

**BEFORE THE FAIR WORK COMMISSION  
SYDNEY REGISTRY  
FAIR WORK ACT 2009**

**s.156 - 4 YEARLY REVIEW OF MODERN AWARDS – AWARD STAGE**

**AM2014/260 – BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2010  
EXPOSURE DRAFT – TECHNICAL AND DRAFTING ISSUES**

**SUBMISSIONS OF MASTER BUILDERS AUSTRALIA**

1. On 23 March 2016 the Fair Work Commission (the Commission) published directions with respect to the 4 Yearly Review of Modern Awards – Award Stage – Group 3 and 4 Awards.
2. On 10 May 2016 the Commission varied the above directions to cause interested parties to file, on or before 4.00 pm on Thursday 30 June 2016 comprehensive written submissions on the technical and drafting issues related to exposure drafts in sub-groups 4A, 4B and 4C.
3. Pursuant to the above directions, Master Builders Australia (MBA) files this submission in respect of the *Building and Construction General On-Site Award 2010* (the On-Site Award).

**Other relevant proceedings**

4. The On-Site Award is the subject of current Award Stage conferences before Senior Deputy President Watson (AM2014/260). Interested parties have made a number of claims that cover a wide range of subjects. Conferences and discussions between the parties in that matter remain ongoing.
5. The On-Site Award is the subject of specific claims advanced in the Casual Employment matter (AM2014/197) that deal with the application of the 25% casual loading in the On-Site Award. In that matter, MBA has submitted that a controversy exists regarding the casual loading that would be resolved by the making of a determination clarifying the ordinary hourly rate to which the loading applies. A draft determination was filed to provide necessary clarification. MBA understands that this matter will be dealt with in July and August 2016.
6. The On-Site Award was also considered by the Award Flexibility matter (AM2014/300). Despite submissions made by MBA in support of its inclusion, the decision to create a

model TOIL term was not extended to the On-Site Award and was referred back to the Award Stage proceeding.

7. The On-Site Award is the subject of consideration in the Payment of Wages matter (AM2016/8) in respect of waiting time. This issue had previously been the subject of Award Stage discussions.
8. MBA notes that proceedings in the Part-Time Employment matter (AM2014/196) may also have a material effect on the On-Site Award. This is also the case with the application made on behalf of Traffic Management Association of Australia for the proposed *Traffic Management Controllers Award* (AM2014/195).
9. Given the relationship between proceedings noted above and related provisions in the draft *Joinery and Building Trades Award 2010*, this submission centres on drafting and technical matters broadly and, where matters noted above interact, summarises the related MBA position. Most of those related positions are advanced in AM2014/260 in which the Commission has produced a table [Summary of Proposed Variations - Construction Awards](#) indicating the breadth of matters under review.

#### **New Clause 2 – Definition of "all purposes"**

10. This clause inserts a new definition of "all purposes".
11. A large number of claims in AM2014/260 relate to allowances in the On-Site Award. This has been the recent focus of discussions between the parties.
12. Those claims impact the relevant definition in new clause 2 of the draft On-Site Award. There are related implications regarding terminology such as 'standard rate' or 'ordinary hourly rate' (which has been newly defined in the exposure draft) or 'ordinary time' from which many of the allowances are derived.

#### **New Clause 2 – Definition of Construction Workers (CW) and Engineering Construction Workers (ECW)**

13. This clause contains an additional definition of CW and ECW. They are reproductions of the definitions contained in clause 19.1(c) of the current On-Site Award (as also retained in clause 19.1(c) of the exposure draft On-Site Award) and are unchanged in substance or expression.

14. It is unnecessary to have CW and ECW defined twice in the same award when one definition is sufficient. They should either be retained at clause 19.1(c) – or – moved to be with other definitions in new clause 2, but not both.
15. MBA would submit they be retained at clause 19.1(c) as this is where the terms CW and ECW are most prevalent and, for an award reader unfamiliar with the building and construction industry, would be most likely the point where definitional clarity is required.

### **New Clause 2 – Definition of default fund employee**

16. This clause has removed the definition of "default fund employee" as contained in the current On-Site Award at clause 3.
17. The existing definition is expressed as follows:

***default fund employee*** means an employee who has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cth)

18. MBA would submit that the existing definition be retained. The definition was only recently inserted by PR545987 on 30 December 2013 further to the decision [2013] FWCFB 10016 as issued during superannuation related proceedings (AM2013/25).

### **New Clause 3 - The National Employment Standards (NES) and the On-Site Award**

19. A new clause 3 is proposed dealing with the relationship between the On-Site Award and the NES. It deals with three distinct concepts – being NES definitions, the relationship between NES and On-Site Award conditions, and employee access to copies of the NES and the On-Site Award.
20. The new clause 3 is expressed as follows:

3.1 The National Employment Standards (NES) and this award contain the minimum conditions of employment for employees covered by this award.

3.2 Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

3.3 The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which

is conveniently located at or near the workplace or through accessible electronic means.

21. The new clause replaces and combines current On-Site Award clauses 3.2, 5 and 6 that are reproduced below:

3.2 Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

5. Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible or made available (whether in hard copy or through electronic means) to an employee within a reasonable time following a request by the employee.

6. The National Employment Standards and this award

The NES and this award combine to contain the minimum conditions of employment for employees covered by this award.

22. MBA notes that the new clause 3 generally replicates the approach described in [2014] FWCFB 9412 as handed down during earlier review proceedings. MBA does not oppose the consolidation of the above mentioned concepts in to the one clause and our comments are therefore confined to matters relevant to new clause 3.2 and 3.3.
23. In terms of new clause 3.2, the attention of the Commission is drawn to an NES related matter advanced by MBA in AM2014/260. In short, MBA seeks to amend the current clause 38.1 to clarify that the definition of continuous service for the purposes of annual leave is determined with reference to the definition set out in the current On-Site Award clause 3.1. The effect of the clarification sought is not substantive and is not inconsistent with the definition set by the *Fair Work Act 2009*, and reinstates the definition commonly used throughout the industry and that existed in the *National Building and Construction Industry Award 2000*. To that end, we would seek that this aspect be dealt with in AM2014/260 given it is unique to the industry. In the event the Commission determines otherwise, we seek leave to make additional submissions in this proceeding.

24. The new clause 3.3 also reflects the decision handed down earlier in review proceedings.<sup>1</sup> However, a distinction can be made between the matters considered in those earlier proceedings and the circumstances in the current On-Site Award.

25. Earlier proceedings revolved around the provision that was common in Group 1 Modern Awards. That provision was expressed as follows:

‘The employer must ensure that copies of the award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.’<sup>2</sup>

26. The exposure drafts for Group 1 awards proposed a replacement clause expressed as follows:

‘The employer must ensure that copies of this award and the NES are available to all employees to whom they apply.’<sup>3</sup>

27. The Commission, after hearing from interested parties, decided that the amended clause would take the form proposed in new clause 3.3.<sup>4</sup>

28. The current award clause 5 is as follows:

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible or made available (whether in hard copy or through electronic means) to an employee within a reasonable time following a request by the employee. (*Our emphasis*)

29. This current clause 5 is not inconsistent with new clause 3.3 but contains an important distinguishing factor – that the obligation to make the On-Site Award and NES available to employees exists only where requested by an employee (refer underlined emphasis above). In other words, there is no positive obligation to make the On-Site Award and NES available for employees to whom it applies unless they so request it.

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<sup>1</sup> [2014] FWCFB 9412 at para 29

<sup>2</sup> Ibid at para 26

<sup>3</sup> Ibid at para 27

<sup>4</sup> Ibid at para 29

30. MBA submits that new clause 3.3 should be amended as follows (with additional words highlighted in bold) to reflect industry convention, existing provisions, and accommodate the unique environment that exists on building and construction sites:

3.3 The employer must ensure that copies of the award and the NES are available to all employees to whom they apply **where so requested**, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

#### **New Clause 4 – Coverage**

31. MBA notes that parties have made claims to vary the current award coverage clause in the context of On-Site Award Stage proceedings AM2014/260.

#### **New Clause 7 – Facilitative provisions**

32. MBA notes that these provisions form part of claims advanced in AM2014/260. In those proceedings, we have sought to vary some of the provisions referenced within the table at new clause 7.
33. MBA does not oppose the format of new clause 7. We note that the words in column 3 of the table entitled "Agreement between an employer and:" may change as a result of proceedings AM2014/260 in which MBA has claimed to change several of these requirements.

#### **New Clause 11.6 – Part-time weekly hire employment**

34. The draft includes a new clause 11.6 that replaces current clause 13.5. The new clause is expressed as follows:

11.6 The employer will provide a copy of the agreement and any variation made in accordance with clause 11.5, to the employee.

35. Draft clause 11.5 is expressed as follows:

11.5 The terms of an agreement may be varied, in writing, by consent.

36. The current clause 13.5 is expressed as follows:

13.5 A copy of the agreement and any variation to it will be provided to the employee by the employer.

37. The draft clause 11.6 may therefore create confusion in that any agreement made may only be varied in accordance with clause 11.5 – or – that only variations to the agreement need to be provided in writing to the employee.
38. MBA submits that it would be appropriate to combine draft clauses 11.5 and 11.6 so that it reads as follows:

The employer will provide the employee a copy of an agreement made pursuant to this clause. Variations to the terms of an agreement, in writing, may be made by consent of the employer and employee in which case copy must be provided to the employee.

**New Clause 14.3 (b) – Overtime and Shiftwork**

39. This new clause deletes the words "they so desire" contained in the current On-Site Award clause 15.3(b) and replaces them with the words "they choose to do so".
40. In proceedings AM2014/260, MBA has made a claim affecting related provisions in the current On-Site Award (clause 15.3 and its interaction with clause 36.)

**New clause 19.1(a) – Minimum Wages – General**

41. This new draft clause has deleted the word "adult" that appears in the current On-Site Award clause at 19.1(a).
42. In proceedings AM2014/260 MBA has sought a variation to insert Junior Rates into the On-Site Award. We would oppose the deletion of the word "adult" from the new draft clause.

**New Schedule C.2.1 – Adjustment of expense related allowance**

43. MBA notes that the draft schedule has altered the applicable Consumer Price Index (CPI) figure reference used to adjust the Tool and Employee Protection Allowance and the Compensation for Clothes and Tools Allowance. The reference to 'Eight Capitals Consumer Price Index' has been deleted and replaced with a reference to 'All Groups'.
44. As noted earlier herein, the issue of allowances and adjustments thereto are the subject of substantive claims in matter AM2014/260. We would, at this time, oppose the CPI reference changes in the new draft schedule.

## **Responses to questions raised in On-Site Award Exposure Draft**

45. MBA provides responses to appropriate questions raised within the On-Site Award exposure draft. Note all clause references hereunder are as per the On-Site Award exposure draft.

### **Clause 2 – Definitions – adult apprentice – page 4**

46. *Q. This definition of “adult apprentice” is different to the definition provided in clause 14.1(a).*
47. It is not necessary to propose a change as both 14.1(a) and 14.1(b) have the same effect as the definition at clause 2.

### **Clause 12 – Casual employment – page 14**

48. *Q. Parties are asked if the provisions clause 23 – Inclement weather apply to casual employees how these provisions are to be applied, given that the provisions are based on a four week accrual period*
49. This matter is the subject of discussions in AM2014/260. MBA submits that would be the appropriate forum for resolution given its unique and narrow application in the building and construction industry. Nevertheless, MBA submits that the application of these provisions to casual employees does not create confusion 'on the ground' within the industry and requires no clarification.

### **Clause 12 – Casual employment – page 15**

50. *Q. Parties are asked whether the casual hourly rate should be calculated by adding 25% to the hourly rate specified in clause 19.1, or calculated in accordance with either 19.3(a) or 19.3(b), or on any other basis.*
51. MBA has filed substantive submissions on this question in AM2014/197 and filed an associated draft determination. We refer the Commission to that submission as filed on 26 February 2016.

### **Clause 16.11 – Hours of Work – Washing time – page 22**

52. *Q. Is the Standards Association of Australia for work in compressed air, Part 1 Airlock Operations still the applicable code for the purpose of clause 16.12?*



53. This is a further area in which MBA has made a claim in AM2014/260 and submit that it be dealt with in that context. The clause refers to an out of date Code: AS CA12-1970 Work in compressed air (known as the SAA Compressed Air Code). This Code provides rules relating to working procedures and to safety and health of persons working in compressed air in tunnels, shafts and pneumatic caissons for pressures up to 50 lbf/in(sup)2, but does not include diving. Sections deal with medical supervision (including requirements for medical officers, medical orderlies and first-aid personnel), operation, equipment and general precautions, and appendices provide details of medical standards for workers in compressed air, instructions, decompression sickness and its treatment, limits on flying or diving after work in compressed air, and decompression tables for the range of pressures covered.
54. AS CA12-1970 was withdrawn and superseded by *AS 4774.1-2003 Work in compressed air and hyperbaric facilities - work in tunnels, shafts and caissons*. This standard specifies requirements for medical supervision of personnel, operating procedures, equipment and general precautions for work in tunnels, shafts and caissons where compressed air is the breathing medium and the maximum pressure of the work area is 4 bar (400 kPa) gauge. Appendices include medical standards and examination forms, information for medical practitioners, instructions for persons working in compressed air and information on decompression illness. Clause 4.8 of AS 4774.1 sets terms for maximum periods in compressed air and mandatory rest periods that are called up by this clause.
55. MBA applied to have subclause 33.1(d) deleted during the Modern Award Review 2012 because it was submitted that regulation of matters about Occupational Health and Safety (OHS) should not be included in modern awards. MBA argued that the referenced document is out of date and has been replaced by *AS 4774.1-2003 Work in compressed air and hyperbaric facilities - work in tunnels, shafts and caissons*. This subclause clearly imposes OHS obligations on employers through the application of the wrong Australian Standard. This provision does not meet the modern Awards objective and should be deleted as part of the 2014 review in AM2014/260.

**Clause 19.10 – National Training Wage – page 34**

56. *Q. Parties are asked whether clause 19.10(a) should include an additional clause reference to rates in clause E.5.2 of Schedule E. It may be unclear whether clause 19.10 has any application to part-time and school-based trainees as their rates of pay are set out in E.5.2 (not E.5.1).*

57. This is a further area affected by claims advanced in AM2014/260.

**Clause 21.12 Site and general wage related allowances – Electricians’ licence allowance – page 45**

58. *Q. Parties are asked whether there should be a provision for WA, ACT, or NT*

59. MBA has sought instructions on this question which, at time of writing, have not been received. We seek leave to make a further submission in response to this question when we have received instruction.

**Clause 23.9 – Inclement weather – page 55**

60. *Q. Parties are asked whether clause 23.9 is obsolete*

61. MBA would not oppose the removal of this clause, however, we have sought further instructions to confirm this is the case. We seek leave to make a further submission in response to this question when we have received instruction.

**Clause 28.4 – Payment for working overtime – page 68**

62. *Q. Parties are asked whether the words ‘beyond an employee’s ordinary time of work’ in clause 28.4 should be amended to ‘outside an employee’s ordinary time of work’ or ‘outside or in addition to an employee’s ordinary time of work’. This may clarify the application of overtime to casual employees.*

63. This matter is likely to be affected by claims made in AM2014/260 and AM2014/197.

**Clause 41 – Forepersons and supervisors – page 79**

64. *Q. Parties are asked whether the award should clarify the method of adjustment of these amounts. The amounts have historically been adjusted in accordance with changes to the standard rate.*

65. This area may be affected by claims made in AM2014/260.

**E.3.3– Coverage – page 121**

66. *Q. Parties are asked to identify “any training program which applies to the same occupation and achieves essentially the same training outcome as an existing apprenticeship in an award as at 25 June 1997 that they consider should not be covered by this Schedule.*

67. MBA has sought instructions on this question which, at time of writing, have not been received. We seek leave to make a further submission in response to this question when we have received instruction.

### **E.7 – Allocation of Traineeships to Wage Levels**

68. *Q. Parties are asked to review the packages listed to ensure the lists are complete and up-to-date.*
69. MBA has sought instructions on this question which, at time of writing, have not been received. We seek leave to make a further submission in response to this question when we have received instruction.

**Master Builders Australia**

**30 June 2016**

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