



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Fair Work Commission

**Technical and Drafting Issues
AM2014/260 Exposure Draft Building and Construction General Onsite
Award 2016**

30 June 2016



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1. INTRODUCTION

- 1.1.1 On 10 May 2016, the Fair Work Commission (**FWC**) issued Directions advising parties to file submissions on the technical and drafting issues related to exposure drafts in sub-groups 4A, 4B and 4C.
- 1.1.2 The *Building and Construction General Onsite Award 2010* (**Onsite Award**) falls within sub-group 4C.
- 1.1.3 HIA provides these submissions in response to those Directions in relation to the Onsite Award.
- 1.1.4 HIA notes that these submissions follow the format and clause numbering of the *Exposure Draft Building and Construction General Onsite Award 2016* (**Exposure Draft Onsite Award**).

2. EXPOSURE DRAFT ONSITE AWARD

2.1 CLAUSE 2 - DEFINITIONS

Accident Pay

- 2.1.1 Accident Pay is defined in both clauses 2 and 26.3 of the Exposure Draft Onsite Award. In HIA's view this is an unnecessary duplication.
- 2.1.2 HIA submits that cross-referencing could be used in place of the repeated text and propose the following amendment to clause 26.2:

The employer must pay accident pay (see clause 2)

Delete clause 26.3

- 2.1.3 This approach is also consistent with the treatment of the definition of 'injury' for the purposes of Accident Pay which is included at clause 2 of the Exposure Draft Onsite Award.

Adult Apprenticeship

- 2.1.4 HIA notes that the definition of *adult apprentice* is contained in both clauses 2 and 14.1(a) of the Exposure Draft Onsite Award.
- 2.1.5 HIA submits that the definition in clause 14.1(a) is preferred. As such, it is proposed that clause 2 be amended to reflect that contained within clause 14.1(a) and that the definitions not be duplicated.

All-Purposes

- 2.1.6 In its decision of 13 July 2015¹ the FWC held that a definition of 'all purposes' would be included in all exposure draft modern awards.
- 2.1.7 Consequentially, the Exposure Draft Onsite Award contains the following:

all purposes means the payment will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave.
- 2.1.8 HIA raises two issues with the inclusion of this definition within the Exposure Draft Onsite Award that militate against its inclusion at this time.

¹ 4 Yearly Review of Modern Awards [2015]FWCFB 4856 at para 91



A. The Casual Loading

- 2.1.9 The inclusion of the above definition in the Exposure Draft Onsite Award directly impacts on HIA's application in AM2014/197 Casual Employment.
- 2.1.10 HIA's submissions dated 12 October 2015, propose a variation to the Onsite Award to insert a provision outlining how the casual rate of pay is calculated.
- 2.1.11 HIA's proposition is that the 25% casual loading applies to the minimum rate of pay under clause 19.1(a) of the Exposure Draft Onsite Award and subsequent to this applicable allowances, including those payable for all-purposes, are added to the rate of pay.
- 2.1.12 The above definition of 'all-purposes' is at odds with HIA's application currently on foot and set for hearing on August 17 2016.
- 2.1.13 Attached to these submissions at Attachment A is the draft determination as proposed in AM2014/197.

B. Payment while on Annual Leave

- 2.1.14 In its decision of 23 December 2014 the FWC noted that:
- 'it is important that the rate of pay to be paid to an employee while on a period of paid leave is clearly identified in the relevant modern award'².*
- 2.1.15 HIA submit that the Exposure Draft Onsite Award sets out the amount payable while an employee is on annual leave and, that while HIA have proposed a variation to the calculation of annual leave loading which may provide further clarity and simplify the Onsite Award, the application of the definition of 'all-purpose' may, in fact, muddy the waters in that regard.
- 2.1.16 Clause 30 of the Exposure Draft Onsite Award sets out a method for the calculation of annual leave, including annual leave loading.
- 2.1.17 The above definition of 'all-purposes' is at odds with the calculation of annual leave loading under clause 30.2(b) which expressly sets out those allowances to be included in the calculation of the loading. Specifically, a conflict arises in that under clause 30.2(b) the Special Allowance under clause 21.1 is not included as part of the calculation of annual leave loading, yet, is included as part of the calculation of the hourly rate of pay under clause 19.3(a) and (b) and consequently payable for all purposes.

Ordinary Hourly Rate

- 2.1.18 The following text has been added to the definition of 'ordinary hourly rate':
- ordinary hourly rate means the hourly rate for an employee's classification specified in clause 19.1(a) plus the industry allowance. Where an employee is entitled to an additional all purpose allowance, this allowance forms part of that employee's ordinary hourly rate.*
- 2.1.19 In the decision of 15 July 2013³ at paragraphs 33-35 the FWC captured the agreement reached between the parties as to the insertion of the definition of '**ordinary time hourly rate**'.

² 4 Yearly Review of Modern Awards [2014] FWCFB 9412 at para 52

³ Master Builders Australia Limited [2013] FWC 4576



2.1.20 The following was then inserted to articulate what is considered to be the ordinary time hourly rate under the Onsite Award:

- for daily hire employees the hourly rate calculated in accordance with clause 19.3(a);
- for weekly hire employees the hourly rate calculated in accordance with clause 19.3(b);
- for apprentices the weekly rate (determined in accordance with clause 19.7 or 19.8) divided by 38;
- for trainees the weekly rate (determined in accordance with clause 28.2 or 28.3) divided by 38;
- for employees covered by clause 42—Lift industry, includes the all purpose amounts specified in clause 42;
- for forepersons and supervisors in the metal and engineering construction sector the relevant weekly rate specified in clause 43.2(a) divided by 38;
- for leading hands includes the amount calculated in accordance with clause 19.2(a) or (b)

2.1.21 While HIA does not take issue with the use of the term ‘ordinary hourly rate’, as controversy remains in relation to those allowances under the Onsite Award which are payable for all-purposes, the inclusion of the new wording and definition of ordinary hourly rate in addition to the existing provision may lead to confusion. As such, at this stage the existing provision is preferred.

2.2 CLAUSE 7 - FACILITATIVE PROVISIONS FOR FLEXIBLE WORKING PRACTICES

2.2.1 It its decision of 24 December 2014, the FWC held that:

‘we do see merit in inserting an index of facilitative provisions’⁴

2.2.2 Consequentially clause 7.7 of the Exposure Draft Onsite Award sets out a list of facilitative provisions.

2.2.3 HIA notes the following should be amended:

- Under clause 16.4 an agreement to bank RDO’s can only be made with a majority of employees when on distant work as covered by clause 24.1. HIA submits that the provision be updated to reflect this.
- Under clause 19.12(d) an agreement to a pay cycle that differs from the standard approach in the Exposure Draft Onsite Award can only be made in the limited circumstances identified in clause 19.12(d)(i) and (ii). HIA submits that the current drafting under clause 7 misrepresents the award provision and should be deleted.

2.2.4 HIA notes that the following should be added to clause 7.7:

- Under clause 16.9(b) a change in start time requires agreement between the employer and the employees and their representatives.

⁴ 4 Yearly Review of Modern Awards [2014] FWCFB 9412 at para 43



2.3 CLAUSE 12 - CASUAL EMPLOYMENT

Application of the inclement weather provision

- 2.3.1 HIA notes that the matter of the application of the inclement weather provision of the Exposure Draft Onsite Award was raised by the Fair Work Ombudsman. This issue was identified in the *Summary of Proposed Variations* produced by the Commission and was discussed during conferences of interested parties.
- 2.3.2 It was concluded during those conferences that no change was to be made to the Onsite Award unless a specific variation was sought. HIA is unaware of any such variation.
- 2.3.3 As such, HIA submits that the issue has been considered and should be removed from consideration during the exposure draft process.

Clause 12.5 - Calculation of the hourly rate for a Casual Employees

- 2.3.4 It is HIA's position that the casual hourly rate should be calculated by adding 25% to the hourly rates specified in clause 19.1.
- 2.3.5 HIA has lodged an application and substantive submissions (dated 12 October 2015) in relation to this issue as a part of AM2014/197. This matter is to be heard on 17 August 2016.
- 2.3.6 As this is a contested issue, subject to arbitration, it should not be dealt with at this stage of proceedings in relation to the Exposure Draft Onsite Award.

2.4 CLAUSE 14 - APPRENTICES

- 2.4.1 HIA proposes that the words *'in lieu of'* in clause 14.8(d) be changed to *'instead of'*.
- 2.4.2 HIA propose that clause 14.6(a) be amended and drafted as follows:
- (a) *All fees charged by a Registered Training Organisation (RTO) and the cost of all prescribed textbooks for the apprenticeship, which are paid by an apprentice, shall be reimbursed by the employer within:*
- (i) *six months of commencement of the apprenticeship or a stage of the apprenticeship; or*
- (ii) *within three months of the commencement of training provided by the RTO.*

whichever is the later, unless there is unsatisfactory progress.

2.5 CLAUSE 16 - ORDINARY HOURS OF WORK AND ROSTERING ARRANGEMENTS

- 2.5.1 HIA submits that clause 16.9(a) can be re-worded to ensure that the award is simple and easy to understand.
- 2.5.2 The current wording in the Exposure Draft Onsite Award states:
- The working day may start at 6.00 am or at any other time between that hour and 8.00 am. The working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period.*
- 2.5.3 HIA submits that the above highlighted in yellow could be clarified as follows:
- ...The working time will then begin to run from the time fixed and the meal break will be adjusted accordingly.*
- 2.5.4 HIA submits that clause 16.10(a) can be re-worded to ensure that the award is simple and easy to understand.



2.5.5 The current wording in the Exposure Draft Onsite Award states:

16.10 Hours of work—part-time employees

- (a) *Despite the provisions of clause 16—Ordinary hours of work and rostering and clause 17—Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off, and further provided that the employee will not work on the rostered day off.*

2.5.6 HIA proposes the following amendment to 16.10(a):

- (a) *Despite the provisions of clause 16—Ordinary hours of work and rostering and clause 17—Shiftwork, an employee working on a part-time basis may be paid for actual hours worked and in such instances the employee will not be entitled to accrue time towards a rostered day off.*

- (b) *In circumstances in which hours of work are arranged in accordance with Clause 16.2 a part-time employee will not work on the rostered day off.*

2.5.7 HIA notes that the reference to clause 16.2 of the Exposure Draft Onsite Award ensures that a part-time employee is not adversely affected where alternative working arrangements are agreed.

2.6 CLAUSE 18 - MEAL BREAKS

2.6.1 HIA proposes that the wording of clause 18.3(f) be amended as follows:

- 'The provisions of clauses 18.3(b), (c), and (e) will not apply to an employee who is allowed entitled to the rest periods prescribed in clauses 22.2(b) and 22.2(c).'*

2.7 CLAUSE 19 - MINIMUM WAGES

Clause 19.2 - Leading Hands

2.7.1 HIA notes that the definition of 'Leading Hand' is found in clause 2 and HIA agrees with the approach of including defined terms only in clause 2 of the award. HIA submit that this approach should be adopted throughout the Exposure Draft Onsite Award.

2.7.2 HIA submits that clause 19.2(a) could be re-worded as follows:

- A person specifically appointed to be a leading hand must be paid at the rate of the following percentages of the weekly rates in clause 19.1(a) of the highest classification supervised, or the employee's own rate, whichever is the higher in accordance with the number of persons in the employee's charge employees supervised.*

2.8 CLAUSE 21 - SITE AND GENERAL WAGE RELATED ALLOWANCES

Clause 21.10 - First Aid Allowance

2.8.1 HIA submits that clause 21.10(a) could be re-worded in the following terms to ensure that the award is simple and easy to understand:

- (a) The first aid allowance will be paid to compensate an employee for the additional responsibilities, skill obtained, and time spent acquiring the relevant qualifications.

(a)(b) The first aid allowance will be paid to an employee who:

- i. is appointed by the employer to be responsible for carrying out first aid duties as they may arise;



- ii. holds a recognised first aid qualification (as set out below) from the Australian Red Cross Society, St John Ambulance or similar body;
- iii. is required by their employer to hold a qualification at that level;
- iv. the qualification satisfies the relevant statutory requirement pertaining to the provision of first aid services at the particular location where the employee is engaged; and
- v. those duties are in addition to the employees normal duties, recognising what first aid duties encompass by definition;

Clause 21.13 - In charge of plant

2.8.2 HIA submits that clause 21.13 could be re-worded as follows to ensure that the award is simple and easy to understand:

(a) In charge of plant means *an employee who is responsible for overseeing and directing work:*

- (i) *when two or more employees are employed at the plant at the one time, ~~the employee who is invested with the superintendence and responsibility or who has to accept the superintendence and responsibility;~~*
- (ii) *~~an employee who is invested with the superintendence and responsibility or who has to accept the superintendence and responsibility~~ over one or more other employees;*
- (iii) *when the employee is the only person of that class employed on the plant the employee who does the general repair work of the plant in addition to the work of operating, but not when the employee merely assists a fitter or engineer to do such work; or*
- (iv) *where shifts are worked, the employee who is directed to carry out the general repair work of the plant in addition to the work of operating, but not when the employee merely assists a fitter or engineer to do such work.*

2.9 CLAUSE 22 - SPECIAL RATES

2.9.1 HIA submits that clause 22.2 (e)(ii) could be re-drafted as follows:

- (ii) *An apprentice with less than two years' experience must not use a swing scaffold or bosun's chair, ~~and further provided that~~*
- iii) *Apprentice solid plasterers when working off a swing scaffold must receive an additional \$0.14 per hour.*

2.9.2 HIA submits that clause 22.2 (g) could be re-drafted as follows:

An employee working in any place where water is continually dripping such that clothing and boots become wet, or where there is water underfoot, must be paid an additional \$0.64 per hour ~~whilst so~~ engaged.

2.9.3 HIA submits that the following words from clause 22.2 (r)(i) be deleted:

An example of this type of system includes the Lubeca Façade System.



2.10 CLAUSE 23 - INCLEMENT WEATHER

Clause 23.9 – Inclement Weather Calendar

2.10.1 HIA submits that clause 23.9 of the Exposure Draft Onsite Award (clause 23.8 of the Onsite Award) is not obsolete and should be retained.

2.10.2 The provision was varied during the 2012 Modern Award Review in *Master Builders Australia Limited*⁵.

2.10.3 HIA raised concern with the provision:

*‘The HIA submitted that there is a lack of clarity as to when the “four week period” referenced in clause 23.8 is to commence and conclude. It submitted that whilst the NBCIA specified in clause 21.7.1 an initial date, from which subsequent four week periods are calculated, the Building On-site Award is silent on this issue, creating confusion.’*⁶

2.10.4 His Honour, SDP Watson concluded:

*‘I accept that the absence of a starting date of the inclement weather calendar creates a technical problem, creating uncertainty as to the operation of clause 23.8 of the Building On-site Award and that a variation is required to remedy that problem.’*⁷

2.11 CLAUSE 26 - ACCIDENT PAY

2.11.1 See above regarding the duplication of definitions.

2.12 CLAUSE 28 - OVERTIME

Clause 28.4 – Beyond an employee’s ordinary time of work

2.12.1 It is HIA’s view that the proposed amendment to the words ‘beyond an employee’s ordinary time of work’ to either ‘outside an employees ordinary time of work’ or ‘outside or in addition to an employees ordinary time of work’ would not clarify the application of overtime to casual employees.

2.12.2 What may be of benefit more generally is the adoption of consistent language for example, replacing ‘beyond an employee’s ordinary time of work’ with:

*‘beyond an employees **ordinary hours of work** as determined in accordance with clause 16 and clause 17 (inclusive of time worked for accrual purposes as prescribed in clauses 16—Ordinary hours of work and 17—Shiftwork)...’*

Clause 28.6 – Work during meal break – day worker

2.12.3 HIA submits that the following amendments to clause 28.6 of the Exposure Draft Onsite Award:

- **Move clause 28.6 to clause 18.1**

HIA submits that all provision relating to meal breaks should be contained within the same section of the award.

On the current drafting, employers unfamiliar with the operation of these provisions are largely left unaware of the penalty rates applicable while an employee works

⁵ [2013] FWC 4576

⁶ Ibid at para 50

⁷ Ibid at para 57



through a meal break. There is nothing in clause 18.1 indicating the application of clause 28.6. As such clause 28.6 should be moved to sit within clause 18.

- **Use of consistent, simpler language**

Clause 28.6 uses the terms 'for finishing of work' and 'the prescribed time of finishing' whereas clause 18.1 uses the term 'cessation of work'. As such HIA suggests the following amendments:

- (a) *If an employer requires an employee to work during the time prescribed by clause 18.1 for ~~finishing-the meal break~~of work, the employee must be paid at the rate of 200% of the ordinary hourly rate for the period worked between the prescribed time ~~of finishing~~for the meal break under clause 18.1 and the beginning of the time allowed in substitution for ~~thate~~ meal break.*
- (b) *If the finishing-meal break provided in accordance with 28.6(a) time is shortened at the request of the employee to the minimum of 30 minutes prescribed in clause 18.1 or to any other extent (not being less than 30 minutes) the employer will not be required to pay more than the ordinary hourly rate of pay for the time worked as a result of such shortening, but such time will form part of the ordinary working time of the day.*

This would also prevent any controversy arising as to the application of the term 'usual finishing time' as defined by clause 18.3(d).

2.13 CLAUSE 29 - PENALTY RATES

2.13.1 HIA submits that clause 29.4 could be re-drafted as follows:

29.4 Paid crib time during overtime—Saturday and Sunday

- (a) This provision operates in place of clause 18.1.
- (b) An employee working overtime on a Saturday or working on a Sunday must be allowed a paid crib time of 20 minutes after four hours' work, to be paid for at the ordinary hourly rate of pay, ~~but this provision~~
- (c) Clause 29.4(b) will does not prevent any arrangements being made for the taking of a 30 minute unpaid meal period, ~~the time~~ in addition to the paid 20 minutes in accordance with clause 29.4(b). ~~being without pay.~~ This provision operates in place of clause 18.1(a).
- (~~b~~)(d) In the event of an employee being required to work in excess of a further four hours, the employee must be allowed to take a paid crib time of 30 minutes which will be paid at the ordinary hourly rate of pay. This provision operates in place of clause 18.3(a) and (b)

2.14 CLAUSE 30 - ANNUAL LEAVE

2.14.1 HIA submits that the following NOTE be deleted:

NOTE: Where an employee is receiving overaward payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see ss. 16 and 90 of the Act).

2.14.2 It is HIA's view that within the context of the Exposure Draft Onsite Award the NOTE is confusing and largely irrelevant.



2.14.3 Under Section 16 of the *Fair Work Act 2009* **Base Rate of Pay** is defined as:

...the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- (a) incentive-based payments and bonuses;*
- (b) loadings;*
- (c) monetary allowances;*
- (d) overtime or penalty rates;*
- (e) any other separately identifiable amounts*

2.14.4 Under the Exposure Draft Onsite Award, clause 30.2(a) specifically excludes the operation of the *base rate of pay* and, consequentially, does not apply to the calculation of the wages an employee receives while on annual leave.

2.14.5 There is also difficulty with the interpretation of the words '*rate specified under this award*'. Does this refer to the minimum rates outlined under clause 19.1? Or the daily and weekly hire rates as per clauses 19.3(a) or 19.3(b)?

2.14.6 The NOTE also presents difficulties in that the rate calculated under clause 30.2(a) will actually be lower than an employee's take home pay while attending work. This is due to the operation of clause 25.10(c), which excludes the daily fares allowance from inclusion in the calculation of wages while on annual leave and clause 24.7(d) which invokes clause 25, leading to the same result.

2.14.7 HIA suggests the following amendment to clause 30.3(a):

(a) An employer may direct an employee to take paid annual leave during all or part of a period in conjunction with the Christmas/New Year holidays, where the employer shuts down the business, part of the business, or a site where the employee works.

~~(a)~~(b) If an employee does not have sufficient accrued annual leave for the period of the shutdown, then the employee may be required to take leave without pay for the balance of the shutdown period for which leave is not accrued.

2.15 SCHEDULE A —CLASSIFICATION DEFINITIONS

2.15.1 The **Construction and Property Services Industry Skills Council (CPSISC)** is now trading as **Skill Oz**.

2.15.2 CPSISC is only used in Schedule A at A.1.6 and A.1.7 in the Exposure Draft Onsite Award.

2.15.3 Further, the defined term in A.1.6 is not used anywhere else in the Exposure Draft Onsite Award.

2.15.4 The real intent behind A.1.6 and A.1.7 seem to be to link the 'competency standards' referred to within each of the classification, with the body who determines those standards and consequentially provides an ability to work out what those competency standards are through the relevant training packages.

2.15.5 HIA suggests that more generic language may need to be used within the Exposure Draft Onsite Award to avoid any confusion.

2.15.6 While HIA does not have a firm view on the best approach, the following are suggested:

- Where the term 'competency standard' is mentioned throughout Schedule A the words '*as set out in the relevant training package*' be added; or



- Competency Standard be defined to mean *the standards endorsed by the National Quality Council for the relevant training package*.

2.15.7 HIA submits that, notwithstanding the above, A.1.6 and A.1.7 be deleted as they are unnecessary and unreferenced throughout the entire award.

2.15.8 Terms that may require definition include *accredited course* (for example see A.2.4 (ii)) and *accredited training* (for example see A.2.2(iii)), although at this stage HIA does not have a firm view on this.

2.16 SCHEDULE C —SUMMARY OF MONETARY ALLOWANCES

2.16.1 The categorisation of allowances under the Onsite Award is currently subject to conciliation.

2.16.2 The following are all-purpose allowance but not identified as such:

- Industry allowance.
- Refractory bricklayer allowance.

2.16.3 The following are not all purpose allowances but the Schedule indicates that they are:

- Hydraulic hammer allowance.
- Waste disposal allowance.

2.16.4 In HIA's view the characterisation of the following allowance is unclear, yet has been classified as 'all purpose':

- Air-Conditioning Industry allowance.



ATTACHMENT A

MA000020 PRxxxxxx



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Casual employment and Part-time employment

(AM2014/196 and AM2014/197)

BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010

[MA000020]

Building, metal and civil construction industries

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL

SYDNEY, XX YYY 2015

4 yearly review of modern awards – casual employment and part-time employment.

A. Further to the decision issued by the Fair Work Commission on [XXX], the above award is varied as follows:

1. By inserting new clause 19.3(c):



(c) Casual Employee

The hourly rate will be calculated by adding the minimum wage calculated in accordance with clause 19.1 for the appropriate classification plus a casual loading of 25%, and the allowances prescribed in:

- clause 21.1—Special allowance;
- clause 21.2—Industry allowance;

and, where applicable:

- clauses 20.1—Tool and employee protection allowance;
- clause 21.3—Underground allowance;
- clause 21.11—Air-conditioning industry and refrigeration industry allowances;
- clause 21.12—Electrician’s licence allowance; and
- clause 21.13—In charge of plant allowance;

and dividing the total by 38.

B. This determination comes into operation from XXX.

VICE PRESIDENT

