow the job’ loading was, therefore, no longer triggered for permanent labourers and tradespeople. This is because they were permanent Weekly Hire workers and not Daily Hire.
- 3.30 A further effect involved notice provisions. Permanent labourers and tradespeople engaged on a Weekly Hire basis would be subject to conventional notice provisions. The exemption from notice provisions applicable to Daily Hire remained, but only to those engaged on a Daily Hire basis.

²² Ibid at clause 18.3.2

²³ AM2008/13-24 at para 39, 23 January 2009

²⁴ Clause 13.1 of the *National Building and Construction Industry Award 2000*

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- 3.31 A related effect was the ability to engage workers to perform any type of occupational category on a casual basis (again, subject to the limitations of the casual conversion clause).
- 3.32 The historical practical restrictions on the use of casual labour, combined with practical limitations when engaging labourers or tradespeople on a permanent basis does (in part) explain not only the existence of the Daily Hire category in the On-site Award and the prevalence within the industry today, but also the confusion that currently exists.

The On-site Award Today

- 3.33 As noted earlier, the On-site Award sets out four categories of employment under which an employee can be engaged.²⁵
- 3.34 Relevantly, clause 14 sets out the conditions of the casual employment category and clause 14.5 specifies that a casual employee must be paid a 25% loading for “*ordinary hours as prescribed in this award*”. It does not, however, define a rate to which this loading should apply.
- 3.35 On the other hand, clauses 14.6 and 14.7 deal with overtime, weekend and public holiday penalty rates for casual employees and do make specific reference to them being paid as percentage loadings applicable to the “*ordinary time hourly rate prescribed for the employee’s classification*”.
- 3.36 While the On-site Award defines an “*ordinary time hourly rate*” for other categories of work (Daily Hire, Weekly Hire, Apprentices and Trainees²⁶) it does not contain such a definition for the casual employee category.
- 3.37 The absence of a defined “*ordinary time hourly rate*” for casual employees is likely to be a consequence of the historical events described earlier and a source of existing confusion.

²⁵ Clause 10 of the *Building and Construction General On-site Award 2010*

²⁶ Ibid at clause 3

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Confusion

- 3.38 The controversy relating to the application of the 25% casual loading is that there is confusion in determining the hourly rate upon which it is applied.
- 3.39 Master Builders submits that not only is there evidence to support the existence of this confusion, the extent of that confusion will compound unless resolved.
- 3.40 There are several interpretations that have been advanced by interested parties.

Fair Work Ombudsman (FWO) Interpretation

- 3.41 In 2012, Master Builders sought clarification from the FWO on the questions of the application of casual loadings.
- 3.42 The FWO position is that casual loadings should be applied to the minimum hourly rate in clause 19.1(a) of the On-Site Award, plus the industry allowance in clause 21.2, plus the special allowance in clause 21.1. A copy of this advice is provided at **Attachment C**.
- 3.43 An extract from the FWO advice, with regard to the calculation of casual rates under the On-Site Award (referred to in the document by the FWO as the Building MA), is as follows:

‘... the casual rate for an employee under the Building MA is calculated by applying the casual loading to the sum of:

- *the minimum hourly rate in clause 19.1(a);*
- *the industry allowance in clause 21.2; and*
- *the special allowance in clause 21.1*

In no instance is a casual entitled to payment of follow the job loading.’

- 3.44 This view was recently reaffirmed by the FWO.

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CFMEU Interpretation

- 3.45 During proceedings on 27 August 2015 relating to Stage 1A and 1B of the four yearly review of Modern Awards AM2014/1 & ors the CFMEU tendered a document containing casual rate calculations for the On-site Award. It was marked Exhibit CFMEU 1 and was subsequently altered by the CFMEU on 28 August 2015. A copy of the altered document is attached **Attachment D**.
- 3.46 The document sets out the CFMEU's view on casual rates payable for the On-site Award.
- 3.47 From this document, it is clear that the CFMEU uses the Daily Hire hourly rate as the ordinary rate to which the casual loading applies for labourers and tradespeople (including the 'follow the job' loading). For remaining occupations, it uses the Weekly Hire hourly rate (which does not include the 'follow the job' loading).

HIA Submission

- 3.48 The HIA submission²⁷ also notes the calculation of the casual rate of pay "remains a source of contention". The proposed resolution in their draft determination²⁸ would differ from that proposed by Master Builders.

Master Builders Interpretation

- 3.49 Master Builders has, in earlier submissions on this topic, stated that (our emphasis):

3.5 *We note that Master Builders advises conservatively that, if employers have formerly applied the casual loading to an hourly rate inclusive of the daily hire follow-the-job loading, then they should maintain that practice but that this issue is not clear-cut.*

- 3.50 And later:

²⁷ HIA Submission to the Fair Work Commission – Four Yearly Review of Modern Awards AM2014/196 & 197 12th October 2015 at 6.1.1

²⁸ Ibid Attachment A

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3.7 *Most of the pre-modern awards provided this loading to casuals, at least where they worked as tradespersons and labourers. Accordingly, as stated at paragraph 3.5 above, on balance Master Builders considers it appropriate to conservatively advise employers that casual loadings should be applied to follow-the-job rates, i.e. as calculated under subclause 19.3(a). However, we submit that this is illogical and legally far from certain.*

- 3.51 Master Builders maintains the above view. The issue is not clear-cut. The advice provided to employers is appropriately conservative in circumstances where they formerly applied the casual loading to an hourly rate inclusive of the Daily Hire ‘follow the job’ loading.
- 3.52 We also note that member associations of Master Builders publish materials (such as a wage rate circular or similar) setting out rates of pay for classifications provided in the On-site Award. It is clear that these materials set out casual rates of pay which are calculated using an ordinary hourly rate of pay derived from the Weekly Hire rate of pay (see **Attachment E**).
- 3.53 The rates for casual tradespeople and labourers contained in those materials differ from the rates derived using the CFMEU interpretation.
- 3.54 For example, a casual Carpenter Diver (CW8) is shown as receiving \$39.26 in **Attachment E** (page 3, column 3) whereas the CFMEU exhibit shows it to be \$40.46 (page 1, column 3).
- 3.55 Master Builders submits that the existence of these differing interpretations is evidence of confusion. An employer or employee wishing to clarify their obligations or entitlements would receive different advice from the FWO, CFMEU or employer associations.
- 3.56 While Master Builders has previously adopted a view to advise employers in the way set out above, it is on the basis that advice is being given to an employer who *previously* applied the casual loading to an hourly rate inclusive of the Daily Hire ‘follow the job’ loading. That advice does not signal acceptance or represent an acknowledgement that this is the correct approach either currently, or in the future.

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- 3.57 Nor would it assist new employers, newly created businesses, or small businesses.
- 3.58 Master Builders notes that, since the creation of the Modern On-site Award, there has been a steady stream of new company entrants to the building and construction sector. The latest data available suggests that, over the four financial years 2010/11 to 2013/14, an average of 49, 258 new firms enter the building and construction industry every year.²⁹
- 3.59 It is trite to acknowledge that this figure will grow and this will therefore increase the extent of confusion unless resolved.

Draft Determination

- 3.60 Master Builders submits that the casual loading should be applied to the ordinary hourly rate for Weekly Hire employees and not that payable to Daily Hire employees. This would alleviate confusion and provide necessary clarity.
- 3.61 This can be achieved by the insertion of a defined “ordinary time hourly rate” for the casual employee category.
- 3.62 The draft determination sets out the changes to provide requisite clarity. It proposes a definition of “ordinary time hourly rate” that is determined with reference to the method used to calculate hourly rates payable to Weekly Hire employees set at clause 19.3(b).
- 3.63 Master Builders submits that usage of the method at 19.3(b) is appropriate for a number of reasons.
- 3.63.1 First, the hourly rate calculated at clause 19.3(b) includes both the minimum wage, industry allowance and special allowance. While not so expressed it is akin to an ‘all purpose’ rate. This is consistent with the decision in the recent absorption and casual loading case ([2015] FWCFB 6656) that noted:

²⁹ ABS Stats – Cat 8165.0 Counts of Australian Business.

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[110] The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.

3.63.2 Second, despite historical limitations in the Award and its predecessor noted above, there are no longer occupational restrictions in terms of who can be engaged as a casual employee (save for the time limitations noted earlier). To this end it is open to an employer to engage a casual as exactly that – a casual, full stop. While in the past an employer was restricted to using the Daily Hire rate as a basis to determine the casual rate, this was because there was no other rate to which it could be applied. This is no longer the case and hence it is appropriate to adopt the approach in 19.3(b).

3.63.3 Third, casual loadings should not be applied to the rates contained in clause 19.3(a) as they expressly apply to Daily Hire employees. A casual employee is not a Daily Hire employee and is separately defined elsewhere. Subclause 19.3(a)(i) of the On-site Award states that the ‘follow the job’ loading is designed to account solely for the ‘incidence of loss of wages for periods of unemployment between jobs’ (for Daily Hire employees) while clause 14.5 indicates that, among other matters, the casual loading compensates for lack of notice of termination entitlements. It is illogical to compensate an employee twice for the same disadvantage, as would occur if a casual were to receive both casual and ‘follow the job’ loadings.

3.64 Master Builders also submits that there are discernible benefits in making the determination as drafted.

3.64.1 First, it will ensure all categories of work defined in the On-site Award have a defined ordinary time hourly rate. As noted earlier, the casual category of employment is the only category for which there is no current definition of an “ordinary time hourly rate”. While interested parties previously reached a consent position on this definition during the 2012 Award Review, it was limited to circumstances involving the

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application of overtime and penalty rates.³⁰ It does not clarify the confusion that exists with respect to clause 14.5.

3.64.2 Second, it will ensure a consistent definition is taken in determining “ordinary time hourly rates” for conventional categories of employment (being permanent part-time, permanent full-time and casual) that is consistent with historical approaches adopted elsewhere.

3.64.3 Third, it will create a further clear distinction between the conventional categories of engagement (casual, permanent part-time and permanent full-time) and Daily Hire engagement. This will assist those interpreting the award, particularly small business and new entrants who are not familiar with this industry specific category of engagement.

4 The Significance of the *Telum* Decision

4.1 A decision of the FWC Full Bench has made it clear that the meaning of a ‘casual employee’ should be drawn from clause 14 of the On-Site Award or applicable enterprise agreement, not the common law. In *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*³¹, the FWC considered whether construction workers, who were engaged and paid as casuals under an enterprise agreement, were entitled to redundancy pay after their employment ceased at the end of a project.

4.2 The Full Bench found that the workers were not entitled to redundancy pay as this entitlement, and others under the National Employment Standards (NES), were compensated for in an employee’s casual loading.

4.3 In its decision, the Full Bench found that the following NES entitlements should not apply to casual employees:

³⁰ Ibid at clauses 14.6 and 14.7

³¹ [2013] FWCFB 2434

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- Parental leave and related entitlements (other than to ‘long term casuals’)
 - Annual leave
 - Paid personal/carer’s (sick) leave and compassionate leave;
 - Notice of termination and redundancy pay; and
 - Public holidays
- 4.4 The Full Bench then noted that these requirements were compensated for in the express casual loading.
- 4.5 The decision in *Telum* illustrates, when considering whether or not an employee is a casual for the purposes of the *Fair Work Act 2009* (Cth) (Fair Work Act) and relevant entitlements under the NES, the definition under the relevant enterprise agreement or award must be considered. In its decision, the Full Bench stated that regardless of whether casuals worked regular hours on an on-going basis or any other indicators that might categorise them as casual workers under the common law, the definition under either the enterprise agreement or Award is that which is binding.
- 4.6 *Telum* is therefore relevant. Essentially, it draws a line in the sand between the historical circumstances giving rise to an award provision and the provision as expressed in a modern award.
- 4.7 While Master Builders has earlier herein noted the history of variations to the On-site Award, we do so to provide context as to the background giving rise to the existing confusion. We do not accept that earlier changes to the pre-Modern Award, by consent or otherwise, represent a settled position or an acceptance of method to calculate the ordinary hourly rate to which a casual loading is applied.
- 4.8 Therefore the Modern On-site Award should be viewed as creating a distinct and separate regime for casual employees. That proposition is in line with *Telum* and is the view adopted by the FWO.

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5 Joinery Award - Minimum Engagement

- 5.1 Master Builders maintains its position with regard to previous submissions on the issue of minimum hours of engagement per day under the Joinery Award. Clause 12.3 of the Joinery Award is as follows:

A casual employee is engaged by the hour with a minimum daily engagement of 7.6 hours.

- 5.2 There is no substantive rationale for the inclusion of this provision currently under the Joinery Award. The issue was raised during the 2012 Modern Award Review but, in considering the matter at that time, the FWC stated that the provision was introduced historically “*in large by consent*”³² but failed to assess the issue on its merits under the Modern Award objectives and therefore the issue was left unresolved.
- 5.3 In keeping with previous submissions, Master Builders is of the view that the historical context that has been used to arguably maintain a provision that is antiquated and significantly out of step with the vast majority of modern awards, fails to satisfy the modern awards objective.
- 5.4 Master Builders notes that the essence of casual employment is the irregular or intermittent basis of employment. Our essential argument is that once engaged as a casual under the Joinery Award if a weeks’ employment is offered then the minimum engagement in that week is full-time hours. This is not a characteristic of irregular or intermittent work and whilst termination of casual employment under the modern Joinery Award can be effected in line with the nature of casual employment, the minimum engagement period of 7.6 hours per day would still remain to be paid.
- 5.5 Master Builders believes that minimum daily engagement for casual employees, equivalent to full-time hours for a 38 hour week, is anomalous. It is anomalous in the sense that it is out of place when considered against other modern awards and has no substantive rationale.

³² Refer to Print 2644, 1317/1995 [1995] AIRC 1350 (6 July 1995)

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5.6 In addition, Master Builders notes that the statutory provisions underpinning the four yearly review provide the FWC with a wider scope to vary Awards. Sections 138 and 134 are pertinent in this regard.

5.7 Master Builders is of the view that clause 12.3 of the Joinery Award, fails to meet the Modern Award Objectives set out in sections 134(1) (a-h) of the Fair Work Act as follows:

134(1)(a) Relative living standards and the needs of the low paid

5.8 A reduction from the existing 7.6 hour per day minimum engagement period to one of four hours per day would not have an adverse effect on living standards or the needs of the low paid.

134(1)(b) The need to encourage enterprise bargaining

5.9 The proposed reduction would not adversely affect enterprise bargaining and would encourage parties to actively bargain for an engagement period that differs from the minimum.

134(1)(c) The need to promote social inclusion through increased workforce participation.

5.10 The proposed reduction would promote social inclusion by minimising a barrier to those who require improved flexibility to either enter into, or remain in work.

134(1)(d) The need to promote flexible modern work practices and the efficient and productive performance of work

5.11 The proposed reduction is necessary to achieve this aim. The current minimum daily engagement of 7.6 hours per day for casuals under the Joinery Award, equivalent to full-time hours under a 38 week, is inconsistent with this type of employment. There is no basis for requiring a casual employee to be engaged for the same duration as full-time employee and to retain this provision would create a disincentive for employees to be engaged as casual. Further, it is virtually impossible for a business and its employees to engage in flexible work practices or adapt to operational changes with the current provision in place.

134(1)(da) The need to provide additional remuneration for employees working overtime; or employees working unsocial,

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irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts.

- 5.12 There would be no impact on this requirement were the provision to be amended as proposed.

134(1)(e) The principle of equal remuneration for work of equal or comparable value.

- 5.13 There would be no impact on this requirement were the provision to be amended as proposed.

134(1)(f) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

- 5.14 It is trite to observe that employment costs to business imposed by the requirement to engage a casual for 7.6 hours per day would be reduced if the requirement was for four hours per day. It is unproductive to engage a casual employee for 7.6 hours per day when they might only be required for a lesser period.

134(1)(g) The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

- 5.15 A minimum engagement period of 7.6 hours per day is extremely unusual. It is not consistent with the minimum engagement periods applying elsewhere in the building and construction industry (which are either 4 or 3 hours).

134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

- 5.16 The proposed reduction in minimum engagement will remove existing disincentives for employers to employ more people and allow business to be more productive and competitive.

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- 5.17 Master Builders notes the Housing Industry Association³³ and the Australian Industry Group³⁴ have also sought to vary the Joinery Award in the same terms. We support and endorse their submissions.

6 Joinery Award – Casual Loading

- 6.1 Master Builders submits that the Joinery Award should be varied to clarify the base rate to which the casual loading applies.
- 6.2 The draft determination (**Attachment B**) provides necessary clarity. The proposed change would remove the reference to clause 18 (Classifications and minimum wages) at clause 12.5 and substitute it with a reference to clause 18.1.
- 6.3 As per earlier submissions, this is a minor change and is intended to provide clarity as the reference to the broad terms of clause 18 currently creates confusion as to the method of calculation.

³³ HIA Submission to the Fair Work Commission – Four Yearly Review of Modern Awards AM2014/196 & 197 12th October 2015.

³⁴ Australian Industry Group Submission to the Fair Work Commission – Four Yearly Review of Modern Awards AM2014/196 & 197 14th October 2015.

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