

BEFORE THE FAIR WORK COMMISSION

s.156 - FAIR WORK ACT 2009

4 YEARLY REVIEW OF MODERN AWARDS

AM 2016/23 – CONSTRUCTION AWARDS

SUBMISSION OF MASTER BUILDERS AUSTRALIA

A. INTRODUCTION

1. This submission is filed by Master Builders Australia ('Master Builders') pursuant to the Decision of 26 September 2018 [FWCFB 6019] ('the Decision') and the Directions of 8 November 2018 (AM2016/23).

B. SUBSTANTIVE MATTERS

2. Item 1 of the 8 November 2018 Directions have sought submissions from the parties about substantive matters as follows:

In accordance with [469] of the decision, interested parties are invited to file any written submissions in relation to the matters identified in paragraphs [151]-[152], [244], [246], [372], [412]-[413] and [451] of the decision by no later than 5.00pm on Wednesday 14 November 2018.

3. Master Builders deals with each of these matters below in the above identified order.

Camp Allowance [Paragraphs 151-152]

4. The Decision contains new provisions [at paragraph 151] in the form of revised clauses 24.4, 24.5 and 24.6 to give effect to the Commission's provisional views expressed [at paragraph 150] as follows:

24.4 Reimbursement of meal expenses for living in camp

Where it is not possible for the employer to provide meals free of charge directly to employees required to live in camp, the employer shall:

- (a) *reimburse employees for food reasonably purchased by them for their own use or for the reasonable cost of meals consumed in the nearest recognised centre; and*
- (b) *pay an allowance of \$201.48 for every complete week the employee is available for work, or in the case of broken weeks \$28.76 per day including any Saturday or Sunday if the employee is in camp and available for work on the working days immediately preceding and succeeding each Saturday and Sunday. If an employee is absent without the employer's approval on any day, the allowance will not be payable for that day and if such unauthorised absence occurs on the working day immediately preceding or succeeding a Saturday or Sunday, the allowance will not be payable for the Saturday and Sunday.*

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24.5 Camp conditions

- (a) *The employer must ensure that a camp is maintained in a clean and hygienic condition.*
- (b) *Where an employer has established a camp site and provides facilities for employees living in their own caravan, the employer must provide reasonable space for the caravans.*

5. Master Builders submits that the provisional clauses require no change and accurately reflects the provisional view as expressed.
6. Further, the provisional clauses do not contain matters that are outmoded and/or irrelevant while ensuring that the core and relevant elements of the existing provision are retained to provide a modern and appropriate safety net. Considered concurrently, these factors cause the provisional clause to be one that would better satisfy the requirements at s.134 of the FW Act.

Coverage and classification issues – Testing of soils, concrete and aggregate [Paragraph 244]

7. The decision [at paragraph 244] seeks a view from the parties with respect to award coverage for workers who conduct soil, concrete and aggregate testing and the utility of existing clause 4.10(b)(v) as follows:

“In the circumstances we have determined that we should invite further submissions as to whether, without disturbing the coverage of either the Building Award or the Manufacturing Award, a variation should be made to the classification structure in the former award to provide a minimum rate of pay for those employees covered under clause 10.4(b)(v) or, alternatively, whether clause 10.4(b)(v) should be removed on the basis that it serves no utility.”

8. Master Builders submit that the Commission should remove clause 4.10(b)(v) on the basis that it serves no utility. We adopt this view for three main reasons:
 - While work of this type may have been contemplated by 4.10(b)(v), Master Builders remains unable to identify a member who engages employees under this clause as it is common industry practice for such work to be undertaken by specialist companies who perform testing off-site;
 - The above proposition was supported by witness evidence taken during arbitration proceedings, particularly that of Wednesday 5 April 2017 at PN2613 – PN2615; and
 - Such evidence is consistent with the On-Site coverage provisions, particularly clauses 4.1 and 4.9 that limit application to work that is *“in all cases undertaken on-site”*.

Coverage and classification issues – Utility Locators [Paragraph 246]

9. The decision [at paragraph 246] outlines a series of questions with respect to the proposed classification of worker to be known as "Utility Locator" as follows:

“Unfortunately the submissions of the other parties did not engage with Mr Walsh’s submission to any real degree, with the result that we have insufficient information to determine his claim. We propose to invite further submissions in order to further progress this issue, addressing the following matters:

- *whether any existing award classification covers utility locators (whether under the Building Award or any other award);*
- *the training, qualifications and accreditation (if any) required to perform utility location work;*
- *the rates of pay currently paid in the market for this work;*

- if there is no current award classification, which award and which classification should apply; and
- any other relevant matter.”

10. In response to these questions, we submit as follows:

(Q1) “Whether any existing award classification covers utility locators (whether under the Building Award or any other award);”

11. Master Builders submits that the work of "Utility Locator" is appropriately captured by the *Surveying Award 2010* [MA000066]. The Surveying Award, at clause 4.1, sets out coverage as follows:

This occupational award covers employers throughout Australia who employ professional surveyors and other employees in the classifications listed in Schedule B—Classification Structure and Definitions and their employees to the exclusion of any other modern award. (Our emphasis)

12. Surveying is described as:

Surveying means the act or process of determining the form, contour, position, area, height, depth or any other similar particulars of the earth’s surface, whether on land or water or of any natural or artificial features on, below or above any part of that surface or planning the position or the length and direction of the bounding lines of any part of that surface, or of any such natural or artificial features thereof and includes the making or obtaining of a plan of plans thereof. (Our emphasis)

(Q2) “The training, qualifications and accreditation (if any) required to perform utility location work;”

13. Master Builders understands that this type of work usually requires the satisfaction of *RIICCM202D - Identify, locate and protect underground services* – a specific unit of competency.

14. The unit of competency is described as:

This unit describes a participant’s skills and knowledge required to identify, locate and protect underground services in Civil Construction. This unit is appropriate for those working in operational roles. Licensing, legislative, regulatory and certification requirements that apply to this unit can vary between states, territories, and Industry sectors. Relevant information must be sourced prior to application of the unit.

15. Master Builders understands that this unit can be delivered in a short-course of two days. One accredited industry RTO who specialises in this training notes that:

We provide a 2 Day Course (Locator Awareness Course) and 5 Day Course (Utility Locator Training Course) for underground locating services, covering a range of topics, including:

- Safety requirements and safe work practices
- Dial Before You Dig plan-reading
- Types of locating devices including EMI, (Electro Magnetic Induction) and GPR, (Ground Penetrating Radar)
- Maximise locating accuracy
- Recognise interference
- Using traceable rodders and sondes
- Solving common locating problems in congested areas
- Non-destructive excavation equipment and techniques

The Locator Awareness Course also forms the first two days of our 5-day Utility Locator Training Program. The Program includes a further 3 days of real-world field training,

incorporating AS5488:2013 with live utility locating to provide more in-depth approaches to problem solving in the field.

16. Other sources of information stepping through a process described above is located at <http://www.dbydlocator.com/become-a-certified-locator/>
17. Master Builders understands that the above unit of competency, while available as a stand-alone course, can also be undertaken as either a broader qualification at Level II or Level III.
18. As a result, the holder of the above unit with a Level III qualification is likely to be classified as either Level 10 or Level 9 at clause B.1.5 or B.1.6 of the Surveying Award.

(Q3) *The rates of pay currently paid in the market for this work;*

19. Master Builders submits that utility locating work is performed by specialist companies that provide services as required at the appropriate phase of construction. A list of such companies with appropriate accreditation can be found <http://www.dbydlocator.com/certified-locators/>
20. We understand that it is these business types who engage utility locators who are sent to client construction sites to undertake relevant work as required. Research indicates that market rates of pay for this type of work is:

“The average salary for a Utility Line Locator is \$95,492 per year in Australia. Salary estimates are based on 10 salaries submitted anonymously to Indeed by Utility Line Locator employees, users, and collected from past and present job advertisements on Indeed in the past 36 months.”
<https://au.indeed.com/salaries/Utility-Line-Locator-Salaries>

(Q4) *“If there is no current award classification, which award and which classification should apply; and”*

21. Master Builders submits that the *Surveying Award* should apply and the classification for such work should be at either Level 10 or Level 9 at clause B.1.5 or B.1.6

(Q5) *“Any other relevant matter.”*

22. Master Builders submits that the work of 'utility locator' involves duties that do not represent "construction work" pursuant to the definitions contained within clause 4.10 of the On-Site Award.
23. For the above reasons, Master Builders would not support any alteration or addition to the On-Site Award to include the work of “Utility Locators”.

Allowances [Paragraph 372]

24. The decision [at paragraph 372] invites the parties to make further submissions with respect to proposed sectoral allowances as follows:

“We will allow interested parties 28 days from the date of this decision to file any further submissions they wish to make concerning the quantum of the sectoral industry allowances. Interested parties may also, during that period, request that a further conference or hearing be conducted in relation to this issue.”

25. Master Builders note that the Commission has sought submissions concerning only the quantum of the sectoral industry allowances and not the concept thereof. While our position on the concept remains that as outlined in our submission of 15 September 2017, Master Builders has determined that it would not oppose the quantum of the proposed sectoral allowances as determined by the Commission of 4 and 5 per cent.

Ordinary Hours of Work [Paragraphs 412-413]

26. The Decision proposes a revised clause at [paragraph 412] that gives effect to the provisional views [at paragraph 411]. This revised clause is expressed as follows:

33. Ordinary hours of work

33.1 *Except as provided in clause 34—Shiftwork, the ordinary working hours will be 38 per week (averaged over a 20 day four week cycle to allow for the accrual and taking of rostered days off (RDO)), worked between 7.00am and 6.00pm Monday to Friday in accordance with the following procedures:*

(a) Hours of work and accrual towards rostered days off

Ordinary working hours will be eight 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 7.6 hours towards a RDO each 19 days of ordinary hours worked.

(b) Accrual towards an RDO on days not worked

An employee will accrue 0.4 of one hour of each day towards a RDO for any public holiday where an employee is not required to work and for each day of paid leave taken. This will not apply on a day an employee takes a RDO.

(c) Taking the accrued RDO

(i) An accrued RDO will be taken in one of the following ways:

- on one day during a 20 day four week cycle on which all employees will take a RDO in accordance with a written roster fixed by the employer and issued 7 days before the commencement of that cycle; or*
- on a day during a 20 day four week cycle during which particular employees will take their RDOs on different days in accordance with a written roster fixed by the employer and issued 7 days before the commencement of that cycle; or*
- by any other method that is agreed by the employer and a majority of that employer's employees and recorded in writing.*

(ii) The means by which a written roster under clause 33.1(c) may be issued include but are not limited to the following:

- by giving an employee a copy of the written roster; or*
- by placing a copy of the written roster on the notice board(s) at the workplace; or*
- by sending the written roster to the employee by post in a prepaid envelope to an employee's usual residential or postal address, by facsimile transmission, or by email or other electronic means; or*
- by any other means agreed to by the employer and employee.*

(iii) A roster issued in accordance with clause 33.1(a)(i) must not require an employee to take an RDO on a day that is a public holiday.

(d) RDO banking

An employee and the employer may agree to allow the employee to bank an accrued RDO that would otherwise be taken under one of the ways fixed under subclause 33.1(c)(i) and in that event the following will apply:

(i) The number of accrued RDOs banked must not exceed five at any time.

(ii) If an accrued RDO is banked, an employee is required to work on the day the employee's RDO was otherwise fixed under clause 33.1(c)(i). In that event subclause 33.1(e) does not apply.

(iii) An accrued RDO that is banked will be taken on a day that is agreed between employer and the employee and on which ordinary working hours may be worked. An employer must not unreasonably withhold agreement for an employee to take a banked RDO on a particular day requested by the employee.

(iv) The employer must maintain a record of:

- the number of accrued RDOs banked by each employee; and
- the date on which each employee takes a banked accrued RDO.

(e) Requirement to work on a day that is a RDO

(i) The employer may require an employee to work on an RDO that is fixed in accordance with clause 33.1(c)(i) by agreement with the employee, or upon the provision of not less than 48 hours' notice where the work to be performed is necessary because of unforeseen delays to a particular project or a section of it or any other reasons arising from unforeseen or emergency circumstances on a project.

(ii) An employee who works on a day rostered for the taking of a RDO in accordance with 33.1(e)(i) will be paid penalty rates as prescribed for Saturday work in clause 37 – Penalty rates, and will retain the accrued RDO.

(f) Entitlement on termination of employment

If an employee's employment is terminated for any reason then, in addition to any other payment to which the employee becomes entitled the employer must pay to the employee:

(i) an amount equal to the payment the employee would have received had the employee taken any accrued RDO yet to be taken and any banked accrued RDO; and

(ii) an amount equal to the payment the employee would have received had the employee taken an RDO for the period representing the number of hours and minutes that have accrued towards an RDO.

33.2 Agreement on working other than the rostered day off cycle

Where an employer and the majority of employees employed at a particular enterprise agree that due to the nature of an employer's operations it is not practicable for an employee to be provided with an RDO in each four week cycle, they may agree to an alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day. Any such agreement shall be recorded in writing.

33.3 Hours of work – part-time employees

(a) The daily ordinary hours of work of a part-time employee shall not exceed 8 hours.

(b) Notwithstanding the provisions of this clause and clause 34 – 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 an RDO.

(c) An employer and employee may agree that the part-time employee accrues time towards an RDO as provided by this clause and clause 34–Shiftwork. In such

instances, the part-time employee will accrue pro rata entitlements to rostered days off in accordance with subclause 33.1(a).

33.4 Hours of work – casual employees

The daily ordinary hours of work of a casual employee shall not exceed 8 hours.

33.4 Other conditions for working ordinary hours

(a) Early starts

The working day may start at 6.00am or at any time between that hour and 8.00am 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 the employees and their representative(s), if requested.

(b) Washing time

The employer will provide sufficient facilities for washing and five minutes will be allowed before lunch and before finishing time to enable employees to wash and put away gear.

(c) Work in compressed air and underground

The working hours of employees working in compressed air or underground shall be subject to any applicable safety standards.

27. The Commission [at paragraph 413] invites submissions from the parties about the proposed new provision as follows:

“Because the provision above contains elements which were not contained in the draft provision in the August 2017 Statement, we will give interested parties an opportunity to file any further submissions in respect of the proposed new provision within 28 days of the date of this decision.”

28. In respect of the proposed new provision, Master Builders makes the following submission regarding new elements – being (a) payment for working RDOs in emergency circumstances and (b) hours of work for casual and part-time employees

(a) Payment for working RDOs in emergency circumstances

29. As the Commission has identified [at paragraph 413] the proposed new provision contains elements that have altered a similar draft as contained in [2017] FWCFB 4239 [at paragraph 7] which reflected the Commission’s then initial provisional view.
30. In response to directions in the Commission’s Statement [2017] FWCFB 4239 Master Builders filed a submission dated 15 September 2017 which affirmed our support for the initial provisional view, subject to suggested improvements.
31. An element within the proposed new provision that differs from the initial provisional view is that at proposed clause 33.1(e)(ii) dealing with payment for work on an RDO in emergency circumstances.
32. The effect of this new element is to provide that an employee who works an RDO in emergency circumstances will, in addition to being paid Saturday penalty rates for that time, be entitled to the RDO. The grounds for the new element appear to reflect submissions from the AWU and CFMMEU.
33. Master Builders contends that the interpretation of clause 33.1(e)(ii) advanced by relevant unions is incorrect and therefore any notion that the Commission’s initial provisional view of clause 33.1 would have resulted in a loss of entitlement is also incorrect.

34. It is our submission that the words "*in addition to accrued entitlements*" in existing clause 33.1(a)(vi) are linked to their use earlier in that same clause (at 33.1(a)(i)) wherein the term "*accrued entitlements*" references allowances at clause 25.2 to 25.7. That provision is necessary to clarify that these allowances form part of the payment for an RDO even though no work is performed, and is expressed as follows:

"Payment on such a rostered day off will include accrued entitlement to the allowances prescribed in clauses 25.2 to 25.7"

35. The words "*in addition to accrued entitlements*" at 33.1(a)(vi) is therefore a contextual reference to allowances at clause 25.2 to 25.7 and clarifies that they remain payable for work performed on an RDO in emergency circumstances; just as they would be payable if the RDO was taken as planned and no work was performed. This achieves consistency within that provision.

36. Master Builders submits that the Commission's initial provisional view was therefore the correct interpretation of this subclause. This is consistent with the position advanced by Master Builder's substantive submission of 2 December 2016 and attached related draft determinations, and the views expressed in our further submission of 15 September 2017.

37. To reflect the above submission, Master Builders submits that the proposed clause should be **amended** as follows:

(e) Requirement to work on a day that is a RDO

(i) The employer may require an employee to work on an RDO that is fixed in accordance with clause 33.1(c)(i) by agreement with the employee, or upon the provision of not less than 48 hours' notice where the work to be performed is necessary because of unforeseen delays to a particular project or a section of it or any other reasons arising from unforeseen or emergency circumstances on a project.

*(ii) An employee who works on a day rostered for the taking of a RDO in accordance with 33.1(e)(i) will, **in addition to accrued entitlements**, be paid penalty rates as prescribed for Saturday work in clause 37 – Penalty rates. ~~and will retain the accrued RDO.~~*

(b) Hours of Work – Casual and Part-time Employees

38. The proposed clause 33.1 also includes new elements that seek to define the maximum number of daily ordinary hours for casual and part-time employees. The Commission sets out the grounds for these elements [at paragraph 405] which includes references to *Fair Work Act 2009* ('the Act') at s.134(1)(a) and (da)(i) as follows:

"Fourthly, as submitted by the CFMMEU, clause 33 in its current form does not provide for any maximum number of daily ordinary hours for casual employees (after which overtime penalty rates would be payable). Nor does it do so for part-time employees. In this respect also, the clause is not a fair and relevant standard, having regard in particular to the needs of the low paid (s.134(1)(a)) and the need to provide additional remuneration for employees working overtime (s.134(1)(da)(i) of the Act)."

39. Master Builders note that the On-Site Award does, in its current form, clearly set out both the requirement for overtime to be paid to casual and part-time employees and the circumstances in which it is paid. Clauses 14.5, 14.6 and 14.7 sets out overtime obligations for casual employees and clause 33.1(b) establishes hours of work for part-time employees.

40. The issue of the ordinary hours of work for casual employees was agitated in AM2014/197. In those proceedings Master Builders submitted there was no ambiguity with reference to the ordinary hours of work for casual employees and that such a clarification was therefore unnecessary, a position we have subsequently and consistently maintained throughout this proceeding.
41. The maximum ordinary hours of work are established with reference to clause 33.1 that states:
- Except as provided in clause 34 – Shiftwork, the ordinary working hours will be 38 per week, worked between 7:00am and 6:00pm, Monday to Friday, in accordance with the following procedure.'*
42. It is our submission that this clause satisfies s.134(1)(a) and (da)(i) of the Act as it sets out circumstances in which overtime is triggered including:
- A daily span of ordinary hours (7am to 6pm);
 - A list of days on which ordinary hours can be worked (Monday to Friday); and
 - A maximum quantum of ordinary hours (38).
43. We submit these are the conventional and commonly observed circumstances that are applicable in the majority of other modern awards.
44. The union parties appear to draw a link between subclause 33.1(a)(i) – a subclause within the broader hours of work clause that deals specifically with a procedure for accruing RDOs. The link so drawn is that the daily hours of work stated in the RDO subclause are prescribed to be 8 (for RDO cycle and accrual purposes) and therefore it is assumed this sets a maximum daily amount which should also apply to casuals and part-time workers.
45. We submit the union interpretation is incorrect. The reference in subclause 33.1(a)(i) to "eight hours" exists only in the context of RDO arrangements. This is necessarily so given the RDO system and associated cycle that specific subclause seeks to establish (e.g. 20 day cycle, eight hours per day, 0.4 of an hour accrued over 19 days towards RDO on day 20).
46. However, this does not and should not represent the maximum daily ordinary hours for casual employees and part-time employees. These are established by reference to the conventional and common provisions noted earlier above as set out at clause 33.1 and which mimic provisions common in modern awards.
47. We submit that the existing provision satisfies s134(1)(a) and (da)(i) of the Act and that the amendment proposed setting maximum daily hours is therefore unnecessary.
48. Further, the fixing of maximum daily hours for part-time and casual employees to be eight hours would have the effect of delivering an outcome that is inconsistent with s134(d)(f) and (h).
49. We submit such inconsistencies would arise as the fixing of maximum daily hours would introduce into the award a level of rigidity that does not exist within its current provision and practical operation. That rigidity would be to limit the number of ordinary hours that can be worked to a maximum of eight per day - whereas the existing daily span allows ordinary hours to be worked between 7am and 6pm – a total of eleven (subject to the terms of clauses 14 and 33).
50. Master Builders submits that the elements comprising s.134(1) of the Act should be balanced in the event of conflict or inconsistency and that in doing so, the Commission should have regard to the industry to which the Award has application.

51. In the context of this proceeding relating to construction awards, we submit that the building and construction industry is not one in which there is a high density of low paid workers with various ABS and other survey data showing construction employees to be earning amounts, on average, of some \$1500 to \$1800 per week¹. Further, the building and construction industry is not one in which employers are unfamiliar with the need to ensure employees are remunerated for working outside of the conventional ordinary hours.
52. Master Builders submit the building and construction industry is, however, an industry that is known as being one in which flexibility is limited both in terms of workplace arrangements and the nature of work performed. In context, we submit that any further limitation on those remaining available flexibilities in the main Modern Award applicable to the sector would be an entirely undesirable outcome both in terms of practical industry impact and the instruments capacity to best meet the object of s.134 in overall terms.

Foreperson and Supervisors [Paragraph 451]

53. The Commission [at paragraph 451] has invited submissions on the structure of a proposed new clause 43.2 as follows:

“Our provisional view is that the appropriate course is to restructure and simplify clause 43 so that it does no more than set properly fixed minimum rates for forepersons and supervisors, either by way of a minimum weekly rate of pay or an allowance. The dollar amounts currently prescribed by clause 43.2 would appear to be appropriate for this purpose. We will invite further submissions in relation to this provisional view before we make a final decision.”

54. At earlier stages of the proceeding Master Builders indicated that it did not oppose the variations sought to this provision. Notwithstanding this, and after having regard to the comments of the Commission regarding clause 43 in the preceding paragraphs in its Decision, Master Builders makes the following observation to assist the Commission in resolving any uncertainty with respect to the background and intended operation of clause 43.2
55. As the Commission is aware, clause 43 is limited in application to forepersons and supervisors in the metal and engineering construction sector. It does not have application to general construction and Master Builders understands this clause was inserted during earlier general award modernisation proceedings.
56. The insertion of the clause was to accommodate the related supervisor/foreperson provisions from within the now defunct *National Metal and Engineering On-site Construction Industry Award 2002* that itself contained elements originally established to deal with supervisors/forepersons engaged under the *Metal Engineering Industries Award 1998*.
57. The relevant provisions in the *Metal Engineering Industries Award 1998* provided remuneration arrangements for supervisors/forepersons that were intended to operate as 'all in' arrangements under which persons performing such duties could be paid a total amount that would off-set and accommodate any otherwise applicable and payable award amounts.
58. The above background is reflected in the current On-Site Award clause 43.2, particularly clause 43.2(b) which comprehends a salaried or 'all in' type arrangement.

¹ See ABS Dataset: 6302.0 - Average Weekly Earnings, Australia, May 2018 – Adult OTE \$1536.10 - Total earnings \$1719.70 - All employment types, Adult Person Total earnings \$1502.80

59. In considering an approach to a revised clause, and subject to any position advanced by other employer parties involved in this proceeding, Master Builders would urge the Commission to have regard to the history of clause 43.2 and in particular the approach reflected in clause 43.2(b)

MASTER BUILDERS AUSTRALIA

14 NOVEMBER 2018