

Master Builders Australia

Submission to the Fair Work Commission

on

Modern Award Review 2012 – AM2012/48

*Building and Construction General On-Site Award
2010 – Shift Times*

6 September 2013



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Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 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 Purpose of the submission

- 2.1 On 16 August 2013, Master Builders Australia wrote to the Fair Work Commission (FWC) to draw its 'attention to an anomaly created by the Decision dated 15 July 2013 in [2013] FWC 4576 (the Decision) at paragraphs 262-170:¹

In reconfiguring shiftwork, the Senior Deputy President has, we believe, inadvertently, provided a shiftwork spread that does not accommodate the hours between 11 pm and 4.30 am and hence work during those hours would ex facie not be classified as shiftwork. Under the clause as extant before the date of the Decision this period would have been covered by the definition of 'night shift' which in clause 34.1(a) was defined to mean "a shift finishing after 11 pm and at or before 7 am."²

- 2.2 Master Builders asked the FWC whether it should treat this matter as an anomaly to be corrected by the FWC or whether it should make an application to seek for the matter to be clarified formally.³ The FWC directed Master Builders 'to provide a proposed variation to correct the anomaly and put any further submissions in relation to the anomaly by 6 September 2013'.⁴ This

¹ Attachment A, at para 1.

² Ibid, at para 2.

³ Ibid, at para 4.

⁴ [2013] 6347, at para 12.

submission outlines that clause 34.1 of the *Building and Construction General On-Site Award 2010* (On-Site Award) as inserted by the Decision creates an anomaly as it does not accommodate the hours of work commenced between 11:00pm and 4:30am. It also sets out a proposed variation to correct this anomaly.

3 Shift work definitions

3.1 Clause 34 of the On-Site Award regulates shift workers. This clause provides a dual shiftwork regime, with clause 34.1 regulating shift workers in the general building and construction and metal and engineering construction sectors and clause 34.2 covering shift workers in the civil construction sector. This bifurcation reflects the importation of terms from the *National Building and Construction Industry Award 2000* (NBCIA)⁵ and the *Australian Workers' Union Construction and Maintenance Award 2002*,⁶ from which clauses 34.1 and 34.2 of the On-Site Award were respectively derived⁷ during the Award modernisation process. Whilst both regimes contain different shift work definitions, this submission only deals with the definition of shift work in the general building and construction and metal and engineering sectors where the anomaly arises.

3.2 The original shiftwork definitions in the On-Site Award for the general building and construction and metal and engineering sectors were derived from clause 30.1 of the NBCIA. This clause provided that:

Afternoon shift means a shift finishing at or after 9.00 p.m. and at or before 11.00 p.m.

Night shift means a shift finishing after 11.00 p.m. and at or before 7.00 a.m.

Morning shift means a shift finishing after 12.30 p.m. and at or before 2.00 p.m.

Early afternoon shift means a shift finishing after 7.00 p.m. and before 9.00 p.m.

⁵ Clause 30.

⁶ Clause 28.

⁷ Re Award Modernisation [\[2009 AIRCFB 50\]](#); (2009) 180 IR 124, at para 44.

- 3.3 When the On-Site Award commenced on 1 January 2010, these identical definitions were transposed into clause 34.1(a) of the Award. In Master Builders' submission to Fair Work Australia in support of an application to vary the *Building and Construction General On-Site Award 2010*,⁸ we outlined that this provision creates an anomaly which is graphically represented at Diagram B1 at Attachment B to this submission derived from diagrams originally lodged with the application:

One of the peculiarities which emerges from a graphical representation of the shift definitions at clause 34.1(a) for the general building and construction and metal and engineering sectors, is that it does not cover all hours. Shifts ceasing between 7.00 am and 12.30 pm, and 2.00 pm and 7.00 pm, are not defined as shifts, which means that no specific shift loading applies. With respect to shifts finishing between 2.00 pm and 7.00 pm, this is understandable, as such hours are close to ordinary hours for non-shift workers, who work without loadings between the hours of 7.00 am and 6.00 pm.⁹ This appears to be the basis for the fact that 'day shifts' in the civil construction sector do not receive any penalties, as they commence between 6.00 am and 7.00 pm, which means that they would finish between 2.00 pm and 6.00 pm, which again is close to ordinary hours for non-shift workers.

However, what is more obscure is why shifts ceasing between 7.00 am and 12.30 pm would not be defined as a shift. It may be because shift work in the general building and construction and metal and engineering sectors rarely (if ever) occurs such that shifts would cease during those hours, so the shift definitions were considered unnecessary. In other words, it may be due to the fact that shift work in the general building and construction and metal and engineering sectors is not typified by 24 hour enterprises, unlike the civil construction sector, where shift work is explicitly defined in those terms and for which shift definitions cover all hours.¹⁰

- 3.4 Whilst Master Builders supports the variation to the shiftwork clause made by the Decision whereby the definitions were re-drafted based on when they commence, rather than cease,¹¹ the wording of the replacement clause creates an anomaly. The shifts which previously could end during the period 11 pm to 4.30 am and be encompassed by a shift definition are not

⁸ <http://www.fwc.gov.au/documents/awardmod/review/AM201248.pdf> at para 7.5-7.6.

⁹ *Building and Construction General On-Site Award 2010*, clause 33.1

¹⁰ Above n 8, at para 7.5-7.6. See also diagrams at Attachment B.

¹¹ Para 264.

accommodated in the redrafted provision. The current definitions in clause 34.1 provide that:

afternoon shift means a shift commencing at or after 1.00 pm and before 3.00 pm

night shift means a shift commencing at or after 3.00 pm and before 11.00 pm

morning shift means a shift commencing at or after 4.30 am and before 6.00 am

early afternoon shift means a shift commencing on or after 11.00 am and before 1.00 pm.

3.5 As highlighted in Master Builders letter to the FWC on 16 August 2013 (attached as Attachment A and referred to in paragraph 2.1 of this submission) we stated that this shiftwork spread 'does not accommodate the hours between 11 pm and 4:30 am and hence work during those hours would ex facie not be classified as shiftwork.'¹² This premise is graphically represented in Diagram B2 of Attachment B of this submission.

3.6 To correct this anomaly Master Builders proposes that a new definition of an early morning shift be inserted into clause 34.1(a) of the On-Site Award. This definition would read as follows:

early morning shift means a shift starting at 11.00 pm and before *4.30 am*

3.7 For clarity, this proposal (which from the Decision introducing the anomalous clause 'the CFMEU did not oppose'¹³) is set out in Diagram B3 in Attachment B.

3.8 If the definition suggested in this submission is inserted into the On-Site Award, Master Builders also proposes that clause 43.2(b) be amended to read:

(b) When an employee is employed continuously (inclusive of public holidays) for five shifts Monday to Friday, the following rates will apply:

¹² Above n 1, at para 2.

¹³ [2013] FWC 4576 at para 266.

(i) afternoon, night and early morning shift – ordinary time hourly rate plus 50%;

(ii) morning and early afternoon shifts – ordinary time hourly rate plus 25%.

4 Conclusion

Master Builders asks the FWC to correct the anomaly discussed in this submission, by inserting a definition of an early morning shift and an early morning rate to accommodate the hours of work which commence between 11:00pm and 4:30am.



MASTER BUILDERS
A U S T R A L I A

16 August 2013

Associate to Senior Deputy President Watson
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: chambers.watson.sdp@fwc.gov.au

Dear Associate,

AM2012/48 - Anomaly Created by Decision Dated 15 July 2013

Master Builders writes to call to your attention to an anomaly created by the Decision dated 15 July 2013 in [2013] FWC 4576 at paragraphs 262-270. These errors were carried forward into the related Determination.

In reconfiguring shiftwork, the Senior Deputy President has, we believe, inadvertently, provided a shiftwork spread that does not accommodate the hours between 11 pm and 4.30 am and hence work during those hours would ex facie not be classified as shiftwork. Under the clause as extant before the date of the Decision this period would have been covered by the definition of 'night shift' which in clause 34.1(a) was defined to mean "a shift finishing after 11 pm and at or before 7 am."

We draw this anomaly to your attention because many companies which had organised their shiftwork around the notion of nightshift in the prior version of the award would be accruing a major contingent liability as nightshift would no longer contemplate the hours which have been omitted from the current version and, arguably, a penalty could apply in relation to work between these hours.

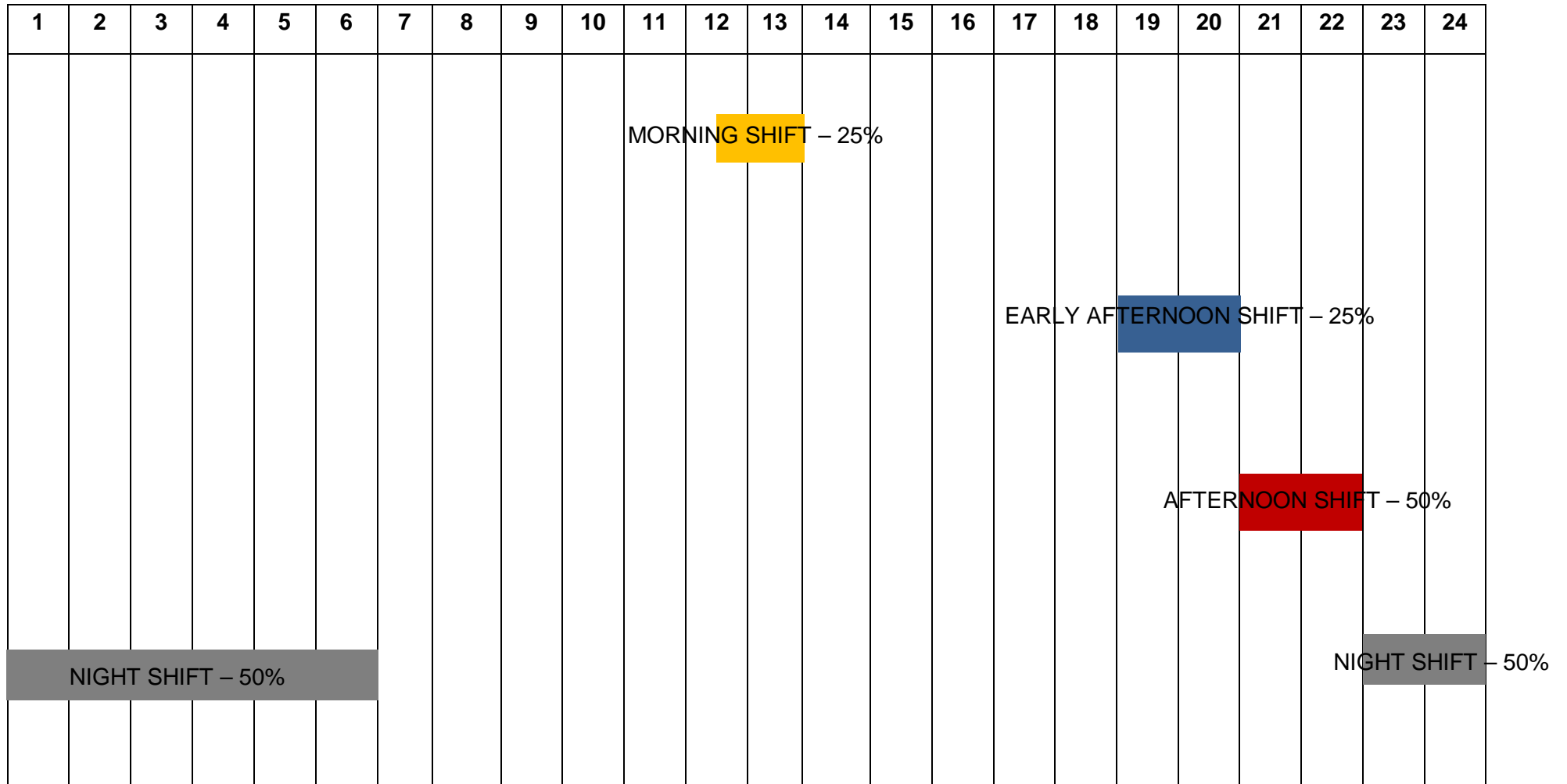
Please advise whether or not Master Builders should treat this matter as an anomaly to be corrected by the Commission or whether or not an application should be made to seek for the matter to be clarified formally.

Yours sincerely,

Richard Calver
**National Director Industrial Relations and
Legal Counsel**

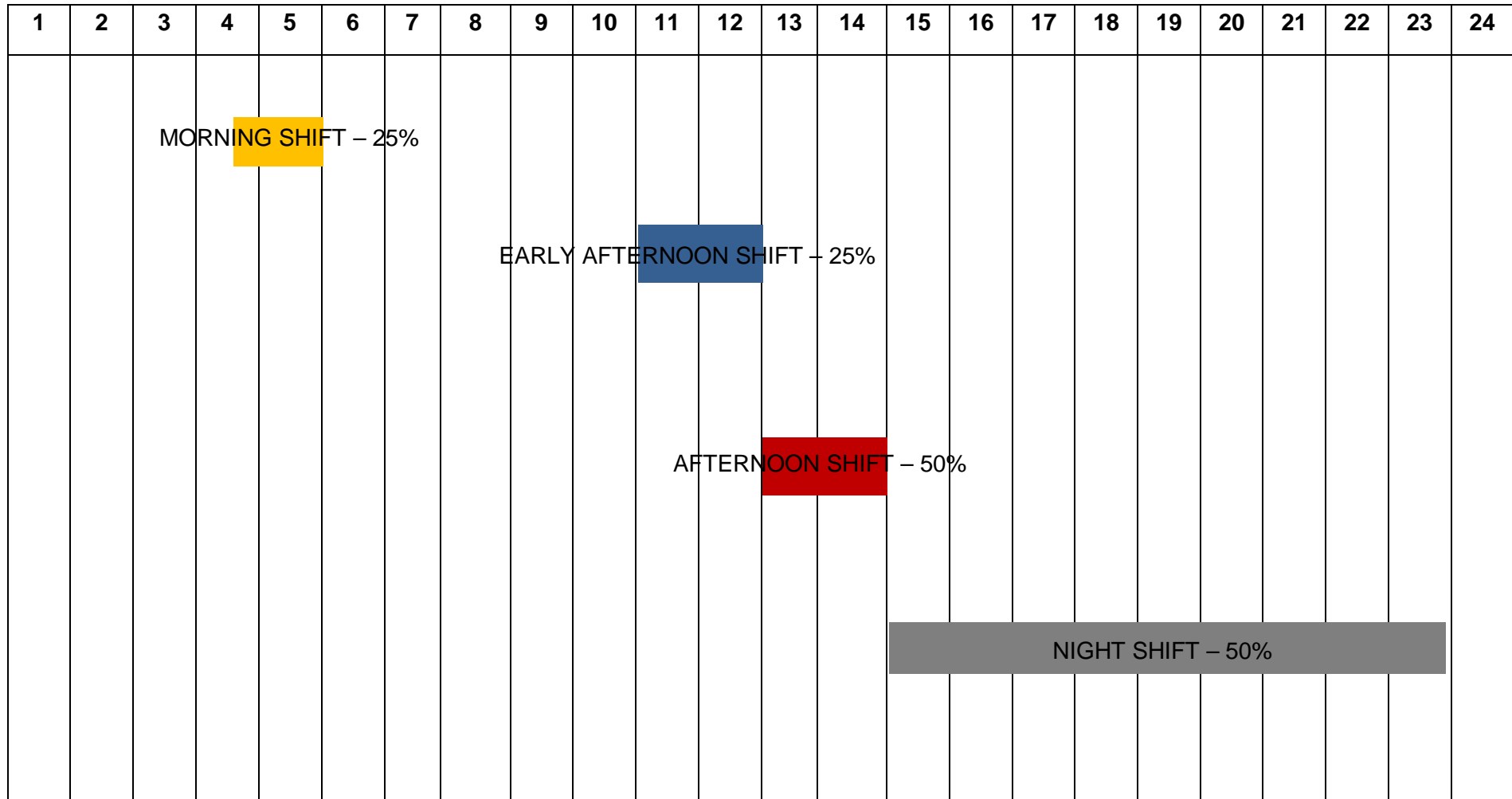
ATTACHMENT B

Diagram B1 – Previous shift work hours under the NBCIA and the *On-Site Award**



* Shifts for the general building and construction and metal and engineering sectors were previously defined by when they finish (clause 34.1(a)), i.e. whether they cease within the windows of time blocked out as a Morning Shift, Early Afternoon Shift, Afternoon Shift or Night Shift.

Diagram B2 – Current shift hours under the *On-Site Award**



* This diagram illustrates shifts in the general building and construction industry are now based on when they start, rather than when they finish (clause 34.1(a)) in order to provide ease of comparison with civil construction shifts which are defined according to when they commence (clause 34.2(a)). The shifts have been translated by moving them eight hours (i.e. the standard hours for a shift – clauses 34.1(e), 34.2(c)) prior to the earliest finishing time of the shifts as defined under clause 34.1(a) and by maintaining the same 'spread' of times. For example, a morning shift is defined as one which finishes between 12.30 pm and 2.00 pm, which means that the earliest such a shift could have commenced would be eight hours prior to 12.30 pm (i.e. 4.30 am) while the latest it would have commenced is eight hours prior to 2.00 pm (i.e. 6.00 am), thereby maintaining the 1.5 hour spread over which the shift is defined.

