

BEFORE THE FAIR WORK COMMISSION

s.156 - FAIR WORK ACT 2009

4 YEARLY REVIEW OF MODERN AWARDS

AM 2016/23 – CONSTRUCTION AWARDS

SUBMISSION – DRAFT DETERMINATION

MASTER BUILDERS AUSTRALIA

A. INTRODUCTION

1. This submission is filed by Master Builders Australia ('**Master Builders**') pursuant to the Decision of 31 October 2019¹ ('**the Decision**') and in response to the Draft Determination issued in conjunction with the Decision.
2. Master Builders makes these submissions with respect to the *Building and Construction (General) On-Site Award 2010* ('**On-Site Award**') in which Master Builders maintains an interest.

B. APPLICATION OF ALLOWANCES ACROSS SUB-SECTORS

3. Master Builders retains concerns that employers who undertake work simultaneously across the two sub-sectors will likely experience confusion when calculating employee entitlements in circumstances where their employees perform work on multiple projects across both sub-sectors.
4. Part of this complexity arises by virtue of the inclusion of a new definition for the residential building and construction industry under clause 21.2(b) of the Draft Determination as follows:

"21.2 For the purposes of determining the applicable industry allowance:

(a) the definitions of general building and construction, civil construction and metal and engineering construction in clause 4.10 will apply.

(b) residential building and construction industry means the activities identified in clause 4.10(a) undertaken in relation to a single occupancy residential building which is not a multistorey building as defined in clause 22.3(c).

(c) the definition of multistorey building in clause 22.3(c) will apply."

5. During the proceedings employer groups generally advanced reservations as to the potential use of the phrase 'single occupancy' as part of the residential definition. The potential for confusion was foreshadowed for award users in identifying the correct allowance and its application to ensure the Award conditions are met.
6. The source of this confusion would likely stem from the absence of a settled view amongst industry participants as to what constitutes a 'single occupancy' dwelling. This is particularly problematic as such a determination would need to be made in advance of the commencement of building work on any particular dwelling under construction and that additional criteria may need to be considered by employers – such as accessing any information made available at the time with respect to a building's concept design, layout and proposed fit-out.

¹ [2019] FWCFB 6860 at para [371]

7. We anticipate this will create particular uncertainty with respect to the Low Rise Medium Density sector including Terraces and Duplex homes (whether they are detached, semi-detached or side by side with Separate Title/Strata Title/Torrens Title (subdivided)/Dual Occupancy etc.).
8. Concerns are maintained that employers may experience circumstances where they will need to make retrospective adjustments to the industry allowance paid where the incorrect allowance was inadvertently selected. An example of where this is likely to arise is in the not uncommon circumstances where the actual building when completed does not align with the initial scope of the project made known prior to a contractor tendering for a project, which was used to set their pay at commencement.
9. Having regard to the elements of the proceedings during which this issue was ventilated at a Full Bench hearing on 17 November 2017,² Master Builders' interpretation of clause 21.2(b) is that the definition of Residential work is such that it incorporates all developments of up to 4 storeys (on the basis that a multistorey building is defined as one with 5 or more storey levels under clause 22.3(c)). Master Builders' view is that the phrase 'single occupancy' is too narrow and will not assist award users in determining the appropriate applicable allowance with the necessary level of clarity and certainty.

C. COMMENCEMENT DATE

10. The Draft Determination proposes that its terms are to take effect 1 January 2020. We submit that, for the grounds and reasons outlined below, this date should be altered to avoid a practical outcome that would be at odds with the overall intent of the Modern Awards Objective.
11. The alterations regarding Allowances within the Determination are significant in terms of both their practical application and the structure of the Award itself. Having existed with a largely unchanged structure under various guises for decades, this Determination will represent the most significant and fundamental change over that period and this will require a period of time for workplaces to become firstly familiar with, and secondly adjust processes and practices, to accommodate them accordingly.
12. In application, alterations to the treatment of allowances will have the effect of raising the minimum amount of weekly and hourly rates payable to those engaged pursuant to the Award. Existing clause 19 makes this clear by stating that:

"The payment of additional allowances is required by other clauses of this award in respect of both weekly and hourly payments. The ordinary time hourly rate for an employee's classification is set out in clause 3"
13. Clause 19.3 variously references that for daily hire, weekly hire and apprentices, the *"hourly rate will be calculated by adding the amounts prescribed in...."* those clauses which are substantially altered by the Determination. In other words, the actual hourly rates which must be paid as a minimum to maintain compliance with the Award will increase regardless of the category of engagement, classification or industry sub-sector in which they apply.
14. We submit that the practical ramifications of these changes will be at least as significant as an adjustment to the Modern Award minimum wage, if not far greater. The structural alteration to allowances, combined with their intrinsic relevance to the determination of what is payable to meet the Award prescribed weekly and hourly amounts, represents an increase in the overall minimums payable to comply with its terms.
15. It is our submission that this triggers the operation of s.166 of the Act and, given the absence of circumstances necessary to satisfy subsection (2), the effective date should be that prescribed by subsection (1). In the alternative, the significant practical impact and ramifications flowing from the Determination will bring about a situation which is akin to that contemplated by s.166 and, in those circumstances, we urge the Commission to adopt the approach of this section.

Other procedural considerations

16. In the alternative, as the Commission is no doubt aware, there are a number of issues that remain outstanding with respect to the On-Site Award that have yet to be determined and/or finalised by

² Transcript – AM2016/23 – Full Bench Hearing - 17 November 2017 at PN311 – PN332

both the Construction Awards Full Bench and other Full Benches dealing with “common issue” matters.

17. We refer to the decision in the final stage proceedings handed down on 14 October 2019, wherein the Commission noted Master Builders’ concerns with respect to programming of the finalisation of the exposure drafts for the Construction Awards and stated at paragraph [184]:

“The MBA had requested that the due dates for submissions on the exposure drafts for the Construction group of awards be deferred until the proceedings in AM2016/23 have concluded. The Statement acknowledges the force of the point raised by the MBA and states:

‘Separate directions regarding the filing of submissions on the exposure drafts for the Construction awards will be issued when the Full Bench in AM2016/23 has been finalised.’”³

18. Issuing a determination which would give effect to such a significant change to the On-Site Award (albeit a discrete section) would cause significant confusion to award users and be inconsistent with the approach of the Full Bench in AM2019/17.
19. In addition, the proposed commencement date would fall during the industry’s annual shut-down period, prior to which time employers would have calculated in advance employee entitlements in accordance with the existing entitlements, therefore creating the potential for unintended breaches of the award.
20. Master Builders therefore urges the Bench to defer the enactment date for the Draft Determination until all outstanding matters have been finalised with respect to the Construction Awards as part of the 4 Yearly Review.

MASTER BUILDERS AUSTRALIA

19 NOVEMBER 2019

³ [2019] FWCFB 6935