

BEFORE THE FAIR WORK COMMISSION

S.156 – 4 Yearly Review of Modern Awards

MATTER NO: AM2020/101 – *Building and Construction (General) On-Site Award 2010*

OUTLINE OF SUBMISSIONS OF MASTER BUILDERS AUSTRALIA

INTRODUCTION

1. This outline of submissions is filed by Master Builders Australia ('Master Builders') with reference to the above matter and the upcoming hearing before the Full Bench at 9:00am on Monday 1 March 2021.
2. The matter deals with an issue, addressed at paragraphs [65]–[72] of [\[2020\] FWCFB 6040](#), raised by Master Builders and HIA with respect to the Distant Work Travelling time entitlements (current clause 25.4) within the *Building and Construction (General) On-Site Award 2010* ('the On-Site Award').
3. The issue was brought to our attention by a number of members sometime after 1 July 2020, when the new clause took effect, and was raised at the first opportunity in our submission of 26 October 2020 in AM2019/17 & AM2014/260.¹
4. Master Builders continues to rely on our October 2020 submissions² and provides this outline with a view to assisting the Commission by giving an overview of the history of the matter to date and the clarifications sought.
5. It should be noted that where quotations include words underlined, these are at the authors' initiative for emphasis.

HISTORY OF CLAIMS – FARES AND TRAVEL PATTERNS ALLOWANCE

6. During the award-stage proceedings in AM2016/23, three of the employer parties made claims to amend elements of the then Fares and travel patterns allowance (clause 25). No union parties sought amendments to those provisions during the proceedings.
7. The claims of Master Builders, HIA and CCF were outlined in the Full Bench Decision [\[2018\] FWCFB 6019](#), with the HIA submitting:
 - The notion of "radial areas" was outdated as the basis for the payment of the daily fares allowance. The allowance should be payable when the employee started and finished at the construction site, and travel time should be payable when the employee had to travel to a construction site more than 50 kms from the employee's usual place of residence.
 - The allowance only be payable when the employee started and finished work at a construction site, and used their own vehicle or public transport for travel to and from that site.
 - The allowance would not be payable when the employee was:
 - Absent from work;
 - Not required to attend a construction site due to an RDO;
 - Required to start and finish at the employer's workshop, yard or depot;
 - Provided or offered accommodation at the construction site;
 - Provided with a company vehicle;
 - Provided or offered transport free of charge from home to the site and return; or

¹ [Submissions of Master Builders Australia - 4 Yearly Review of Modern Awards - AM2019/17, AM2014/260 - Finalisation of Exposure Drafts and variation determinations - Tranche 3 - Construction Awards - 26 October 2020](#)

² *Ibid*

- An apprentice attending an RTO for training and assessment in accordance with a contract of training.³
8. In addition, Master Builders sought amendments to:
- Place a limitation on the employee's use of a vehicle supplied by the employer in the circumstances described by clause 25.8(b) by adding the words "and for no other private use";⁴ and
 - Vary clause 24.7(d) to clarify that the provision excludes normal operation of the fares and travel patterns allowance (clause 25) in circumstances where distant work is undertaken and employees are residing on site or adjacent to the site or are provided with transport;⁵
9. CCF also sought amendments to clause 25 to:
- Exclude employees who are provided with a funded motor vehicle from also receiving the Fares and travel patterns allowance; and
 - Exclude employees not working on a building site as part of their normal duties from receiving a travel allowance.⁶
10. During the Full Bench Hearing held in Melbourne in April 2017, the parties made comprehensive oral submissions with respect to the Fares and travel allowance, including about the circumstances in which it was applied. During those proceedings, the CFMEU concurred with the conventional interpretation of when the distant work travel allowance was payable, being that an employee would be entitled to the allowance from the 50 km radius to the distant work site.⁷

DECISION OF THE CONSTRUCTION AWARDS FULL BENCH

11. Upon consideration of the claims, in [\[2018\] FWCFB 6019](#) the Full Bench held that it did not consider there was a proper basis for any "substantial alteration" to the entitlement established by clause 25 of the On-Site Award.⁸ The Bench, however, stated that it could not identify any legitimate rationale for the payment of the allowance in circumstances where the employee is:
- Absent from work for any reason including leave and RDOs;
 - Provided with or offered free transport by the employer to and from the construction site;
 - Provided with a fully maintained vehicle by the employer to travel to and from the construction site (regardless of any other use that may be made of the vehicle); or
 - Not required to start and finish work at the construction site but rather at another fixed location (so that actual travel to and from the construction site occurs in paid working time).⁹
12. The Bench also went on to state that there was substance to the proposition advanced by HIA that clause 25 is unnecessarily complex and confusing, where it stated:

'We have had some regard to the evidence adduced by the HIA concerning member confusion about the obligations under clause 25, but primarily we have taken into account the way in which the clause is drafted. In particular, the provisions concerning distant work (clause 25.3), travel outside radial areas (clause 25.5), into radial areas from a residence outside any radial area (clause 25.6) and between radial areas (clause 25.7) are complex both in expression and their relationship with each other and to the primary criterion for payment in clause 25.2. We consider that clause 25 should be varied, so that the fares and travel pattern allowance and other travelling time entitlements are simplified as follows:'

25.1 Fares and travel pattern allowance

(a) In recognition of the travel patterns and costs peculiar to the industry, which include mobility in employment and the nature of employment on construction

³ [\[2018\] FWCFB 6019](#) at para [159]

⁴ *Ibid* at para [163]

⁵ *Ibid* at paragraph [164]

⁶ *Ibid* at paragraph [165]

⁷ [Transcript - Full Bench Hearing - AM2016/23 - 11 April 2017 at PN 4559](#)

⁸ [\[2018\] FWCFB 6019](#) at paragraph [181]

⁹ *Ibid* at paragraph [182]

work, an employee is to be paid an allowance of \$17.43 per day for each day worked when the employee starts and finishes work on a construction site, or is required to perform prefabricated work in an open yard and is then required to erect or fix on-site.

(b) An employee will not be entitled to the allowance in paragraph (a) on any day where the employer:

(i) provides or offers to provide transport free of charge from the employee's home to the place of work and return; or

(ii) provides a fully maintained vehicle free of charge to the employee.

25.2 Travelling between construction sites

An employee transferred from one site to another during working hours will be paid:

(a) for the time spent in travelling; and

(b) if the employer does not provide transport:

(i) the reasonable cost of fares for public transport between construction sites; or

(ii) where the employee uses their own vehicle the employee must be paid an allowance at the rate of \$0.78 per kilometre.

25.3 Travelling outside ordinary hours

Time spent travelling from an employee's home to their job and return outside ordinary hours will be unpaid unless the employer directs the employee to pick up and return other employees to their homes.

25.4 Distant work payment

(a) If an employee is required to travel to a construction site that is:

(i) not located in a metropolitan radial zone in which the employee's usual place of residence is located; and

(ii) more than 50 kms by road from the employee's usual place of residence;

the employee will be entitled to the distant work payment in paragraph (b) in addition to the allowance in clause 25.1.

(b) The distant work payment is:

(i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and

(ii) any expenses necessarily and reasonably incurred in such travel, which will be \$0.47 per kilometre where the employee uses their own vehicle.

(c) *Despite paragraph (a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.*

(d) *In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:*

(i) *the GPO of a capital city of a State or Territory; or*

(ii) *the principal post office in a regional city or town in a State or Territory.*¹⁰

25.5 Apprentices

(a) *An apprentice will be entitled to a proportion of the allowances prescribed in clauses 25.1 and 25.4 in accordance with the following scale:*

(i) *on the first year rate - 75% of the amount prescribed;*

(ii) *on the second year rate - 85% of the amount prescribed;*

(iii) *on the third year rate - 90% of the amount prescribed;*

(iv) *on the fourth year rate - 95% of the amount prescribed.*

(b) *When a school-based apprentice attends off-the-job training or assessment not at the school at which they are enrolled they will receive 25% of the allowance prescribed in clause 25.1*

25.6 Adjustment of allowances

The monetary allowances prescribed in clause 24, clause 25.1, clause 25.2(b)(ii) and clause 25.4(b)(ii) will be adjusted in accordance with clause 20.4.

13. The variation with respect to Travelling time entitlements came into effect on 1 July 2020 together with a number of other changes arising from the award-stage proceedings by way of [Determination - PR715725](#).
14. Determination PR715725 then formed part of the draft variation determinations for the On-Site Award, published on 8 October 2020¹¹ together with a statement wherein the parties were directed to make comment on the draft.
15. In accordance with the statement, as noted at paragraph [3] of this submission, Master Builders filed a submission on 26 October 2020 wherein we raised the anomaly arising from the re-drafted distant work payment provision (clause 26.3).¹²
16. Master Builders raised this anomaly in response to concerns raised by members as to their interpretation of the new distant work payment provisions after coming into effect on 1 July 2020.

PROBLEM ARISING FROM AMENDMENTS

¹⁰ *Ibid* at paragraph [184]

¹¹ [Draft Determination - Building and Construction General On-Site Award 2010](#)

¹² [Submissions of Master Builders Australia - 4 Yearly Review of Modern Awards - AM2019/17, AM2014/260 - Finalisation of Exposure Drafts and variation determinations - Tranche 3 - Construction Awards - 26 October 2020](#) at paras [18]-[33]

17. As noted in our October 2020 submission to the Award finalisation Full Bench,¹³ new clause 26.4(a)(ii) deals with payments for travel in circumstances involving distant work. This new clause replaced the earlier corresponding provision at clause 25.5.
18. Noting that replacement clause 26 is now far clearer, since the provision has come into effect we have been alerted by members that the amendments have seemingly given rise to an interpretation contrary to the intention as expressed in the Full Bench decision of [\[2018\] FWCFB 6019](#) at paragraph [184].
19. As noted in our submissions¹⁴, previous clause 25 was underpinned by a concept that established 'radial areas' of 50km with a 'designated boundary' that was used to determine both eligibility and amounts payable for travel for work purposes. In simple terms, clause 25 operated by establishing amounts that were payable for travel within a radial area (<50km from an employee's home) and travel outside thereof (>50km from an employee's home).
20. Where travel was required *outside* of the radial area, it was (save for some specifically identified circumstances) considered to be distant work and triggered a different allowance arrangement. This arrangement applied for travel *from and beyond* the 'designated boundary' (more than 50kms) and was payable *in addition* to the usual arrangement for travelling *within* the normal 'radial area' (less than 50km).
21. Since coming into effect, the re-drafted provision is now being interpreted by some members such that it creates a 'double-dip' outcome. That is, an employee should receive *both* the conventional travel allowance and distant work arrangement for *all* travel to and from distant work – whereas previously the distant work arrangement only applied for the distance from and beyond that normally travelled.
22. The perceived effect of the changes can be illustrated as follows, with re-drafted clause 26.4 stating that:
- a) If an employee is required to travel to a construction site that is:*
- (i) not located in a metropolitan radial area in which the employee's usual place of residence is located; and*
- (ii) more than 50 kms by road from the employee's usual place of residence;*
- the employee will be entitled to the distant work payment in paragraph (b) in addition to the allowance in clause 25.1*
- b) The distant work payment is:*
- (i) payment for the time outside ordinary working hours reasonably spent in travel, paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and*
- (ii) any expenses necessarily and reasonably incurred in such travel, which will be \$0.47 per kilometre where the employee uses their own vehicle.*
- c) Despite paragraph (a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.*
- d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:*
- (i) The GPO of a capital city of a State or Territory or;*
- (ii) The principal post office in a regional city or town in a State or Territory.*
23. Former corresponding clause 25.5 – Travelling outside radial areas is set out below (our emphasis):

¹³ *Ibid*

¹⁴ *Ibid*

Where an employer requires an employee to travel daily from inside one radial area mentioned in clauses 25.2, 25.3 and 25.4, to work on a site outside that area, the employee will be entitled to:

- a) the allowance prescribed in clause 25.2 for each day worked; and
- b) in respect of travel **from the designated boundary to the job and return to that boundary**:
 - (i) the time outside ordinary hours reasonably spent in such travel, which will be paid at the ordinary time hourly rate, and calculated to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey; and
 - (ii) any expenses necessarily and reasonably incurred in such travel, which will be \$0.47 per kilometre where the employee uses their own vehicle.

24. The re-drafted new clause removed the notion of “designated boundary” and as a consequence, new clause 26.4(a) has in some instances been subsequently interpreted to create an entitlement for employees to be paid for the entire distance travelled from their home to the distant work site (rather than simply for the return trip between the 50km radius point and the distant work site).
25. New clause 26.4(c) therefore should reflect the previously available arrangements, however, it only precludes the allowance being payable in circumstances where the employee resided more than 50km from the site when they were initially employed. This contrasts with the previous arrangement whereby the distant work allowance was payable only for travel beyond the metropolitan radial area, for example outside the 50km radial boundary and back to the boundary.
26. As a result the new provision is, in some instances, being read such that employees could now claim the Fares and travel pattern allowance under clause 26.1 in addition to the distant work payment for travel from the employee’s usual place of residence to the distant work site.
27. In our submissions, we have also noted that in addition to the apparent extension of the allowances that may be payable, the new provisions would appear to impose additional administrative obligations on our members which would be contrary to the intent of the Modern Awards Objective and create confusion. This is due to some members holding the view that employers now have to apply different methods of calculating the distant work payment for each of their individual employees every time they travel from their individual place of residence to the distant work site and return.
28. The former version of this clause provided that such calculation only needed to be done once (a return trip from the designated boundary to the job) for all employees – whereas the new provision could be interpreted to require this to be done individually for each and every employee, based on their specific individual location of residence and the distance between that residence and the distant work site.
29. While strongly supporting the Commission’s intent to simplify the distant work payment provisions, we submit the re-drafted clauses may not reflect the decision [\[2018\] FWCFB 6019](#) and are now being interpreted in a way not intended by the Full Bench.
30. We therefore seek that the anomaly be addressed by way of the clarification as proposed by Master Builders herein.

OPTION TO CLARIFY

31. Master Builders submits that the confusion arising from this unintended outcome can be resolved by making the wording clarification as follows:

26.4 Distant work payment

- a) *If an employee is required to travel to a construction site that is:*
 - (i) ~~not located in~~ *outside of a metropolitan radial area in which the employee’s usual place of residence is located; and*
 - (ii) *more than 50 kms by road from the employee’s usual place of residence;*

the employee will be entitled to the distant work payment in clause 26.4(b) in addition to the allowance in clause 26.1.

- b) The distant work payment is:*
- (i) payment for the time outside ordinary working hours reasonably spent in travel from the 50 km boundary of the metropolitan radial area or 50 kms from the employee's usual place of residence (whichever is the greater), to the construction site;*
 - (ii) paid at the ordinary time hourly rate, calculated to the next quarter of an hour, and with a minimum payment of one half an hour per day for each return journey; and*
 - (iii) any expenses necessarily and reasonably incurred in such travel, which will be \$0.47 per kilometre where the employee uses their own vehicle.*
- c) Despite clause 26.4(a), the distant work payment is not payable when, at the commencement of employment, the employee's usual place of residence was more than 50km by road from the construction site on which the employee was initially engaged.*
- d) In this subclause, a metropolitan radial area is the area within a radius of 50 kilometres of:*
- (i) The GPO of a capital city of a State or Territory or;*
 - (ii) The principal post office in a regional city or town in a State or Territory.*

CONCLUSION

32. Master Builders submits that our proposed clarification of clause 26.4 would not have the effect of reducing any existing entitlement, however, would address the ambiguity and any related unintended regulatory burden of the provision, and therefore better meet the objectives set out within ss 134(1)(f) and (g) of the FW Act.

MASTER BUILDERS AUSTRALIA

1 March 2020