

From: [Adler, Melissa](#)
To: [AMOD](#)
Subject: HIA Final Submissions AM2014/197
Date: Friday, 22 July 2016 9:57:19 AM
Attachments: [image001.png](#)
[HIA Final Submission AM2014.197.220716.pdf](#)

Please find attached submissions from the HIA in AM2014/197.

Kind regards

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A promotional banner for HIA HR docs. On the left is a teal-tinted image of a smiling woman. The text 'let HIA be your HR solution' is centered, with 'your HR solution' in white on an orange background. The HIA logo and 'HR docs' are in the top right. A dark blue bar at the bottom contains the contact information: 'Contact your local workplace adviser on 1300 650 620 or go to hia.com.au/hrdocs'.

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HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Fair Work Commission

**Four Yearly Review of Modern Awards
Casual Employment AM2014/197**

22 July 2016



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1. INTRODUCTION

- 1.1.1 On 17 March 2014, the Fair Work Commission (**Commission**) issued a Statement identifying a number of common matters to be dealt with as a part of this 4 yearly review of modern awards (**Review**). Variation applications in relation to part time and casual employment were identified as amongst those Common Matters.
- 1.1.2 Further to this, on 29 June 2015, the FWC issued directions (**Directions**) outlining the matters to be dealt with as part of this Common Matter and a further timetable for the filing of submissions.
- 1.1.3 In accordance with item 2 of those Directions, on 17 July 2015, HIA submitted two Draft Determinations proposing variations to the *Joinery and Building Trades Award 2010* (**See Attachment A to these submissions**) and the *Building and Construction General Onsite Award 2010*.
- 1.1.4 Further to the submissions of 17 July and in accordance with item 3 of those Directions HIA filed submissions in support of the proposed Draft Determinations dated 12 October 2015 (**HIA Submission**).
- 1.1.5 The CFMEU filed submissions in reply dated 22 February 2016 (**CFMEU Submission**).
- 1.1.6 The HIA applications as they relate to the *Building and Construction General Onsite Award 2010* (**Onsite Award**) and the *Joinery and Building Trades Award 2010* (**Joinery Award**) were then set down for hearing.
- 1.1.7 It is of note that proceedings in relation to the Common Matters referred to above have been ongoing, however given the discrete nature of the claims arising from the Onsite and Joinery Awards, these matters were separated from the Common Matter proceedings. Consequentially, those claims relating to the Joinery Award were set down for hearing on 15 July 2016, while claims relating to the Onsite Award are set down for hearing on 17 August 2016.
- 1.1.8 On 20 June 2016, HIA filed correspondence requesting that the hearing of HIA's claim in relation to the Joinery Award scheduled for 15 July 2016 be vacated in light of there being no witness evidence.
- 1.1.9 In agreeing to vacate this hearing date the Commission issued directions permitting proponents of the claims in relation to the Joinery Award to file final comprehensive submissions in response to those opposing the claim by 22 July 2016.
- 1.1.10 These submissions are made in accordance with those Directions and should be read in conjunction with the HIA submissions dated 12 October 2015.
- 1.1.11 HIA notes that proceedings in relation to the HIA claim in the Onsite Award will progress as scheduled.

2. THE PROPOSED VARIATION

- 2.1.1 As outlined in the HIA submission, **Attachment A** proposes to vary the Joinery Award to change the minimum engagement for a casual employee.
- 2.1.2 Currently clause 12.3 of the Joinery Award provides:

'A casual employee is engaged by the hour with a minimum daily engagement of 7.6 hours'
- 2.1.3 Attachment A proposes to change the minimum engagement for a casual employee under the Joinery Award to 4 hours (**HIA Claim**).



3. THE MODERN AWARDS OBJECTIVES AND PROBATIVE EVIDENCE

- 3.1.1 In order for the Commission to grant a claim during this Review it must come to the conclusion that the variation is necessary to meet the modern awards objectives outlined within s134 of the *Fair Work Act 2009 (FWA)*. In doing so, the Commission must also have regard to the general objects of the FWA set out at s3.
- 3.1.2 The need for Modern Awards to provide a *'fair and relevant minimum safety net'*¹ is critical. HIA submits that the current provision of the Joinery Award is at odds with this objective.
- 3.1.3 During this Review the proponents of a claim must bring evidence in support of their claim. However, the extent of that evidence will depend on the circumstances.²
- 3.1.4 HIA rejects the implication that we are simply relying on *'bar table statements'*.³ HIA have put forward material to the Commission in support of our claim to the extent necessary in the circumstances.
- 3.1.5 HIA submit that the variation is necessary to meet the modern awards objectives⁴ and have outlined three key basis in support of this position, including that:
- The current provision of the Joinery Award is inconsistent with the minimum engagement period for casual employees in most Modern Awards, in particular other construction based awards.
 - The current provision does not reflect the true nature of casual employment.
 - The current provision was not fully considered during award modernisation, nor has the provision been fully considered in over 22 years.
- 3.1.6 Each of these three limbs of our argument is supported by determinative material, a large portion of which has gone unchallenged. In fact, the Full Bench decision in *Victorian Employers Chamber of Commerce and Industry*⁵, highlighted within the CFMEU Submission specially noted that while the Tribunal will require evidence, the presence of uncontested submissions should also be afforded weight⁶, a point HIA addresses in more detail below.
- 3.1.7 Further, HIA submit that reducing the minimum casual engagement period under the Joinery Award will, in meeting the modern awards objectives:
- encourage collective bargaining;
 - promote flexible work practices; and
 - reduce employment costs.
- 3.1.8 In opposing HIA's claim the CFMEU Submission advance just three propositions:
- That the substantive nature of the claim requires probative evidence which has not been brought in support of the change.
 - That the history of the Joinery Award demonstrates a clear basis for the current provision.
 - That the terms of casual employment should be considered on a case by case basis.

¹ Section 134(1) *Fair Work Act 2009*

² [2014] FWCFB 1788 at paragraph 23

³ CFMEU Submission at paragraph 68

⁴ Section 138 *Fair Work Act 2009*

⁵ [2012] FWA 6913

⁶ CFMEU Submission at paragraph 69



3.1.9 HIA rejects these assertions and asks that, on the basis of the material provided, the Commission grant the HIA Claim.

4. THE HISTORY OF THE JOINERY AWARD

- 4.1.1 During this Review the historical context of a Modern Award is one factor amongst many the Commission is to consider when assessing a claim. Such history can assist in informing the Commission as to the prevailing industry custom and practice. However, the CFMEU go further and seek to rely on the arbitral history of the Joinery Award as providing a '*clear rationale*'⁷ for the current provision; a position strongly disputed by HIA. At best, the current provision indicates the acceptance of a set of circumstances, nothing more.
- 4.1.2 The assertion that the '*rationale for the 7.6 hour minimum is that casuals in off-site joinery shops have been traditionally employed for the full day*'⁸ is baseless and the lack of material in support of this statement points to an award provision **setting** industry custom and practice as opposed to a simple codification of the status quo.
- 4.1.3 The extracted transcript of proceedings during the creation of the *National Joinery and Building Trades Award 1993* at paragraph 73 of the CFMEU Submission provides no assistance to the CFMEU's opposition. This transcript says nothing about a desire for the minimum engagement to be 7.6 hours and, if anything the extracted comments support HIA's position, notably that:
- An employee working an average of 38 hours week would not be a true casual. HIA's submission highlights that a minimum engagement of 7.6 hour per engagement is more akin to full time employment than that of casual employment.
 - Casual employment was used on an ad hoc, project basis to cover intense periods of activity and to manage fluctuations in work. HIA's submissions point to the true nature of casual employment as 'intermittent or irregular'⁹ and the need for the current provision to be varied to support this flexible work arrangement.
 - A desire, by one business, to engage all employees on a full day basis, says nothing about the appropriateness of a minimum engagement period of 7.6 hours. In fact, clearly the HIA Claim does not prevent any business from engaging casual employees for 7.6 hours.
- 4.1.4 The CFMEU Submission also asserts that the current provision has been considered on '*no less than 5 occasions*'. HIA disputes this.
- 4.1.5 Firstly, the first instance decision of Commissioner Grimshaw relating to the *National Joinery and Building Trades Award 1993* only considered the discrete issue of the limitations of employing casuals for more than 12 weeks in a 12 month period.
- 4.1.6 On appeal, the Bench accepted that the issue of the casual minimum engagement was not addressed and it was considered that the parties did not fully turn their minds to that issue.
- 4.1.7 Secondly, the CFMEU Submission notes the **consent** position reached in relation to the minimum casual engagement period in 2002.

⁷ CFMEU Submission at paragraph 84

⁸ CFMEU Submission at paragraph 72

⁹ HIA Submission at paragraph 5.3.4



- 4.1.8 Thirdly, HIA respectfully submit that the CFMEU have significantly overstated the consideration of the casual minimum engagement period in the decision of 3 September 2003.¹⁰
- 4.1.9 In that case, the Australian Industrial Relations Commission was asked to consider a variation application by the CFMEU to increase the casual loading in the Joinery Award from 20 percent to 25 percent. In response, Master Builders Australia (**MBA**) put forward draft orders, on a without prejudice basis, which contemplated the increase in the loading to 25 percent amongst other variations including, for example, a variation to the termination of engagement provision and a change to the entitlements for which the casual loading provides compensation. Another one of those items included a proposal to reduce the minimum casual engagement to 4 hours.
- 4.1.10 Significantly, this was not an employer application but an attempt to reach an outcome, seen by the MBA, as militating against the argued cost impacts of the increase of the casual loading. Of note, the Commissioner outlined that the central issues in the matter were:
- What benefits should be taken into account [*when determining the appropriate level of loading*]?
 - How should the value of those benefits be measured and reflected in the loading figure arrived at?¹¹
- 4.1.11 The CFMEU Submission simply highlights that the Commission turned its mind to the draft orders and concluded that an offsetting approach was ill-advised in this case.

4.2 AWARD MODERNISATION

- 4.2.1 The CFMEU Submission points to the submissions of AFEI and ABI made during the award modernisation as support for their contention that the matter of the minimum engagement for casual employees under the Joinery Awards was ‘*decided*’ during award modernisation. HIA disputes this position.
- 4.2.2 During proceedings Ms Lee of ABI made the following submission:
- ‘In respect of casual employment we note that ABI has raised concerns with respect to the minimum daily engagement of casual employees under clause 12.3 of the exposure draft. This clause provides for a minimum daily engagement of 7.6 hours for casual employees. ABI argues that this provision is restrictive and inconsistent with the current four hour minimum engagement of certain casual employees contained under the Building Industry NAPSA.’¹²*
- 4.2.3 Of note, ABI did not make written submissions on the issue.
- 4.2.4 AFEI was the only employer party to identify the issue in a written submission.¹³
- 4.2.5 The above accords with the position of HIA; that the issue was mentioned during the award modernisation process but not fully considered.¹⁴
- 4.2.6 HIA re-iterates the observation that the decision accompanying the 3 April 2009 Joinery Award simply stated that:

‘The terms and conditions in the award largely reflect those in the National Joinery and Building Trades Products Award 2002.’¹⁵

¹⁰ *Re National Joinery and Building Trades Products Award 2002* PR937301

¹¹ *Ibid* at paragraph 30

¹² 24 February 2009 at PN1554

¹³ CFMEU Submission at footnote 69

¹⁴ HIA Submission at paragraph 5.4.4

¹⁵ [2009] AIRCFB 345 at paragraph 113



4.2.7 HIA also draws the Commissions attention to the observations of VP Watson in the matter of the *Stevedoring Industry Award 2010* that articulate the task undertaken during award modernisation:

*'As a result of the award modernisation process, approximately 1,560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards by the award modernisation Full Bench of which I was a member. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers'*¹⁶

(our emphasis added)

4.2.8 Significantly, the CFMEU Submission does not challenge HIA's position that the matter was not *fully considered* and has presented no material demonstrating any detailed consideration of the matter during award modernisation, as such the CFMEU's contention should be rejected.

4.3 2012 MODERN AWARD REVIEW

4.3.1 HIA submits that the decision of 13 June 2013 in *Master Builders Australia Limited*¹⁷ determined during the 2012 Modern Award Review is the only matter referred to in the CFMEU Submission that squarely considered the issue of the minimum engagement period for casual employees. However, HIA submits that this decision is clearly distinguishable from the current case.

4.3.2 Firstly, *'this Review is broader in scope than the Transitional Review of modern awards completed in 2013.'*¹⁸

4.3.3 Secondly, the particular context within which past decisions were made will also need to be considered.¹⁹

4.3.4 Thirdly, unlike the 2012 Modern Award Review this Review *'...represents the first full opportunity to consider the content of modern awards without the requirements in the award modernisation Ministerial requests to avoid disadvantage to employees and increased costs for employers.'*²⁰

4.3.5 Indicative of a change in approach during this Review relates to provisions that impose a penalty for the late payment of wages.

4.3.6 This matter was also raised in *Master Builders Australia Limited*²¹ via an application to vary clause 26.3 of the Joinery Award to remove payments made by direct credit from being subject to a waiting time penalty in the event that such circumstances arose. The MBA were unsuccessful. Despite this the issue of a penalty for the late payment of wages and indications

¹⁶ [2015] FWCFB 1729 at paragraph 73

¹⁷ [2013] FWCFB 3751

¹⁸ [2014] FWCFB 1788 at paragraph 60

¹⁹ Ibid

²⁰ *Security Services Industry Award 2010* [2015] FWCFB 620

²¹ [2013] FWCFB 3751



by interested parties of variations in relation to some Modern Awards with similar provisions has led the Commission to issue a Statement²² and the inclusion of this issue as part of the common matter in AM2016/8.

4.3.7 Such moves demonstrate the broader nature of this Review and a discernable difference from the approach during the 2012 Modern Award Review.

5. DIFFERENCES ACROSS AWARDS

5.1.1 HIA's Submissions highlight the discrepancies between Modern Awards as to the minimum engagement period for casual employees.²³ In response, the CFMEU assert that casual provisions should be dealt with on a 'case by case basis'.²⁴

5.1.2 Aside from the history of the award which, based on the above we say should be given very little weight, the CFMEU Submission puts forward nothing to substantiate why the casual minimum engagement under the Joinery Award should be any different from other construction based awards.

5.1.3 In fact, the CFMEU have argued the opposite in the past. In putting the case for an increase in the casual loading, in the September 2003²⁵ decision discussed above the CFMEU submitted that:

'The CFMEU, in support of its application submitted that the principles enunciated in the Metal Industry Casuals Case were relevant to the matter before me. The principles identified were...

- Where the casual loading in the Award is broadly conceived to be aligned with comparable callings and industries, having regard to the variations since 1974, then it is appropriate to regard the Metal Industry Casuals Case as authority...²⁶*

5.1.4 It is also curious that the CFMEU have argued that casual provisions should be dealt with on a case by case basis while simultaneously the ACTU, as part of the Common Claims aspect of these proceedings, have sought to vary 62 Modern Awards to insert a standard provision that would require a casual employee be paid for a minimum of 4 hours, notably the ACTU submission of 19 October 2015 states:

'The ACTU will lead evidence to show that a minimum of 4 hours per engagement is a necessary standard across all industries²⁷

5.1.5 Two matters arise from this.

5.1.6 Firstly, the needs of individual industries are not a relevant consideration in respect of the ACTU claim and, secondly it is clear that a 4 hour minimum casual engagement period is seen as an acceptable safety net provision.

5.1.7 HIA respectfully submit that the reliance on some notion by the CFMEU that casual provisions are (or should be) industry specific, without providing any justification as to why this should be the case, is simply an argument of convenience and should be rejected.

5.1.8 HIA submit that the CFMEU's reliance on the decision in the *Stevedoring Industry Award 2010*²⁸ is overstated in the current context.

²² [2016] FWCFB 3737 at paragraphs 14-20

²³ HIA submission at paragraph 5.2.2

²⁴ CFMEU Submission at paragraph 87

²⁵ *Re National Joinery and Building Trades Products Award 2002* PR937301

²⁶ *Ibid* at paragraph 6

²⁷ ACTU Submission at paragraph 94

²⁸ [2015] FWCFB 1729



5.1.9 In that case, amongst other variations, the Stevedoring Employers sought to:

- Increase the ordinary hours of work from 35 hours per week to 38; and
- Reduce penalty rates under the award.

5.1.10 In refusing to vary the award to provide for a 38 hour week, the Commission outlined a very clear reason and rationale for the 35 hour week in the Stevedoring Industry:

*I am not satisfied that the Stevedoring Employers have established a sufficient case for the variation or that the variation is necessary to meet the modern awards objective. A 35 hour week is present in some awards for the similar historical reasons as the stevedoring industry. There is nothing inherently contrary to the modern awards objective in the continuation of this prescription. **Further the highly unusual nature of shift allocation systems for waterfront labour warrant a swings and roundabout approach to award entitlements. Greater demands on employees that contribute to a more intrusive availability requirement than in most other areas of employment warrant a more generous ordinary hours prescription. This provides compensation for the inconvenience of the rostering arrangements in the stevedoring industry. The allocation practices arising from the need for flexible labour requirements obviously contributed to the unique structure of the award hours provisions and remain relevant today.** I would not grant the variation sought.²⁹*

(our emphasis added)

5.1.11 In contrast, the current claim has not undergone the same forensic opposition as that put by the union parties in this case.

5.1.12 On the matter of penalty rates, his Honour VP Watson, in his minority decision granted the claim on the basis that:

'...there is no merit justification for the existing high level of penalty rate and that they are out of step with all other modern awards.'³⁰

5.1.13 His Honour also observed that:

'The penalty provisions have a long history but the consensual nature of the provisions and the changes that have occurred since that time require a reconsideration of what are quite anomalous safety net provisions... In my view, it is no longer sustainable to have an inflated penalty rates regime, inherited from another era, so out of proportion with the safety net provisions of other modern awards.'³¹

'They [employer parties] are not seeking a reduction to levels below the current standard penalty rates in other comparable awards.'³²

5.1.14 HIA respectfully submit that his Honours rationale be applied and adopted in the current case.

5.1.15 HIA submits that the lack of material justifying the current anomalous provision of the Joinery Award in conjunction with a clear desire by the Commission to create commonality across award provisions³³ provides ample grounds upon which to grant HIA's Claim.

²⁹ Ibid at paragraph 65

³⁰ [2015] FWCFB 1729 at paragraph 70

³¹ Ibid at paragraph 89

³² Ibid at paragraph 94

³³ HIA Submission at paragraph 5.2.4



6. MATTERS UNCHALLENGED

6.1.1 There are a number of matters arising from the HIA Submission that remain unchallenged.

6.2 PRE-REFORM AWARDS

6.2.1 HIA's Submission highlights that the pre-reform awards indicate an absence of provisions setting a minimum engagement for casual employees.³⁴ This proposition goes unchallenged.

6.2.2 Further and on the basis of Attachment C to the HIA Submission it is entirely available to the Commission to conclude that a minimum engagement of 7.6 hours for casual employees was not industry custom and practice, as asserted by the CFMEU, providing a solid basis upon which to grant the HIA Claim.

6.3 TRUE NATURE OF CASUAL EMPLOYMENT

6.3.1 The CFMEU Submission does not address the incongruence between the true nature of casual employment and a minimum casual engagement of 7.6 hours or the broader impact of this as it pertains to the characterisation of casual employment under the award.

6.3.2 HIA refers to section 5.3 of its 12 October 2015 submission.

6.4 FLEXIBILITY

6.4.1 HIA submit that the variation is necessary in order for the Joinery Award to promote flexible work practices.³⁵ The CFMEU fail to respond to this proposition and put forward nothing in opposition to it.

6.4.2 HIA's Submissions also highlight the unusual situation that a part time employee under the Joinery Award must be engaged for a minimum of 3 hours, while a casual must be engaged for a minimum of 7.6 hours.

6.4.3 There is no justification for this approach and none is provided in the CFMEU Submission.

6.4.4 HIA submit that the case of *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*³⁶ is persuasive in the current context and refer to paragraph 5.3.8 of the HIA Submission.

6.4.5 Further, by failing to address this incongruence it is HIA's view that the CFMEU do not adequately respond to the HIA position that a 7.6 hour minimum engagement acts as a disincentive to engage casual employment hampering efforts to foster flexible modern work practices.

6.5 COST

6.5.1 HIA submit that the variation is necessary in order to ensure that the Joinery Award meets the modern awards objectives by mitigating the imposition of unjustifiable cost and regulatory burden on employers.

6.5.2 It is of note that the CFMEU Submission provides no response to this proposition as such the cost burden of engaging casual employment implicit in a minimum engagement of 7.6 hours (or payment in lieu of) remains standing as a persuasive matter of fact in support of the variation.

³⁴ HIA Submission at paragraph 5.3.9 and Attachment C

³⁵ Section 134(1)(d) *Fair Work Act 2009*

³⁶ No. 22704 of 1999, 29 December 2000.



7. CONCLUSION

7.1.1 In commenting on the task of the Commission during this Review his Honour VP Watson in *Stevedoring Industry Award 2010* noted that:

‘The legislative task does not allow historical inertia to be a determinative factor, or to base decisions on the identity of applicants and supporters. Rather, the Commission must ensure that the award ... represent a fair and relevant minimum safety net having regard to the various elements of the modern awards objective.’³⁷

7.1.2 Clause 12.3 of the Joinery Award is out of step with the notion of a ‘fair and relevant safety net’, a minimum engagement of 7.6 hours for a casual employee is neither fair nor relevant.

7.1.3 Not only is the notion that a casual must be engaged for a minimum of 7.6 hours completely at odds with the true nature of casual employment, the current provision is inconsistent with other Modern Awards and is, in fact inconsistent with many pre-reform awards.

7.1.4 No material has been brought to justify the continued inclusion of the current provision in the Joinery Award. In fact much of the material relied on to oppose the HIA Claim should be given very little weight.

7.1.5 HIA submit that it has put forward cogent and persuasive arguments in support of its claim; the need for award provisions to support flexible modern work practice and not unjustifiably impose additional costs outweigh assertions that the historical development of an award provision demands maintenance of the status quo.

7.1.6 HIA ask that the Commission grant the HIA Claim and vary the Joinery Award in the terms outlined at Attachment A to change the minimum engagement period for casual employee to 4 hours.

³⁷ [2015] FWCFB 1729 at paragraph 71



ATTACHMENT A

MA000029 PRxxxxxx



DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Casual employment and Part-time employment

(AM2014/196 and AM2014/197)

JOINERY AND BUILDING TRADES AWARD 2010

[MA000029]

Building, metal and civil construction industries

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT HAMBERGER
COMMISSIONER ROE
COMMISSIONER BULL

SYDNEY, XX YYY 2016

4 yearly review of modern awards – casual employment and part-time employment.

A. Further to the decision issued by the Fair Work Commission on [XXX], the above award is varied as follows:

1. By deleting clause 12.3 and inserting the following:

12.3 A casual employee is engaged by the hour with a minimum daily engagement of 4 hours.

B. This determination comes into operation from X XX.

VICE PRESIDENT

