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Fair Work Commission
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AM2020/101 - 4 yearly review of Modern Awards Building and Construction General Onsite Award 2020

HIA refers to the decision dated 2 March 2021¹ (Decision) in matter AM2020/101.

The Decision set out a provisional view regarding an issue arising with the interpretation of clause 26.4 of the *Building and Construction General Onsite Award 2020* (Onsite Award).

These submission respond to the invitation set out at paragraph 11 of the Decision to provide a response to the provisional view as set out at paragraph 10.

HIA does not support the provisional view.

It is HIA's view that adopting the provisional view would:

- Result in a significant change to the Onsite Award at odds with the view of the Fair Work Commission, set out in the 26 September 2018 decision (September decision)², that there was no proper basis for any substantial alteration to the entitlement established by clause 25;
- Impose additional costs at odds with the Modern Awards Objectives;
- Represent a significant shift away from the well-established application of the provision; and
- Unwind a variation adopted as a result of the 2 yearly review of modern awards that has assisted award users.

HIA elaborates on these matters below.

¹ [2021] FWCFB 1105

² [2018] FWCFB 6019

Additional Cost

While the provisional view does overcome a potential 'double dip' outcome explained at paragraph 7 of the Decision, and is simple and easy to understand it does not return award users to the position they would have been in prior to the September decision.

Specifically, the payment required to be made under the provisional view will impose additional costs when compared to that which was payable under the former provision.

Notably, under the provisional view the examples provided by Master Builders Australia in their submission dated 26 October 2020 still stand, however the total amount payable under the current provision would be \$115.90 per day (reduced from \$133.33 by the amount of the fares and travel patterns allowance of \$17.43/day). This still remains more than the amount of \$57.93 per day estimated to be payable in accordance with the application of the former provision.

2 yearly review of Modern Awards

HIA is concerned that if the provisional view is adopted matters addressed during the 2 yearly review of modern awards that have assisted award users could be jeopardised and upset the well-established understanding of the provision. This may simply lead to greater confusion.

When the Onsite Award was made in 2010 the equivalent provision was as follows:

25.2 Metropolitan radial areas

An employee, other than an employee in the metal and engineering construction sector who is required to commence or cease work at the employer's workshop, yard or depot other than on a construction site, must be paid an allowance of \$16.50 per day for each day worked when employed on construction work, at a construction site located:

- a) within a radius of 50 kilometres of the GPO in a capital city of a State or Territory; or*
- b) within a radius of 50 kilometres of the principal post office in a regional city or town in a State or Territory.*

25.5 Travelling outside radial areas

- a) Where an employer requires an employee to travel daily from inside one radial area mentioned in clauses 25.2, 25.3 and 25.4 to work on a construction site outside that area, the employee will be entitled to:*
 - i. the allowance prescribed in clause 25.2 for each day worked; and*
 - ii. payment for the time reasonably spent in travelling from the designated radial boundary to the job and return to the radial boundary; and*
 - iii. any expenses necessarily and reasonably incurred in such travel, which will be \$0.44 per kilometre where the employee uses their own vehicle.*
- b) The time outside ordinary working hours reasonably spent in such travel will be calculated at the ordinary hourly on - site rates to the next quarter of an hour, with a minimum payment of one half hour per day for each return journey.*

During the 2 yearly review of modern awards HIA raised concerns with this provision.

While it was clear from clause 25.5(a)(ii) that time spent in travel was payable for the time spent travelling from radial boundary to the job and back to the radial boundary such demarcation was not clear in relation to the application of clause 25.5(a)(iii) or clause 25.5(b).

This wording also differed from the wording in the *National Building and Construction Industry Award 2000* which under clause 38.4.1(b) stated:

In respect of travel from the designated boundary to the job and return to that boundary:

- *The time outside ordinary working hours reasonably spent in such travel, calculated at ordinary hourly “onsite” rates to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey.*
- *Any expenses necessarily and reasonably incurred in such travel, which shall be 47 cents per kilometer where the employee uses their own vehicle.*

Under that provision it was clear that both time spent travelling outside ordinary working hours and reimbursement for expenses associated with travelling outside the radial area is calculated from the designated boundary to the job and return to the boundary.

To remedy this, a consent position was reached. As outlined in the July 2013 decision³

[21] *In its initial application, the HIA sought a variation to clause 25.5—Travelling outside radial areas of the Building On-site Award, to provide clarity as to which radial area should be used for the purposes of calculating the excess entitlement under clause 25.5. It submitted that ambiguity exists as a result of the current terms of clause 25.5, which differs from the wording in the National Building and Construction Industry Award 2000 (NBCIA), and that amendment is necessary to simplify the clause so that the radial area for the purposes of this clause is clear.*

[22] *The HIA variation was discussed during the conference held on 6 December 2012, resulting in some level of agreement as to a variation to provide clarity within clause 25.5 and an intention of the parties to continue discussions on the drafting of an appropriate variation.ⁱⁱ*

[23] *In correspondence of 12 December 2012, the HIA advised of an agreed proposed variation and its terms. On 13 December 2012, I issued directions affording interested parties the opportunity to make written submissions in relation to the amended variation by 19 December 2012. On 18 December 2012, the CFMEU advised its consent to the proposed variation on behalf of itself, the AMWU, the AWU and the CEPU. No other submissions were received.*

[24] *On 4 January 2013, the HIA filed correspondence confirming the consent position recorded in its 12 December 2012 correspondence. However, on 10 January 2013, notwithstanding the absence of any submissions in relation to the directions of 13 December 2012, other than that of the CFMEU on 18 December 2012, the HIA advised that it had been brought to its attention that not all interested parties could consent to the variation to clause 25.5 in the form it proposed and that the parties would meet again in relation to it on 17 January 2013. No subsequent information concerning the amended clause 25.5 proposed by the HIA was provided. As a result, a further notice of listing of 7 March 2013 provided an opportunity for any further and final positions to be put in relation to the amended clause 25.5 proposed in the HIA correspondence of 12 December 2012.*

[25] *No further submissions were received.*

³ [2013] FWC 4576

[26] The amended terms of clause 25.5 as proposed, with the agreement of other interested parties and without objection by any interested party are as follows:

“25.5 Travelling outside radial areas

- (a) Where an employer requires an employee to travel daily from inside one radial area mentioned in clauses 25.2, 25.3 and 25.4, to work on a construction site outside that area, the employee will be entitled to:
- (i) the allowance prescribed in clause 25.2 for each day worked; and
 - (ii) in respect of travel from the designated boundary to the job and return to that boundary:
 - the time outside ordinary working hours reasonably spent in such travel, calculated at ordinary hourly ‘on site’ rates to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey; and
 - any expenses necessarily and reasonably incurred in such travel, which shall be \$0.46 per kilometre where the employee uses their own vehicle.”

[27] I am satisfied that the variation to clause 25.5 now proposed provides clarity as to its operation and should be made to give effect to the modern awards objective in s.134(g), to address any practical confusion arising from the current terms. The variation does not materially alter the relevant terms and conditions...

HIA proposal

In order to ensure the integrity of the provision, maintain consistency and stability within the Onsite Award and provide a solution that is as simple as possible in light of the current obligations under the Onsite Award, HIA proposes the following amendments highlighted in red:

HIA sees that the approach below is the most appropriate way to ensure that the Onsite Award is meeting the Modern Awards Objectives.

26.4 Distant work payment

a) If an employee is required to travel to a construction site that is:

- i. not located in a metropolitan radial area in which the employee’s usual place of residence is located; and
- ii. more than 50 kms by road from the employee’s usual place of residence;

the employee will be entitled to the distant work payment in clause 26.4(b) in addition to the allowance in clause 26.1.

b) The distant work payment, **is in respect of travel from the 50km boundary of the metropolitan radial area or 50kms from the employee’s usual place of residence (whichever is greater) to the construction site, is:**

- i. payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and
- ii. any expenses necessarily and reasonably incurred in such travel, which will be **\$0.47** per kilometre where the employee uses their own vehicle.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED

A handwritten signature in black ink, appearing to read "M. Adler". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Melissa Adler
Executive Director - Industrial Relations and Legal Services
