

Master Builders Australia

Submission to the
Fair Work Commission

AM2016/23 - 4 Yearly Review of Modern Awards

Construction Awards

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ATTACHMENTS

Attachment A: Statement of Mr David Solomon

Annexure A: *Building and Construction On-Site Award 2010 – Work Health and Safety Act/Regulations Comparison Table*

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1 Introduction

- 1.1 This additional submission is made by Master Builders Australia (Master Builders).
- 1.2 Master Builders is Australia’s peak building and construction industry association, federated on a national basis in 1890. Master Builders’ members are the nine Master Builder State and Territory associations.
- 1.3 Over the past 120 years the association has grown to represent over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.
- 1.4 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Overview

- 2.1 This submission sets out Master Builders' claims to vary the *Building and Construction General On-Site Award 2010* (On-Site Award) in respect of Allowances and Work Health and Safety.
- 2.2 These issues are distinct except insofar as they relate to this proceeding and the respective position of Master Builders.
- 2.3 In summary, this position is as follows:
 - 2.3.1 If an allowance or award clause deals with a matter that would otherwise be covered by relevant WHS laws, it should be deleted from the On-Site Award. This will involve claims identified in the Fair Work Commissions’ (Commission) table as MBA items 39, 43, 44, 47-58, 60, 68, 71-74, 78, 79, 81-86, 88-90, 94-97, 99, 100, 102, 105, 108-120, 159, 167.

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- 2.3.2 Allowances or award clauses that are outmoded, irrelevant or no longer applicable should be deleted. This will involve claims identified in the Commissions' table as MBA items 39, 98 and 118.
- 2.3.3 If an allowance or award clause deals with a matter that would not otherwise be covered by relevant WHS laws as noted above, or is not outmoded, irrelevant or no longer applicable, then (a) it should be rationalised so as to group allowances under the category of skill, disability and expense related and (b) for those grouped under the category of disability related allowances, a further grouping take place so as to identify those which are composite and those which are cumulative. This will involve claims identified in the Commissions' table as MBA items 26, 27, 30, 36, 39, 40, 42, 45, 46, 59, 61-64, 66, 67, 91-93, 101, 103, 104, 106, 107, 123-128, 130, 132, 135, 136, 137, 138, 139, 140, 141, 144.
- 2.4 Only in the event the Commission does not move to delete the allowance or Award clause that deals with a matter that would otherwise be covered by relevant WHS laws, then they should be amended to remove references to WHS matters and any other words that are not necessary to allow the provision to operate appropriately.
- 2.5 Only in the event the Commission does not adopt the approach identified immediately above, then those clauses that cause an inconsistency with WHS laws should be altered to replace specific references with generic references.
- 2.6 It should be noted that the primary position advanced by Master Builders is that identified at paragraph 2.3 above.

3 Legislative context

- 3.1 The 4 Yearly Review arises pursuant to s.156 of the *Fair Work Act 2009* (Cth) (FW Act).
- 3.2 In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

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- 3.3 The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission’s powers under Part 2-3 of the Act, which includes s.156.
- 3.4 Section 136(1) of the FW Act is also relevant. It deals with what a modern award can include. Relevantly, s.139(1) provides a list of matters about which a modern award can include related terms.
- 3.5 Section 138 of the FW Act is particularly relevant to the claims in this submission. The legislative provisions applicable to the 2 yearly review of modern awards, as opposed to the 4 yearly review, were considered in a Full Bench decision relating to the relevant legislative context and scope of the 2 yearly review, dated 29 June 2012 (The First Decision).
- 3.6 The Full Bench noted at paragraphs [33] and [34]:

“To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act.”¹

- 3.7 The importance of this section was also recognised by a Full Bench in the subsequent 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision that noted:

“Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is

¹ [2012] FWA FB 5600

*'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.'*²

- 3.8 The passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was also adopted by the Full Bench in the 2014 Preliminary Jurisdictional Issues decision:

*"... a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."*³

- 3.9 In 2012 the Commission (then Fair Work Australia [FWA]) heard an earlier application by Master Builders concerning the inclusion of WHS provisions in the On-Site Award. The application sought to vary the award to remove provisions that regulated WHS.

- 3.10 The argument advanced in the 2012 Review related to the lawfulness of WHS provisions and their inclusion in the Award.

- 3.11 In its decision, FWA addressed the issue of the interaction of the FW Act and instruments made under it with the various State and Territory OHS laws. In discussing sections 27 and 29 the Full Bench concluded that:

"The effect of these provisions is that in the event of inconsistency between a term of a modern award dealing with OHS and State and Territory OHS legislation the latter prevails. To the extent that a provision in a modern award purports to reduce an entitlement

² [2014] FWCFB 1788 at [36]

³ [2014] FWCFB 1788 at [38]

under the relevant State and Territory legislation, the provision is of no legal effect.”⁴

3.12 In addressing the secondary matter of whether or not provisions were lawful because they fall outside of the matters that must or may be included in modern awards under Division 3 of Part 2-3 of the Act, the Full Bench noted that provisions:

“...must be tested on the basis of considering and determining whether the particular provision is a term about any of the matters listed in s.139 or is an incidental or machinery term within s.142. As we have already found, this test is to be applied whether or not the term touches upon OHS matters or “directly regulates” OHS.”⁵

3.13 This test was subsequently applied and the claims rejected as they dealt with matters that were about:

- allowances, including expenses incurred in the course of employment (s.139(1)(g)(i));
- expenses incurred in the course of employment (s.139(1)(g)(i));
- disabilities associated with the performance of particular tasks or work in particular conditions or locations (s.139(1)(g)(iii));
- matters incidental to minimum wages and skill-based classifications, (ss.139(1)(a) and 142(1)(a)); and
- arrangements for when work is performed, including hours of work (s.139(1)(c)).

3.14 Notwithstanding this, the Full Bench noted that:

“Parts of the On-site Award are complex and possibly outdated, reflecting the fact that they are a product of the variation of predecessor awards at various points of time. This is evident in

⁴ [2012] FWAFB 10080 at para [54]

⁵ Ibid at para [67]

*some of the provisions raised by the MBA and other employer associations in the context of power questions raised in the current proceedings, most particularly in relation to the extensive allowance provisions in the On-site Award.*⁶

3.15 And later:

*“Addressing the issue referred to us for determination - the lawfulness question in relation to provisions said to raise OHS matters - we have decided that there is power to include the particular award terms in question. However, there do remain questions as to whether such provisions and others (which do not deal with OHS) require review by reference to the considerations which arise from Item 6 of Schedule 5 of the Transitional Provisions Act. This question arises, for example, in relation to propositions put to us that some terms of the On-site Award include reference to outdated regulation, protective clothing which is no longer sanctioned, obsolete or relate to practices no longer occurring.”*⁷

3.16 The 2 yearly review was undertaken in the context of a legislative framework that required an assessment of modern awards and the removal of items that were inconsistent with the modern awards objective.⁸ In the First Decision, the Full Bench stated that:

*“We also accept that the observations of Tracey J in SDAEA v NRA (No.2), as to the distinction between that which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.”*⁹

3.17 And later:

⁶ Ibid at para [80]

⁷ Ibid at para [82]

⁸ Refer to Item 6 of Schedule 5 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

⁹ [2012] FWAFB 5600 at para [33]

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“While s.138 is relevant to the [2 yearly] Review, there is still the question of the extent of its impact and the circumstances in which it will have on an application to a variation determination.”...“The precise impact of s138 is a question best considered in the context of a particular application.”¹⁰

- 3.18 The 4 yearly review is different. As noted above, s.138 requires that the relevant award includes terms only to the extent necessary to achieve the modern awards objective, as opposed to its confined application during the 2 yearly review.
- 3.19 We submit that while the Commission has found items to which our claims relate may lawfully exist in the On-Site Award, this finding was made in the context of the 2 Yearly Review of Modern Awards.
- 3.20 The 2 Yearly Review only required consideration of whether or not award terms were inconsistent with the modern awards objective. As noted above, the Four Yearly Review is different in that it enlivens s.138 of the FW Act and therefore requires that the inclusion of a particular term must be necessary to achieve the modern awards objective.
- 3.21 Therefore, in the context of this proceeding, there is broader scope for the Commission to determine whether or not clauses are necessary to meet the modern awards objective.
- 3.22 We therefore submit that the matters to which our claims relate would remove items that are not necessary to achieve the modern awards objective (s.138) and this will ensure the Award achieves the modern awards objective in a more comprehensive manner.
- 3.23 To not grant the claims as sought would have the effect of preserving terms that have no legal effect. This would cause the Award to retain a number of inoperative provisions and this would be inconsistent with the modern awards objective.

¹⁰ Ibid at para [34]

- 3.24 Adopting the approach foreshadowed in paragraph 2.3 above would be a better way to achieve the modern award objective in the most comprehensive manner and that is open to the Commission to do so.

4 WHS items

- 4.1 The On-Site Award commenced on 1 January 2010. Most of the provisions of the On-Site Award are based upon clauses contained in three federal awards which were in place prior to award modernisation. There were also a large number of State and Territory based pre-modern awards which covered employers now covered by the On-Site Award.
- 4.2 Many of the provisions in the current award (including those clauses relating to WHS) were the result of years of the normal industrial processes, including negotiation between the industrial parties and arbitration at a time when there were differing provisions in the various State and Territory WHS statutes.
- 4.3 This has created a situation where there are a large number of items within the On-Site Award that deal with matters that would otherwise be (and otherwise are) covered by relevant WHS Laws, WHS Regulations, relevant Codes of Practice, guidance materials, Australian Standards and other publications (“WHS Laws”).
- 4.4 These items create a number of problems including:
- The creation of inconsistencies between the Award requirements and the obligations under WHS laws;
 - The creation of overlap between Award requirements and the obligations under WHS laws;
 - The inclusion of references to practices, processes, items or types of work that are outmoded, irrelevant or no longer occur;
 - Creating requirements on employers to do specific things that do not contribute to, and may in fact detract from, the need to ensure workplaces are safe;

- Creating an approach to WHS that is prescriptive and contrary to the performance based model adopted in contemporary WHS laws;
- Create requirements that involve different approaches to ensuring a safe workplace dependent upon the type of person in the workplace (e.g. obligations in respect of employees that are different to obligations in respect of non-employees).

4.5 As noted earlier, similar concerns to those above were raised in context of the 2 Yearly Review. While the FWA found that the interaction rules allowed for matters which related to WHS to be included in the Award, it is our submission that (for the reasons we detail below) their retention in the context of this proceeding is contrary to the intent of the modern awards objective.

4.6 That is, while WHS matters may exist lawfully in the Award, they are not necessary to achieve the objective. This is because they contain provisions that are inconsistent with WHS Laws and, as observed by the Commission, WHS Laws prevail to the extent of any inconsistency.¹¹

4.7 In addition, where a provision is retained that reduces an entitlement otherwise available under WHS laws, it will have no legal effect.¹²

4.8 The outcomes noted immediately above are inconsistent with the objectives of s.134, particularly in relation to 134(1)(g) that aims to ensure awards are simple and easy to understand.

4.9 For the reasons outlined below, the objective would be better achieved were the course proposed in paragraph 2.3 adopted.

5 Developments since the On-Site Modern Award was made

5.1 The On-Site Award commenced on 1 January 2010. However, circumstances have changed in the time since that are relevant to the Commissions considerations.

¹¹ [2012] FWA FB 10080

¹² Ibid

- 5.2 It is relevant to consider the developments since the modern Award was made because there is broader scope (s.138) to have regard to these matters in this review than in earlier reviews.
- 5.3 The developments are widely known. They demonstrate the breadth and quantity of pertinent changes to the obligations of employers and employees to maintain safe work places and how they go about discharging those obligations.
- 5.4 They also highlight a contrast between performance based approaches to WHS and the prescriptive approach in the On-Site Award, and the historical basis of many provisions within the Award to which our claims relate.
- 5.5 This reinforces the notion that WHS should not be a matter which is the subject of comprehensive obligations set under the On-Site Award and is best determined with reference to WHS Laws.
- 5.6 There is now a **Model WHS system** that seeks to achieve national consistency across jurisdictions, and deliver what is essentially a national WHS system.
- 5.7 The Commonwealth, in conjunction with other jurisdictions, developed Model OHS laws. These were introduced in 2011 by the Australian Government in the form of the *Work Health and Safety Act 2011 (Cth)* (Model WHS Act).
- 5.8 Many jurisdictions have adopted the national model. Others that have not done so for reasons that include a substantial similarity of their existing laws to the national model as was developed.
- 5.9 There are Model Regulations that accompany the Model WHS Act that also seek to achieve national consistency. These have been adopted and implemented in much the same way across jurisdictions as the Model WHS Act.
- 5.10 There is a national **safety body**.
- 5.11 Safe Work Australia is an Australian Government statutory agency established in 2009 under the Safe Work Australia Act 2008. Their primary

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responsibility is to improve work health and safety and workers' compensation arrangements across Australia. Safe Work Australia works with the Commonwealth, State and Territory governments to improve WHS and workers' compensation arrangements. Safe Work Australia is the national policy maker, not a regulator of WHS. The Commonwealth, states and territories have responsibility for regulating and enforcing WHS Laws in their jurisdiction.

- 5.12 Safe Work Australia publishes 24 Model Codes of Practice (CoP) which also provide WHS guidance on certain types of work for example, Managing Risks of Falls in the Workplace and undertaking Demolition Work.¹³
- 5.13 Many of these CoP have been recognised by state based regulators as being a practical guide to achieving the standards of WHS with reference to a particular work activity. The CoP provide an additional layer of WHS regulation with which employers must become familiar in order to ensure they meet their obligations under the law.
- 5.14 There are currently 99 individual Safe Work Australia publications. This number has increased by more than 30 since the 2 Yearly Review, providing guidance on how to comply with the WHS Laws. There is a National Compliance and Enforcement Policy; 9 Major Hazard Facilities Guides; 35 Fact and Information Sheets; 4 Interpretive Guidelines; 50 General Guides.¹⁴
- 5.15 Although not a development arising since 2010, it also relevant to consider another industry specific safety matter. In response to a recommendation of the Cole Royal Commission, the **Office of the Federal Safety Commissioner (OFSC)** was established.
- 5.16 The OFSC seeks to ensure that in relation to construction projects funded by the Australian Government, construction companies tendering for projects must first be certified as compliant with a higher level of safety regulation.

¹³ <http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/model-cop/pages/model-cop>

¹⁴ <http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/guidance/pages/guidance-material>

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- 5.17 The approach to WHS embraced in the WHS Laws can be described as *performance based*. This conflicts with the approach in the On-Site Award which is a *prescriptive approach*.
- 5.18 The prescription arises in that the On-Site Award details specific matters to achieve WHS compliance. Prescription is not the way in which WHS Laws continue to be framed where workplace safety legislation is performance based.
- 5.19 The performance based approach encapsulated in WHS Laws has its foundations in the Robens Committee Report produced in the UK in 1972. It is from this report that the performance standards of is "reasonably practicable" is derived. A workplace safety duty is not absolute and the duty must be met by the respective holder, "so far as is reasonably practicable".¹⁵
- 5.20 In a jurisdiction which turns on continual improvement in safety technology, design, experience and knowledge, any prescriptive legal provision is prone to becoming quickly outdated, obsolete and therefore confusing to the end user. Likewise, work practices which might have been recently common are constantly under review and being altered to take account of the advances in knowledge, experience and technology.
- 5.21 Prescriptive provisions in the On-Site Award invariably result in inconsistency or conflict with the performance based provisions of WHS laws. Unlike performance based provisions, prescription does not allow for continual improvement whereas performance based legislation allows for continual improvement without the need for constant updating of the legislation. This is because prescriptive workplace safety provisions are prone to being quickly outdated, obsolete and too often relate to practices that no longer occur.
- 5.22 Having regard to the above developments, it can be seen why the inclusion of WHS matters within the Award create problems as categorised in paragraph 4.4 above.

¹⁵ *Safety and Health at Work; Report of the Committee 1970-72; Chairman Lord Robens; London, Her Majesty's Stationary Office Cmnd. 5034*

- 5.23 Annexure A to Attachment A provides greater detail as to the relevant award clauses and the WHS laws that also apply in each circumstance. Examples follow that highlight provisions within the Award that reference outdated regulation, reference protective clothing no longer sanctioned, that is obsolete or reflect industry practices that no longer occur, and the problems arising as a result.

The creation of inconsistencies between the Award requirements and the obligations under WHS laws.

- 5.24 There are many clauses that create and inconsistency between the obligations set by the Award and those required under WHS Laws.
- 5.25 An example of this is Clause 22.2(e)(ii) of the Award that relates to apprentice use of certain equipment and states that *"an apprentice with less than two years' experience must not use a swing scaffold or bosun's chair"*.
- 5.26 This causes a conflict with the WHS Laws. Allowing an employee who does not have sufficient skills and experience to use a swing scaffold or bosun's chair would be contrary to the primary duty of care in section 19 of the WHS Act, specifically section 19(3)(f).
- 5.27 The clause as expressed could be read by the Award user to imply that an apprentice (if they have more than two years' experience) has sufficient skills and experience to use such items notwithstanding that this might not be the case.
- 5.28 This is but one example of an inconsistency between the obligations within the Award and WHS Laws.

The creation of overlap between Award requirements and the obligations under WHS Laws.

- 5.29 Many clauses in the On-Site Award overlap with the requirements that already exist under WHS Laws.
- 5.30 An example of this is Clause 33.1(c) that appears as follows:

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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.

- 5.31 This clause sets requirements that overlap, and broadly duplicate, regulation 41 of the WHS Regulations. This regulation relates to the provision of adequate washing facilities.

The inclusion of references to practices, processes, items or types of work that are outmoded, irrelevant or no longer occur.

- 5.32 Clause 20.1(d)(iii) deals with special conditions that apply to bricklayers engaged on construction or repairs to refractory brickwork and provides that:

an employer must reimburse an employee for an x-ray once every six months, if requested by an employee engaged in refractory brickwork, or working in a tuberculosis home or hospital. Such x-rays may be taken during working hours and count as time worked. An employee who ceases work in a tuberculosis home or hospital may also request an x-ray on cessation of work.

- 5.33 The provision is based upon clause 24.3.5 of the *National Building and Construction Industry Award 2000 (NBCIA)*. Tuberculosis treatment facilities have been closed down in recent decades as a result of the significantly reduced incidence of tuberculosis in Australia.¹⁶

- 5.34 Therefore, designated tuberculosis treatment facilities no longer exist in Australia. Any cases of tuberculosis are treated within the infectious disease unit of a hospital, where the patient is isolated in a negative pressure room.¹⁷

- 5.35 This is an example of a clause which is obsolete.

¹⁶ *Tuberculosis notifications in Australia, 2012 and 2013* –Toms, Stapleton, Waring, Douglas and the National Committee, for the Communicable Diseases Network, Australia, and the Australian Mycobacterium Reference Laboratory Network. 2015

¹⁷ *Tuberculosis*, CDNA National Guidelines for the Public Health Management of TB – 12 August 2013

Creating requirements on employers to do specific things that do not contribute to, and may in fact detract from, the need to ensure workplaces are safe.

5.36 An example if this can be found with respect to confined space award provisions. The definition of “confined space” in clause 22.2(d)(ii) of the Award does not accord with the definition in the WHS Regulations.

5.37 The Award clause states that a confined space is:

a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.

5.38 Regulation 5 of the WHS Regulations provides that a confined space is an enclosed or partially enclosed space that is not designed or intended primarily to be occupied by a person and which has the following risks, or likely risks, to health and safety:

- an atmosphere that does not have a safe oxygen level;
- contaminants, including airborne gases, vapours and dusts, that may cause injury from fire or explosion;
- harmful concentrations of any airborne contaminants; or
- engulfment.

5.39 In addition, Regulation 71 of the WHS Regulations requires employers to provide employees with respiratory equipment if the atmosphere in a confined space does not have a safe oxygen level.

5.40 Allowing workers to undertake work in a defined space per the above Award definition would be contrary to obligations under the WHS Regulations to not allow an employee to work in a confined space without sufficient ventilation.

5.41 This clause and the definition therein as drafted relates to a practice that is no longer occurring. It is an example of many similar clauses that create an obligation that does not contribute to, and may detract from, the need to ensure workplaces are safe.

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Creating an approach to WHS that is prescriptive and contrary to the performance based model adopted in contemporary WHS Laws

5.42 Clause 20.3(a) of the Award is one of many that deals with PPE and states that:

An employee whose clothes, spectacles, hearing aids or tools have been accidentally spoilt by acid, sulphur or other deleterious substances, fire, molten metal or corrosive substances, must be paid such amount to cover the loss suffered by the employee as may be agreed upon between the employee and the employer.

5.43 This clause overlaps, and potentially conflicts with WHS Laws.

5.44 It contemplates situations where an employee has used a method to control a risk that may not be appropriate, and becomes exposed to a situation where, for example, clothes have been “accidentally spoilt” by “molten metal”.

5.45 Where there is a risk of an employee being splashed by acid, sulphur or other deleterious substances, fire, molten metal or corrosive substances, employers have obligations under WHS Laws to eliminate or minimise that risk so far as is reasonably practicable, using a hierarchy of controls, including through the provision of suitable PPE where necessary¹⁸ (compared with clause 20.3(a) of the Award which only requires employers to compensate loss).

5.46 This provision is therefore:

- too prescriptive; and
- ignores the hierarchy of controls that forms the basis of the performance based approach underpinning contemporary safety laws; and
- implies the use of PPE in circumstances that should not otherwise exist if obligations arising under WHS laws were discharged appropriately; and

¹⁸ *Managing Risks of Hazardous Chemicals in the Workplace* – Code of Practice – July 2012 – Safe Work Australia

- implies that PPE is supplied by the employee which is not consistent with the obligations of WHS Laws.

5.47 The clause as drafted is an example of similar provisions containing practices that are prescriptive and contrary to the approach encouraged in contemporary WHS Law.

Create requirements that involve different approaches to ensuring a safe workplace dependent upon the type of person in the workplace (e.g. obligations to employees that are different to obligations for non-employees).

5.48 The provisions in the WHS Laws cover all personnel on a site, including visitors, management, workers, contractors etc, however, the award has a narrower coverage. Therefore there could be different treatment of the same risk or hazard for those various groups on a particular site.

5.49 For example, clause 20.3(a) (as noted above) is premised on the notion that an employee has provided PPE at their own expense. Notwithstanding that this premise is not consistent with that adopted in WHS laws, if observed by an employer it would mean employees have to supply their own PPE whereas visitors to a site would need to have the PPE supplied by the employer, thereby creating two approaches to minimising the same hazard dependent upon the type of person in the workplace.

Consequences

5.50 The problems noted above serve to highlight the significant difficulty when discerning obligations to provide a safe workplace when they are contained in both the On-Site Award and WHS Laws. There are many inconsistencies that arise and many problems that present themselves not only in seeking to discharge obligations, but even at the point a user seeks to find out the nature of those obligations and where they are located.

5.51 The nature of the building and construction industry is such that safety is an important matter to all building industry participants. Safe Work Australia has

identified the building and construction industry as a “priority industry” in terms of its focus and the necessity to ensure workplaces are safe.

- 5.52 While it is incumbent upon all industries to ensure workplaces are safe, this is particularly important for the building and construction industry. Ensuring that there is no (or minimal) conflict between the requirements of the Award and those that apply more broadly in work health safety law is desirable.
- 5.53 As noted earlier, there is a multitude of legislation, regulation, codes of practice, standards and other related materials that apply to workplaces in the building and construction sector. An additional level of obligation, particularly a level of obligation which is inconsistent with that provided by the broader law, will not assist the building and construction industry in ensuring building sites are safe. In fact, the inclusion of WHS provisions in the On-Site Award could in fact operate to the extent that they require employers to do things that could be contrary to their broader obligations to provide safe workplaces and/or detract from improved safety outcomes in the sector generally.
- 5.54 The other consequence of the items noted above is that the inconsistencies overlap and confusion of obligations created as a result of the interaction between the On-Site Award and WHS Laws, continues and unless addressed, will continue to worsen.
- 5.55 As noted earlier, there were 64 materials available from Safe Work Australia when the Award was last the subject of a 2 yearly review and that number has now increased by 35 to 99.
- 5.56 The longer WHS related provisions are retained within the On-Site Award, the greater the divergence between the obligations they purport to create and those in the WHS Laws. The associated confusion that brings will continue to grow and in fact become greater as time goes on.
- 5.57 That is, the difference between obligations of the Award and the obligations of WHS Laws will continue to grow and the notable divergence will become more acute as time goes on.

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- 5.58 That is why this 4 Yearly Review presents a unique opportunity to address these circumstances. It will benefit the industry and building industry participants generally, and address issues that will, if not fixed now will only continue to worsen in the future.
- 5.59 It would be difficult to imagine the circumstance we seek to address being envisaged when the framework for modern awards was created. That parties who have an interest in a particular modern award would constantly need to amend it to reflect work health safety changes is not tenable.
- 5.60 It would be an absurd circumstance if the Award was required to be varied every time a State or Territory work health safety law, whether or not they reflect the model provisions or otherwise, changes or alters. This cannot logically have been the intention when the framework was established.

6 Other items

Ordinary hours of work - underground work

- 6.1 There are two other items that are WHS related but are the subject of a claim for differing reasons. They relate to provisions dealing with Underground Work (Item 160) and Working in Compressed Air (Item 159).

Ordinary hours of work - underground work.

- 6.2 Clause 33.1(e)(iii) of the On-Site Award deals with underground work and states that the ordinary hours of work for underground workers is 30 hours per week.
- 6.3 The current provision is an anomaly as it is the only clause within the On-Site Award that sets the weekly hours for any worker as being less than 38. Interpretation of the provision is further confused by the preceding clause 33.1(e)(ii) which states “*The hours of work for underground work will be 38 per week in accordance with the provisions of clauses 33.1(a)(i) and 33.1(a)(ii)*”.

- 6.4 The Award’s predecessor, the NBCIA, did not prescribe the ordinary weekly hours of underground workers to be 30, but did refer to allowances payable for underground work under clauses 24.2.
- 6.5 There is no commentary, in the form of an FWC decision, statement of any submissions made thereto, to suggest there is any reasoning to substantiate the anomaly.
- 6.6 As the hours of work are outlined in preceding clause 33.1(3)(ii), we submit that the purpose of the clause is to clarify the provision of crib time for underground workers (where it is highlighted that a week’s work is exclusive of crib time, with the exception of three classifications of workers where crib time is included).
- 6.7 Master Builders submits that Clause 33.1(e)(iii) has been drafted in error and that the ordinary hours for underground work should be amended to be 38, to remedy an inconsistency not only with clause 33.1(e)(iii) of the Award, but to also align the ordinary hours for underground work with those prescribed for all other workers under clause 33.1 of the On-Site Award.

Working in compressed air

- 6.8 Clause 33.1(d) states that the working hours and conditions of employees working in compressed air are with reference to the *Standards Association of Australia for work in compressed air, Part 1 Airlock Operations (AS CA112 – 1970)*.
- 6.9 This Standard has been since withdrawn and replaced by AS 4774.1 – 2003 – *Work in compressed air and hyperbaric facilities – work in tunnels, shafts and caissons*.
- 6.10 In addition to referencing an out of date Standard, clause 33.1(d) places an unreasonable burden upon employers by requiring them to purchase a costly instrument (\$163.48), which fails to provide the guidance it asserts. For this reason the clause should be deleted.

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7 Deletion of clauses involving WHS

- 7.1 We submit that clauses involving WHS in the On-Site Award have the effect of directly regulating WHS matters.
- 7.2 To this end, we submit that clauses relating to WHS should be deleted.
- 7.3 Alternatively, where a clause involves the payment of an allowance or similar to an employee for working in circumstances that would represent a breach of obligations arising elsewhere under WHS Laws, they should be deleted.
- 7.4 The basis for deletion is simply that the circumstances in which the payment arises should not occur in the event obligations in WHS Laws were appropriately discharged.
- 7.5 For example, clause 22.2(o) of the On-Site Award that deals with employees laying heavy blocks. It is currently expressed as:

(o) Heavy blocks—employees laying other than standard bricks

- (i)** Employees employed laying blocks (other than concrete blocks for plugging purposes) must be paid the following additional rates:
- where the blocks weigh over 5.5 kg and under 9 kg—3.2% of the hourly standard rate per hour;
 - where the blocks weigh 9 kg to 18 kg—5.8% of the hourly standard rate per hour;
 - where the blocks weigh over 18 kg—8.2% of the hourly standard rate per hour.
- (ii)** This special rate will not apply to employees being paid the extra rate for refractory work.
- (iii)** Stonemasonry employees not provided with mechanical means for the handling, lifting and placing of heaving blocks will be paid the rates prescribed in this clause.
- 7.6 The clause provides additional payment for those employed to lay blocks in defined circumstances calculated with reference to the weight of the block. It does not apply to employees who are otherwise already in receipt of an extra rate for refractory work.

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- 7.7 The clause only requires additional payments in circumstances described at subclause (iii) involving the absence of mechanical means for moving blocks.
- 7.8 As drafted, the clause can be read as allowing an employee to be paid an additional rate for moving a block that is more than 18kg. This could therefore include a block of any weight over 18kg leading to a nonsensical outcome. More relevantly, requiring an employee to move a block that weighed, for example, 50 kilograms without mechanical aid would be not be consistent with obligations to adopt a safe system of work based on the hierarchy of controls and minimise risk.
- 7.9 In other words, the existence of this clause contemplates a situation that would represent a failure to discharge obligations under WHS Laws applicable both the employer and employees.
- 7.10 A further example is that involving powdered lime dust at clause 22.4(b) of the On-Site Award. The provision is expressed as follows:

(b) Powdered lime dust

- (i) Employees exposed for any period greater than one hour in any shift to powdered lime dust from the spreading or mixing of powdered lime used in the stabilisation of road making material must be reimbursed the cost of purchasing the following protective clothing:
- overalls;
 - wide vision goggles;
 - respirator;
 - boots; and
 - gloves.
- (ii) The provisions of this subclause do not apply where the protective clothing is supplied by the employer.
- (iii) In addition, the employer must maintain at or near the work site or other place where such lime is being used, adequate facilities to enable any employee whose skin is contaminated with lime either directly or through their ordinary clothing to wash the affected area. A supply of barrier cream and hand cleanser must be

provided for the use of any employee required to handle powdered lime.

- (iv) Employees engaged in carrying out lime work will be obliged to wear the protective clothing supplied by the employer.
- (v) Each employee exposed to powdered lime dust whilst engaged in spreading or mixing powdered lime must, during the time they are so exposed, be paid an additional 3.5% of the hourly standard rate per hour in addition to all other rates payable in this award.

7.11 The clause as expressed could be read to require the following obligations:

- Employees can be exposed to powdered lime dust for up to one hour without the need to use PPE;
- Only where the exposure is more than one hour, then the employee is required to provide their own PPE and the cost of which must be reimbursed by the employer (but the clause does not oblige employees to actually use PPE);
- The entire subclause has no application if the employer provides PPE. This renders all other aspects of the powdered lime dust subclause to be inapplicable, including that which requires the use of a 'hand cleanser' and the additional payment for such work;
- The PPE, where noted, is restricted to very specific items;
- The only time employees are obliged to wear PPE is where supplied by the employer, notwithstanding the conflicting provision that states the subclause has no application where the PPE is supplied by the employer;
- The requirements to provide facilities for employees to wash themselves is premised on the basis that they will become "contaminated with lime either directly or through their ordinary clothing" implying that PPE will not be worn or assumes that employees will be exposed to a potential hazard;
- The requirement for payment only applies "during the time they are so exposed" which describes a circumstance where both the employer and

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employee have not complied with their respective obligations under WHS laws. Such circumstance should not exist.

7.12 Not only is it the subclause clumsily worded, it reverses the way in which conventional obligations apply, is premised on an assumption that work will most likely be unsafe, obliges employees to only wear PPE in a narrow circumstance, then renders itself inoperative when conventional safety obligations are observed. The entire provision describes circumstances that are almost entirely inconsistent with, if not entirely the opposite of, the obligations that exist for employees and employers under WHS laws and describes circumstances that should not apply if those obligations were observed.

7.13 The clause is an example of many that regulate WHS obligations and should be deleted.

8 Removal of references that are WHS related and/or obsolete, outdated, or reflect historical practices

8.1 As noted at section 2 above, in the event the Commission does not move to delete the allowance or award clause that deals with a matter that would otherwise be covered by relevant WHS Laws, then those clauses should be amended to remove references to WHS matters and any other words that are not necessary to allow the provision to operate appropriately.

8.2 By way of example, the provision involving confined spaces is currently expressed as:

(d) Confined space

(i) An employee required to work in a confined space must be paid an additional 4.0% of the hourly standard rate per hour or part thereof.

(ii) Confined space means a place the dimensions or nature of which necessitate working in a cramped position or without sufficient ventilation.

- 8.3 The removal of the WHS related reference would see item (ii) above deleted and the clause appear as follows:

(x) Confined space

(i) An employee required to work in a confined space must be paid an additional 4.0% of the hourly standard rate per hour or part thereof.

9 Replacement with generic references

- 9.1 As noted at section 2 above, only in the event the Commission does not move to delete the allowance or award clause that deals with a matter that would otherwise be covered by relevant WHS Laws, or amend them to remove references to WHS matters and any other words that are not necessary to allow the provision to operate appropriately, then they should be replaced with generic references that allow provisions to operate without the specificity that lends itself to becoming out-dated in a very short period of time.
- 9.2 Such a concept is best explained by way of example relating to the provision of PPE, which is a topic that is consistently spread throughout many items that are the subject of our claims.
- 9.3 A generic provision could be included in the Award which deals with all matters involving the requirement to provide PPE.
- 9.4 An example of such a generic clause is set hereunder.

(XX) Personal Protective Equipment (PPE)

(xx.x) Where PPE is required and is not supplied by the employer, they shall reimburse to an employee the cost of acquiring the PPE.

- 9.5 The benefit of such a provision is that it would, by default, replace a multitude of existing other award provisions that deal variously with matters pertaining to the provision of PPE.
- 9.6 While it remains our preferred view and position that references to work health safety, and in particular the obligation to provide PPE would be best left to WHS Laws, the inclusion of such a standard provision would drastically

reduce the number of areas where the Award makes reference to PPE and combines them into one standardised clause.

- 9.7 The inclusion of such a provision as proposed above would ensure that the requirements of the modern award objectives are, in particular those that require awards to be simple and easy to understand, are more readily achieved.

10 Allowances

- 10.1 A number of other MBA items relate to allowances which do not have a WHS element attached to them.
- 10.2 These allowances are matters deal with issues that are conventionally associated with the payment of an allowance in a modern award.
- 10.3 These allowances have previously been noted by the Commission as arising in circumstances where employees are required to perform particular tasks or duties as part of their obligations arising from the award. They have variously been described as allowances falling into the category of disability, skill or expense related.
- 10.4 In the 2012 2 Yearly Review, Master Builders put forward a claim that would have seen the allowances grouped by allowance category, (eg skill, disability and expense) in an effort to make the reading of the Award clearer, simpler and more user friendly.
- 10.5 We submit that the categorisation of allowances within the On-Site Award, based on expense, skill and disability, provides a logical basis for rationalisation.
- 10.6 Disability allowances could be grouped further as either composite or cumulative.
- 10.7 As noted herein above in section 2, paragraph 2.3, in the event that allowances which have a WHS element are not deleted or altered in the manner proposed earlier herein, then those allowances can too be included in the grouping as proposed, notwithstanding that that is a inelegant solution and

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would not achieve the modern award objective as comprehensively as it would if our other proposals are adopted.

11 Summary

- 11.1 For the reasons set out above, Master Builders Australia seek that our claims as sought to vary the On-Site Award in respect of WHS and allowance matters be granted in the terms proposed.

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IN THE FAIR WORK COMMISSION**AM2016/23 – 4 Yearly Review of Modern Awards – Construction Awards****Re Application by: Master Builders Australia****Statement of DAVID WOOTTEN SOLOMON**

On 16 December 2016, I, David Wootten Solomon of the Master Builders Association of NSW (MBA NSW), 52 Parramatta Road, Forest Lodge NSW 2037, make the following statement:

1. I am employed as Executive Officer Safety and Risk overseeing MBA NSW's Work Health and Safety department.
2. I have been employed in my current role since March 2014 and am a JAS-ANZ accredited OHS, Quality and Environmental Certified Auditor and a Fellow of the International Safety Quality and Environment Management Association (ISQEM).
3. I have worked in safety for around 7 years and before my current role was at MBA NSW, I formerly held a Site Manager/Safety role for Jones Lang LaSalle (now known as JLL) for 4 years.
4. My team of 4 provides WHS advice and training to approximately 8000 member companies, to assist them in understanding and meeting their obligations under the NSW Work Health and Safety Act 2011 and associated Regulation. These laws reflect the national model WHS laws that were harmonised some years ago.
5. The main award for our industry is the Building and Construction General On-Site Award (On-Site Award). I have read the award and am aware that it contains a lot of references to WHS matters. These include clauses such as those that prescribe specific types of PPE to be used, the circumstances when they are used, and amounts to be paid when using the PPE.
6. The areas in the On-Site Award that involve WHS are also covered by the NSW WHS Act, the Regulation, Codes of Practice, and other guidance and information materials.
7. Attached to this statement is a document marked **Annexure A** that shows each clause of the On-Site Award that relates to WHS, and the relevant related provisions of the WHS Act and Regulation.
8. The WHS Legislation adopts a risk assessed methodology to WHS matters in the workplace. In some cases "Proactive Measures" might be used in the field to reduce risk. Whereas the Award adopts a more prescriptive approach which is in conflict with the WHS Legislation.
9. Many of the Award clauses are out of touch with WHS legislative requirements and do not in any way reflect current industry best practice. Obligations contained in both documents often overlap and occasionally contradict each other.
10. Other areas of the Award have become obsolete or refer to things or practices that no longer exist.
11. The existence of these clauses within the On-Site Award causes much confusion among members as MBA NSW often receives enquiries about whether guidance on WHS matters should be taken from the Legislation or the Award.

Signature by:



on 16 December 2016

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COMPARISON
Building and Construction General On-Site Award 2010
Work Health and Safety Act/Regulations

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS <small>(Italics identify applicability of regulation)</small>
1	Clause 8 – Consultation	Division 2 of Part 5 – Consultation with workers	
2	Clause 9 – Dispute resolution	Division 5 of Part 5 – Issue resolution Division 6 of Part 5 – Right to cease or direct cessation of unsafe work Section 84 – Right of worker to cease unsafe work	Chapter 2 Part 2.2 – Issue Resolution Regulation 23 – Default procedure
3	Clause 15.3(a) – Overtime and shiftwork (no apprentice/trainee will work overtime or shiftwork on their own or without supervision)	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work; Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking;	Chapter 3, Part 3.2, Division 1 Regulation 39 – Provision of information, training and instruction Chapter 4, Part 4.5, Division 1 Regulation 84 – Duty of person conducting business or undertaking to ensure direct supervision (<i>in relation to high risk work</i>) Chapter 6, Part 6.3, Division 1 Regulation 297 - Management of risks to health and safety (<i>in relation to construction work</i>) Chapter 7, Part 7.1, Division 7 Regulation 379 – Duty to provide supervision (<i>regarding hazardous chemicals</i>)
4	Clause 20.1(b) – Tool and employee protection allowance	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of control measures Chapter 3, Part 3.2, Division 5 – Personal protective equipment

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
		provision and maintenance of safe systems of work;	Chapter 6, Part 6.3, Division 1 Regulation 297 - Management of risks to health and safety (<i>in relation to construction work</i>)
5	Clause 20.1(c) (PPE for employees using toxic substances)	As above	As above, in addition to: Chapter 3, Part 3.2, Division 2 Regulation 40 – Duty in relation to general workplace facilities Regulation 40(e) – ventilation enables workers to carry out work without risk to health and safety; and Regulation 41 – Duty to provide and maintain adequate and accessible facilities Regulation 41(1) – A person conducting a business or undertaking at a workplace must ensure, so far as is reasonably practicable, the provision of adequate facilities for workers, including toilets, drinking water, washing facilities and eating facilities. <i>(in relation to washing facilities)</i>
6	Clause 20.1(d)(i) - Special conditions for bricklayers engaged on construction or repairs to refractory brickwork	As above	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of control measures Regulation 36(5) – If a risk then remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment. Chapter 3, Part 3.2, Division 5 – Personal protective

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
			equipment Chapter 6, Part 6.3, Division 1 Regulation 297 - Management of risks to health and safety (<i>in relation to construction work</i>)
7	20.3 – Compensation for clothes and tools	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work; Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking	Chapter 3, Part 3.1 – Managing risks to health and safety Chapter 3, Part 3.2, Division 5 – Personal protective equipment Chapter 6, Part 6.3, Division 1 Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>) Chapter 7, Part 7.1, Division 5 Regulation 351 – management of risks to health or safety (<i>in relation to hazardous chemicals</i>)
8	21.2 – Industry allowance	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(b) – the provision and maintenance of safe plant and structures; Section 19(3)(c) – the provision and maintenance of safe systems of work;	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of control measures Chapter 3, Part 3.2, Division 2 Regulation 40 – Duty in relation to general workplace facilities Regulation 41 – Duty to provide and maintain adequate and accessible facilities Chapter 4, Part 4.2 – Hazardous Manual Tasks

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
		<p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances;</p> <p>Section 19(3)(e) – the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;</p> <p>Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking; Section 19(3)(g) – that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.</p>	<p>Chapter 4, Part 4.4 – Falls</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
9	21.3 – Underground allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances;</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 4, Part 4.3 – Confined spaces</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in</i></p>

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
			<i>relation to construction work</i> Chapter 6, Part 6.3, Division 3 - Excavation work
10	21.4 – Multistorey allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(b) – the provision and maintenance of safe plant and structures;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work;</p> <p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances;</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 4, Part 4.4 – Falls</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
11	21.6 – Laser safety officer allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
12	21.7 – Carpenter-diver allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 4, Part 4.8 – Diving work</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
13	21.8 – Refractory bricklaying allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
14	21.9 – Cofferdam worker	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(b) – the provision and maintenance of safe plant and structures</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(d) – the safe</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 4, Part 4.8 – Diving work</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in</i></p>

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
		use, handling and storage of plant, structures and substances	<i>relation to construction work)</i>
15	21.10 – First aid allowance	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(e) – the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;</p> <p>Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking</p> <p>Section 19(3)(g) – that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking</p>	Chapter 3, Part 3.2, Division 3 – First aid
16	21.11 – Air-conditioning industry and	Division 2 of Part 2 – Primary duty of care	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
	refrigeration industry allowances	<p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(e) – the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities;</p>	<p>control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
17	22 – Special rates	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 3, Part 3.2, Division 5 – Personal protective equipment</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
18	22.2 – Special rates applicable to all sectors 22.2(a) - Insulation		
19	22.2(d) – Confined space		(In addition to the above, Chapter 4, Part 4.3 – Confined spaces)

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
20	22.2(e) – Swing scaffold	(In addition to the above, Section 19(3)(f) – the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking)	
21	22.2(f) – Explosive powered tools		(In addition to the above, Chapter 4, Part 4.1 – Noise Regulation 57 – Managing risk of hearing loss from noise)
22	22.2(i) – Toxic substances		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
23	22.2(k) – Asbestos		(In addition to the above, Chapter 8 – Asbestos)
24	22.2(m) – Furnace work		
25	22.2(n) – Acid work		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
26	22.2(o) – Heavy blocks – employees laying other than standard bricks		(In addition to the above, Chapter 4, Part 4.2 – Hazardous Manual Tasks)
27	22.2(p) - Bitumen work		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
28	22.2(q) – Height work		(In addition to the above, Chapter 4, Part 4.4 – Falls)
29	22.2(s) – Employee carrying fuels, oils and greases		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
30	22.3 – Special rates applicable only to the general building and construction sector	As above.	As above.
31	22.3(a) – Towers allowance		(In addition to the above, Chapter 4, Part 4.2 – Hazardous Manual Tasks and Chapter 4, Part 4.4 – Falls)
32	22.3(b) – Cleaning down brickwork		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
33	22.3(d) – Plaster or composition spray		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
34	22.3(f) – Dry polishing of tiles		(In addition to the above, Chapter 4, Part 4.1, Regulation 57 – Managing risk of hearing loss from noise and Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
35	22.3(i) - Roof repairs		(In addition to the above, Chapter 4, Part 4.2 – Hazardous Manual Tasks and Chapter 4, Part 4.4 – Falls)

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
36	22.3(l) – Brewery cylinders - painters		(In addition to the above, Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
37	22.3(n) – Spray application – painters		
38	22.3(o) – Pneumatic tool operation		(In addition to the above, Chapter 4, Part 4.2 – Hazardous Manual Tasks)
39	22.3(p) – Bricklayer operating cutting machine		(In addition to the above, Chapter 4, Part 4.1, Regulation 57 – Managing risk of hearing loss from noise)
40	22.4 – Special rates applicable only to the civil construction sector	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;</p> <p>Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(d) – the safe use, handling and storage of plant, structures and substances</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>
41	22.4(a) – Pipe enamelling		(In addition to the above, Chapter 3, Part 3.2, Division 6, Regulation 48 – Remote or isolated work and Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
42	22.4(b) – Powdered lime dust		(In addition to the above, Chapter 3, Part 3.2, Division 2, Regulation 41 – Duty to provide and maintain adequate and accessible

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
			facilities)
43	22.4(d) – Live sewer work		(In addition to the above, Chapter 4, Part 4.3 – Confined spaces)
44	22.4(e) - Timbering		As above.
45	22.4(f) – Special work		(In addition to the above, Chapter 5, Part 5.1, Division 7, Regulation 216 – Roll-over protection on tractors)
46	22.4(h) – Cutting stone		(In addition to the above, Chapter 4, Part 4.1, Regulation 57 – Managing risk of hearing loss from noise and Chapter 7, Part 7.1, Division 5, Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous chemicals</i>))
47	Clause 23 – Inclement weather	<p>Division 2 of Part 2 – Primary duty of care</p> <p>Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work</p> <p>Section 19(3)(g) – that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking;</p>	<p>Chapter 3, Part 3.1</p> <p>Regulation 36 – Hierarchy of control measures</p> <p>Chapter 3, Part 3.2, Division 2</p> <p>Regulation 40 – Duty in relation to general workplace facilities</p> <p>Regulation 41 – Duty to provide and maintain adequate and accessible facilities</p> <p>Chapter 6, Part 6.3, Division 1</p> <p>Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)</p>

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
48	Clause 33 – Ordinary hours of work		
49	33.1(c) – Washing time	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety;	Chapter 3, Part 3.2, Division 2, Regulation 41 – Duty to provide and maintain adequate and accessible facilities
50	33.1(d) – Work in compressed air	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work Section 19(3)(g) – that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of control measures Chapter 3, Part 3.2, Division 2 Regulation 40 – Duty in relation to general workplace facilities Chapter 6, Part 6.3, Division 1 Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)
51	35.4 – Working with toxic materials	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work	Chapter 3, Part 3.1 Regulation 36 – Hierarchy of control measures Chapter 3, Part 3.2, Division 2 Regulation 41 – Duty to provide and maintain adequate and accessible facilities Chapter 7, Part 7.1, Division 5 Regulation 351 – Management of risks to health or safety (<i>in relation to hazardous</i>

AWARD/WHS COMPARISON			
ITEM NO	AWARD CLAUSE	WHS ACT	WHS REGS (Italics identify applicability of regulation)
			<i>chemicals)</i>
52	36.1 – Requirement to work reasonable overtime	Section 19(3)(c) – the provision and maintenance of safe systems of work Section 19(3)(g) – that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking	
53	42.2 – Lift industry allowance	Division 2 of Part 2 – Primary duty of care Section 19(3)(a) – the provision and maintenance of a work environment without risks to health and safety; Section 19(3)(c) – the provision and maintenance of safe systems of work	Chapter 3, Part 3.2, Division 2 Regulation 40 – Duty in relation to general workplace facilities Chapter 4, Part 4.3 – Confined spaces Chapter 4, Part 4.4 – Falls Chapter 6, Part 6.3, Division 1 Regulation 297 – Management of risks to health and safety (<i>in relation to construction work</i>)