

BEFORE THE FAIR WORK COMMISSION

S.156 – 4 Yearly Review of Modern Awards

MATTER NO: AM2019/17, AM2014/260 & – Finalisation of Exposure Drafts and variation determinations – Tranche 3 - Construction Awards

SUBMISSIONS OF MASTER BUILDERS AUSTRALIA

INTRODUCTION

1. This submission is filed by Master Builders Australia ('Master Builders') with reference to the above matter and the Statement issued on 7 October 2020¹.
2. Exposure drafts were issued on 8 October 2020 for the *Building and Construction (General) On-Site Award 2010* ('On-Site Award')² and the *Joinery and Building Trades Award 2010* ('Joinery Award')³ together known as the ('Construction Awards'). In accordance with paragraph [9] of the Statement⁴ Master Builders has reviewed the exposure drafts and identified several matters for consideration of the Commission as detailed hereunder.
3. Wherever appropriate, Master Builders has proposed amendments to the relevant exposure draft provisions as marked in green, with the Commission's tracked changes remaining maintained in red.

ISSUES IDENTIFIED IN THE EXPOSURE DRAFT OF THE ON-SITE AWARD

Clause 14.2(a) – Apprentices - Conditions of employment

4. Trainees are referenced within clause 14.2(b) but not in clause 14.2(a). This appears to be a minor oversight and clause 14.2(a) should also incorporate the word 'trainees' so it appears as follows:
(a) Apprentices/trainees will be permitted to be absent from work, without loss of pay or continuity of employment, to attend the off-the-job training in accordance with the contract of training.

Clause 14.3(c) – Apprentices – Conditions of employment

5. Registered Training Organisation is identified by the acronym (RTO) at clause 14.3(c) whereas this phrase first appears earlier at clause 14.1(e). Clause 14.3(c) should be amended as identified below with consequential changes made to clause 14.8(a) and 14.9(a)(iii)(A) for consistency.
(c) No apprentice will, except in an emergency, work or be required to work overtime or shiftwork at times which would prevent their attendance at the ~~Registered Training Organisation~~ RTO as required by any y stature, award, regulation or the contract of training applicable to them.

Clause 16.2 – Ordinary hours of work and rostering arrangements – Hours of work and accrual towards RDOs

6. For clarity clause 16.2 should be amended as follows:

Ordinary working hours will be 8 hours in duration each day, of which 0.4 of one hour of each day worked will accrue towards a RDO and 7.6 hours will be paid. An employee will therefore accrue a maximum of 7.6 hours towards a RDO each 19 days of ordinary hours worked.

¹ [\[2020\] FWCFB 5353](#)

² [Exposure Draft - Building and Construction \(General\) On-Site Award - issued 8 October 2020](#)

³ [Exposure Draft - Joinery and Building Trades Award - issued 8 October 2020](#)

⁴ [\[2020\] FWCFB 5353](#)

Clause 16.11(a) – Ordinary hours of work and rostering arrangements – Other conditions for working ordinary hours – Early starts

7. The Commission will be familiar with the operation of clause 16 which determines ordinary hours of work. Key components of this clause are that there is to be a maximum number of ordinary hours worked each day (with 0.4 of one hour accruing to an RDO) and these are to be worked during a span of hours of 7:00am and 6:00pm for the week Monday to Friday.
8. Clause 16.11(a) provides the ability for 'Early Starts' and allows for agreement to be reached such that ordinary hours can commence anywhere between 6:00am and 8:00am. This means that were the start time to commence at 6:00am the finishing time would become 2:00pm, and likewise if the start time were to commence at 8:00am the finishing time would become 4:00pm.
9. Given that the span of hours allows for ordinary hours to be worked up to 6:00pm, ordinary hours could commence at 10:00am and still be within the conventional maximum span. However, the clause is limited to starts between 6:00am and 8:00am – but not 10:00am even though this would be within the conventional span.
10. To rectify this anomaly, we are instructed to submit that the Award should provide for not only early starts commencing between 6:00am and 8:00, but any time commencing between 6:00am and 10:00am.
11. We are therefore instructed to submit that clause 16.11(a) should be varied as follows:

(b) Early starts

The working day may start at 6:00 am or at any time between that hour and ~~8:00am~~ 10:00am and the working time will then begin to run from the time so fixed, with a consequential adjustment to the meal cessation period. The change to the start time requires agreement between the employer and employees and their representative(s), if requested.

Clause 20.6(a)(ii) – Payment on termination of employment

12. The Commission is aware that this provision has its genesis in a separate common issue proceeding that dealt specifically with payment of wages on termination of employment. That proceeding determined a new standard clause which would be inserted into Modern Awards including the On-Site Award. This standard clause was made effective on 13 October 2020 by way of [Determination - PR723313](#).
13. An unintended consequence has arisen from the insertion of this clause as it relates to Daily Hire, which as the Commission will be aware, is a lawful category of employment type established by the On-Site Award and widely used within the building and construction industry. Daily Hire is also recognised within the Fair Work Act.
14. In the form proposed, clause 20.6(a)(ii) only recognises the more conventional categories of employment by referencing termination payments due to an employee under the Award and the NES. This has the effect of excluding those who are employed in the category of Daily Hire.
15. This is because s.123(3)(b) of the FW Act provides that a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures) is not covered by notice of termination provisions under the NES.

16. Previous iterations of the award made reference to termination payments being all other amounts that are due to the employee “*under the award or the NES*” as opposed to “*under the Award and the NES.*”⁵
17. This former wording better comprehended the unique nature of the Daily Hire employment category set by the Award and recognised by the FW Act. The former wording is commonly understood and accepted within the industry. A return to this wording would avoid creating confusion for Award users that is likely to arise and would allow the provision to better meet the Modern Awards Objective⁶ if amended as follows:

(ii) all other amounts that are due to the employee under this award ~~and~~ or the NES.

Clause 26.4(a)(ii) – Living away from home – Distant work - Travelling time entitlements – Distant work payment

18. New clause 26.4(a)(ii) deals with payments for travel in circumstances involving distant work. This new clause replaced the earlier corresponding provision at clause 25.5.
19. Previously, clause 25 generally was the subject of submissions from various parties during Award stage proceedings. It was eventually determined by the Commission to be “*unnecessarily complex and confusing*”⁷ and required simplification.
20. While the replacement clause 26 is far clearer and easier for award users to interpret, it has given rise to a consequence that we submit is unintended and was not sought by any of the interested parties appearing in the Award stage proceedings.
21. The previous clause 25 was underpinned by a concept that established ‘radial areas’ of 50km with a ‘designated boundary’ that was used to determine both eligibility and amounts payable for travel for work purposes. In simple terms, clause 25 operated by establishing amounts that were payable for travel within a radial area (<50km from an employee’s home) and travel outside thereof (>50km from an employee’s home).
22. Where travel was required *outside* of the radial area, it was (save for some specifically identified circumstances) considered to be distant work and triggered a different allowance arrangement. This arrangement applied for travel *from and beyond* the ‘designated boundary’ (more than 50kms) and was payable *in addition* to the usual arrangement for travelling *within* the normal ‘radial area’ (less than 50km).
23. The re-drafted provision can now be interpreted such that it creates a ‘double-dip’ outcome. That is, an employee will receive *both* the conventional travel allowance and distant work arrangement for *all* travel to and from distant work – whereas previously the distant work arrangement only applied for the distance from and beyond that normally travelled.

24. Re-drafted clause 26.4 states that:

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 paragraph (b) in addition to the allowance in clause 25.1

⁵ [Clause 16.2 - Building and Construction Award 2010 - as at 12 January 2016](#)

⁶ [In particular s134\(1\)\(g\)](#)

⁷ [\[2018\] FWCFB 6019 at para \[184\]](#)

b) *The distant work payment 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.*

c) *Despite paragraph (a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.*

d) *In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:*

- (i) *The GPO of a capital city of a State or Territory or;*
- (ii) *The principal post office in a regional city or town in a State or Territory.*

25. Former corresponding clause 25.5 – *Travelling outside radial areas* is set out below (our **emphasis**):

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 site outside that area, the employee will be entitled to:

a) *the allowance prescribed in clause 25.2 for each day worked; and*

b) *in respect of travel **from the designated boundary to the job and return to that boundary**:*

- (i) *the time outside ordinary hours reasonably spent in such travel, which will be paid at the ordinary time hourly rate, and calculated to the next quarter of an hour 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.*

26. The re-drafted new clause removed the notion of “designated boundary” and as a consequence, new clause 26.4(a) can be interpreted to create an entitlement for employees to be paid for the entire distance travelled from their home to the distant work site (rather than simply for the return trip between the 50km radius point and the distant work site).

27. While Master Builders and other parties advanced claims and made submissions with respect to previous clause 25, none of these sought to amend the fares and travel allowance so that it would be applicable for the full distance travelled between the distant work site and the employee's home. Similarly, no changes of that nature were proposed by the Commission and it appears that this is an unintended outcome arising from the need to simplify the clause.

28. Replacement clause 26.4(c) therefore should reflect the previously available arrangements, however, it only precludes the allowance being payable in circumstances where the employee resided more than 50km from the site when they were initially employed. This contrasts with the previous arrangement whereby the distant work allowance was payable only for travel beyond the metropolitan radial area, for example outside the 50km radial boundary and back to the boundary.

29. As a result the new provision can be read such that employees can now claim the fares and travel pattern allowance under clause 26.1 in addition to the distant work payment for travel from the employee's usual place of residence to the distant work site.

30. An example of the impacts arising from the re-drafted provision when compared to the earlier provision is attached marked **Attachment A**.

31. In addition to the apparent extension of the allowances that are payable, the new provisions give rise to significant additional administrative obligations which would be contrary to the intent of the Modern Awards Objective and create confusion. This is due to employers now having to apply different methods of calculating the distant work payment for each of their individual employees every time they travel from their individual place of residence to the distant work site and return.
32. The former version of this clause provided that such calculation only needed to be done once (a return trip from the designated boundary to the job) for all employees – whereas the new provision requires this to be done individually for each and every employee, based on their specific individual location of residence and the distance between that residence and the distant work site.
33. Master Builders submits that the confusion arising from this unintended outcome can be resolved by making the amendment identified below:

26.4 Distant work payment

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

- (i) ~~not located in~~ outside of 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:

- (i) payment for the time outside ordinary working hours reasonably spent in travel from the 50 km boundary of the metropolitan radial area or 50 kms from the employee's usual place of residence (whichever is the greater), to the construction site;*
- (ii) 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*
- (iii) any expenses necessarily and reasonably incurred in such travel, which will be \$0.47 per kilometre where the employee uses their own vehicle.*

c) Despite clause 26.4(a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.

d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:

- (i) The GPO of a capital city of a State or Territory or:*
- (ii) The principal post office in a regional city or town in a State or Territory.*

MASTER BUILDERS AUSTRALIA

26 October 2020

Attachment A

Former application of distant work allowance in relation to a site located 75km from GPO

Prior to the changes which came into effect on 1 July 2020, under the *Building and Construction (General) On-Site Award 2010*:

- Clause 25.5(b) provided that if the employee resided within the 50km radial area and was required to work at a distant work site 75km from the GPO an employee would be entitled to:
 - (i) payment for the time outside ordinary working hours reasonably spent in such travel from the designated boundary to the job and return, paid at the ordinary time hourly rate (calculated to the next quarter with a minimum payment of half an hour per day);
 - If you employed a CW3 (with a minimum hourly wage of \$22.70/hr) and on the estimate that it would take approximately 40 minutes (rolled up to 45mins) to travel 50km return (on the basis that the average travel speed was 80km/hour) – they would be paid an additional **\$17.00/day** for the distant work payment; and
 - Where the employee uses their own vehicle, for any expenses necessarily and reasonably incurred in the distant work travel, \$0.47 per kilometre (ref. former clause 25.5(b)(ii) - (being in this case 50km return) they would be paid **\$23.50/day**.
 - For any travel within the 50km radial boundary, the employee would also be paid **\$17.43/day** for each day worked (ref. former clause 25.2); and
- In the above scenario under the former provisions, if a CW3 used their own vehicle, they would therefore be entitled to **a total payment of \$57.93 per day**.

New application of distant work allowance in relation to a site located 75km from GPO

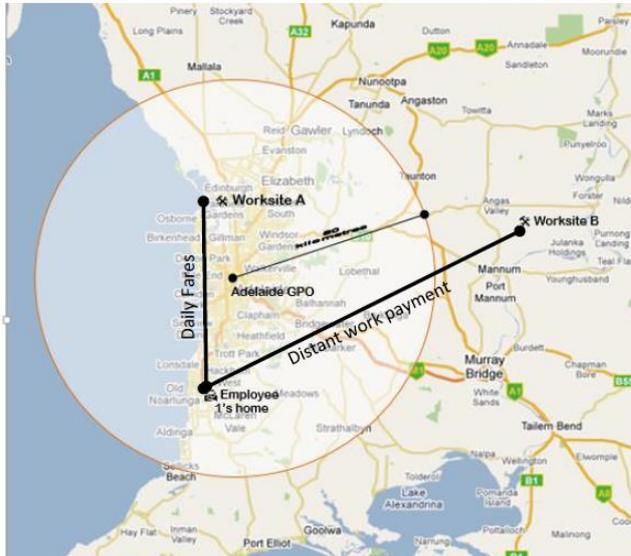
Since the changes came into effect on 1 July 2020, under the *Building and Construction (General) On-Site Award 2010*:

- Clause 25.4 provides that if the distant work site is located more than 50km from the employee's residence (in this case 75km) an employee would be entitled to:
 - (b)(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 with a minimum payment of half an hour per day);
 - Again, if you employed a CW3 (with a minimum hourly wage of \$22.70/hr), that employee resided next door to the GPO, and on the estimate that it would take approximately 1 hour, 52 minutes (rolled up to 2 hours) to travel 150km return (on the basis that the average speed was 80km/hr) – they would be paid an additional **\$45.40/day** for the distant work payment; and
 - Where the employee uses their own vehicle, for any expenses necessarily and reasonably incurred in the distant work travel, \$0.47 per kilometre (ref. clause 25.4(b)(ii)) (being in this case 150km return) they would be paid **\$70.50**; and
 - For any travel within the 50km metropolitan radial area, the employee would also be paid **\$17.43/day** for each day worked (ref. new clause 25.1).
- In the above scenario under the current provisions, if a CW3 used their own vehicle, it would appear they would now be entitled to **a total payment of \$133.33 per day**.

Attachment A

An example of how the new distant work provisions could be interpreted is illustrated in the following diagram:

Distant work payment



- Travel from home to Worksite A in own vehicle = daily fares only
- Travel from home to Worksite B in own vehicle = daily fares + travel time + 0.47 per km