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Fair Work Commission  
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Your Honour

#### **4 Yearly Review of Modern Awards – Plain Language- Standard Clauses (AM2016/15)**

HIA refers to the Full Bench Decision<sup>1</sup> (**Decision**) dated 11 December 2018.

The Commission has released Draft Determinations relating to the plain language standard redundancy clauses for the *Building and Construction General Onsite Award 2010* (**Onsite Award**), *Joinery Building Trades Award 2010* (**Joinery Award**), and *Timber Industry Award 2010* (**Timber Award**), which HIA maintains an interest in.

At paragraph 145 of the Decision the Commission has invited interested parties to provide further comment in relation to the Draft Determinations.

Paragraph 28 of the Decision notes that it is the Commissions provisional view *'that awards with an industry-specific element that supplements the NES should be amended to include the plain language standard redundancy clause, but with adaptations as necessary to retain the substance of the industry –specific elements.'* With this in mind, HIA provides the following comments in respect of the Timber and Joinery Award Draft Determinations.

#### **General Comments**

Paragraph 43 of the Decision and item 6 of the Timber Award Draft Determination provides for a revised Clause 15.4(f) and (g) in the context of redundancy pay for employees of small business employers.

Similarly the Joinery Award Draft Determination provides at item 6 proposed Clause 17.4(f) and (g), as a revised Clause 17.2(b) of the Joinery Award.

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<sup>1</sup> [2018] FWCFB 7447

The proposed revised clauses (f) and (g) are as follows:

*(f) The terms of s.120 of the Act apply as if s.120 referred to 'paragraph (c)' rather than 'section 119'.*

*Note: Under s.120 of the Act the Fair Work Commission can determine that the amount of redundancy pay under the NES is to be reduced if the employer obtains other acceptable employment for the employee or cannot pay that amount. Paragraph (f) applies these arrangements also to redundancy pay under clause 15.4.*

*(g) The terms of s.122 of the Act apply as if s.122 referred to 'clause 15.4' rather than 'this Subdivision' and to 'paragraph (c)' rather than 'section 119'.*

*Note: Under s.122 of the Act transfer of employment situations can affect the obligation to pay redundancy pay under the NES and the Fair Work Commission can make orders affecting redundancy pay. Paragraph (g) applies these arrangements also to redundancy pay under clause 15.4.*

HIA understands that these clauses intend to clarify that the small business redundancy pay specified within the award is the relevant redundancy pay to be considered, as compared to the NES, in circumstances where a small business employer seeks a variation to redundancy pay, or where there is a small business transfer of employment.

HIA is concerned that proposed subclauses (f) and (g) are somewhat confusing and have the potential to lead to issues of interpretation, for example, while the clauses state that the Act applies, 'paragraph c' is to supplant a reference to a provision of the Act. In some cases it may be unclear to a reader where 'paragraph c' is from, and how to apply the provision 'rather than'.

It also requires that, in very practical terms, the Act and the award be read together. Whilst in terms of the operation of industrial laws generally this may be the case, however the approach proposed is a novel one and sets a level of acumen in terms of legislative interpretation that may be beyond that which should be expected of modern award readers.

Further, HIA is of the view that the current wording in the Timber and Joinery Award is sufficient in so far as it explains the application of the small business employer redundancy pay within the context of the operation of the Act.

HIA is also unaware of any specific issues with the interaction between the small businesses redundancy provisions of the Timber and Joinery Award and section 122 of the Act. As such HIA is of the view that the variation is not necessary to meet the modern awards objectives.

### **Timber Award**

HIA recommends that the current wording under Clause 15.7(b) of the Timber Award be retained in a varied form and inserted into the Timber Award Draft Determination as follows:

- Replace proposed Clause 15.4(f) with:

*(f) Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the scope of this award except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with Clause 15.4(d).*

- Delete proposed Clause 15.4(g).

## Joinery Award

HIA recommends that the current wording under Clause 17.2(b) of the Joinery Award be retained in a varied form and inserted into the Joinery Award Draft Determination as follows:

- Replace proposed Clause 17.4 (f) with:

*(f) Despite the terms of s.121(1)(b) of the Act, the remaining provisions of Subdivisions B and C of Division 11 of the NES apply in relation to an employee of a small employer who performs any of the work within the scope of this award except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with Clause 17.4(d).*

- Delete proposed Clause 17.4 (g).

Yours sincerely  
HOUSING INDUSTRY ASSOCIATION LIMITED



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