



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the

Fair Work Commission

**Construction Awards
(AM2016/23)**

14 November 2018



contents

1. INTRODUCTION	3
2. ALLOWANCES	3
2.1 DEFINITION- RESIDENTIAL BUILDING AND CONSTRUCTION	3
2.2 INDUSTRY ALLOWANCE- QUANTUM	5
3. HOURS OF WORK.....	5
3.1 CASUAL EMPLOYEES.....	5

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1. INTRODUCTION

- 1.1.1 As part of the 4 yearly review of modern awards, on Wednesday 26 September 2018 the Full Bench of the Fair Work Commission (**Commission**) issued a Decision¹ (**Decision**) in relation to matter AM2016/23 - Construction Awards.
- 1.1.2 The Construction Awards include the *Building and Construction General Onsite Award 2010 (Onsite Award)*, the *Joinery Building Trades Award 2010 (Joinery Award)*, the *Mobile Crane Hiring Award 2010 (Mobile Crane Award)*, and the *Plumbing and Fire Sprinklers Award 2010 (Plumbing Award)*.
- 1.1.3 The Decision finalises a significant number of before the Commission, including those advanced by the Housing Industry Association Ltd (**HIA**).
- 1.1.4 At paragraph 469 of the Decision interested parties are invited to file written submissions in relation to a range of matters on which the Full Bench has expressed a provisional view.
- 1.1.5 Please find outlined below HIA's response to those matters outlined at paragraphs [372] and [412] – [413] of the Decision.
- 1.1.6 In summary:
- HIA supports the Commissions approach to the re-organisation and simplification of allowances.
 - HIA supports the quantum of the industry allowance proposed for the residential building and construction sector.
 - HIA seeks to reiterate concerns with the proposed definition of the Residential Building and Construction sector.
 - HIA is generally supportive of the Commissions determination in relation to the Ordinary Hours of Work provisions, particularly the introduction of a system to allow the banking of RDO's.
 - HIA however expresses concern in relation to the maximum hours of engagement for casual employees.

2. ALLOWANCES

2.1 DEFINITION- RESIDENTIAL BUILDING AND CONSTRUCTION

- 2.1.1 At paragraph 368 of the Decision the Full Bench indicated that:

'...our provisional view is that it is sufficient to for there to be two sectors only: residential building and construction (defined by reference to the activities referred to in clause 4.10(a) of the Building Award undertaken in relation to single occupancy residential building which is not



a multi-storey building), and all other building and construction, including civil construction and metal and engineering construction.'

2.1.2 While HIA supports the sectoral approach to the quantum of industry allowance, HIA maintains concerns in relation to the definition of 'residential building and construction' outlined in the extract above.

Use of the terms 'Multi-Storey' and 'Single Occupancy'

2.1.3 The terms 'multi-storey' and 'single occupancy' residential building have been used as a reference point to determine whether the relevant construction work is in the residential building and construction sector.

2.1.4 In response to a statement issued by the Commission on 6 December 2017 HIA opposed the inclusion of those terms in the definition of the residential building and construction industry (**December Statement**).

2.1.5 At a conference held on the 19 December 2017 HIA noted that:

- The term *single occupancy* is open to interpretation and potentially confusing for the industry given it is not a term broadly used within the residential construction industry.
- The definition proposed in the December 2017 Statement included a definition of 'multi-storey building' that differed from the existing award definition at clause 21.4(c) of the Onsite Award.² The current definition defines a multi-storey buildings as a ' *building which will, when complete, consist of five or more storey levels*'.

2.1.6 These views were outlined in correspondence to the Commission dated 19 December 2017 (**December Correspondence**).

2.1.7 In HIA's view:

- The term *single occupancy* should be removed from the proposed definition of the residential building and construction sector; and
- The definition of 'multi-storey building' used from the purposes of the definition of the residential building and construction sector be consistent with the current definition outlined at clause 21.4(c) of the Onsite Award.



2.1.8 To that end HIA seeks to re-advance the definition of ‘Residential Building and Construction’ outlined in the December Correspondence:

‘Residential Building and Construction means the activities undertaken in clause 4.3(a) for a residential purpose’.

2.1.9 If the Commission is not minded to that approach HIA asks that the Commission re-consider the provisional view outlined in the December Statement. In those circumstances HIA would seek a further opportunity to propose options in relation to the definition of the residential building and construction sector.

2.2 INDUSTRY ALLOWANCE- QUANTUM

2.2.1 HIA supports the proposition outlined in the Decision that not all current disability allowances are applicable to the residential construction sector.

2.2.2 HIA does not oppose the adoption of a new industry allowance, in replacement of those set out at paragraph 369 of the Decision of 4% of the weekly standard rate for the residential building and construction sector.

3. HOURS OF WORK

3.1 CASUAL EMPLOYEES

3.1.1 The Decision expresses a provisional view that the daily maximum number of ordinary hours for casual employees should *‘not exceed 8 hours’*³ principally on the basis of a desire for consistency with the provisions that apply to full-time employees.

3.1.2 On 16 March 2017 HIA filed submission, which, amongst other matters, responded to a CFMMEU proposal to insert a new provision to provide clarity in relation to overtime payment for casual employees (**March 2017 Submission**).

3.1.3 HIA opposed the CFMMEU’s proposal.

3.1.4 HIA maintains the view outlined in the March 2017 Submission that the position adopted by the Fair Work Ombudsman (FWO) and set out on their website is appropriate and accepted industry practice.



3.1.5 For convenience the following is the published position of the FWO:

Overtime - Casual employees

Casual employees get overtime rates if they work:

- *more than the maximum number of ordinary hours of work per week only (not per day)*
- *outside the spread of ordinary hours.*⁴

3.1.6 HIA is also concerned that the proposal stands at odds with previous decisions.

3.1.7 In *Master Builders Australia Limited* [2013] FWC 4576, an application made by HIA to vary clause 14.2 of the Onsite Award to include RDOs as one of the modern award matters which does not apply to casual employees, in light of the casual loading, was rejected on the following grounds:

*'Clause 14.2 was formulated by the Award Modernisation Full Bench having regard to the submissions made, including those in the MBA's 10th submission, and having regard to the terms of pre-modern instruments. RDOs were not one of the excluded matters in clause 13.4.1 of the NBCIA, which was inserted in 2002 to give effect to changes arising out of the Casuals Case. Clause 13.4.1 of the NBCIA did not include RDOs as one of the excluded conditions, which is unsurprising given the Casuals Case decision did not include RDOs as an excluded condition in determining the casual loading. Nor did any notional agreements preserving State awards (NAPSAs) exclude RDOs in the casual loading provision. The NSWIRC Secure Employment Test Case did not specifically consider the applicability of RDO provisions to casual employees.'*⁵

3.1.8 To that end, it would seem a settled matter that current clause 33 applies to casual employees and sets their ordinary hours of work.

3.1.9 HIA is concerned that establishing that the ordinary hours of work for a casual must not exceed 8 hours per day has the potential to cause confusion in light of the decision in *Master Builders Australia*, and the current operation of clause 33.

⁴ <https://www.fairwork.gov.au/employee-entitlements/hours-of-work-breaks-and-rosters/hours-of-work/when-overtime-applies#2169-2174>
<accessed 171018>

⁵ Paragraph 183

