

# BEFORE THE FAIR WORK COMMISSION

s.156 - FAIR WORK ACT 2009

## 4 YEARLY REVIEW OF MODERN AWARDS

### AM 2016/15 – PLAIN LANGUAGE – STANDARD CLAUSES

#### DRAFT DETERMINATIONS

#### SUBMISSION

#### MASTER BUILDERS AUSTRALIA

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#### A. INTRODUCTION

1. This submission is filed by Master Builders Australia ('**Master Builders**') pursuant to the Decision of 11 December 2018 [2018] FWCFB 7447 ('**the Decision**') and the Schedule of draft determinations published on 13 December 2018.
2. Master Builders makes these submissions with respect to the *Building and Construction (General) On-Site Award 2010* ('**On-Site Award**') and the *Joinery and Building Trades Award 2010* ('**Joinery Award**'), together the ('**Construction Awards**') in which Master Builders maintains an interest.
3. Specific clauses about which we make submissions are identified below by reference to associated proposed clause number in the Draft Determination ('**the Determination**').
4. While Master Builders supports the Commission's desire to improve the consistency of clauses commonly appearing within Modern Awards, we observe that parties to this proceeding have either not sought (or sought only minor) changes to provisions proposed for replacement by the Determinations. When consulting with Master Builders' members about the Determinations, feedback received consistently included raising the adequacy of existing clauses and concerns that Award users may find the proposed replacement clauses more complex and the source of possible confusion. To this end, we are instructed to note a general preference to retain the existing provisions to which this submission relates on the basis that doing so would better satisfy the objects of s. 134.
5. Secondly, or in the alternative, when considering this submission and any changes to the Construction Awards, we ask that the Commission has regard broadly to the challenges attested to by small businesses in interpreting Modern Awards. This was noted in research commissioned by the Commission which highlighted that Modern Awards were a source of frustration and that they were (amongst other concerns):

*'Difficult...To navigate and find the answers they needed. The modern awards were seen by participants to be a document outlining policy and legislation, not a document designed to help businesses appropriately compensate employees.'*<sup>1</sup> (Our emphasis).

6. Further, we note the President's acknowledgement and re-enforcement of the above report's key findings, where during a radio interview he described Modern Award language as '*tortuous*' specifically drawing attention to the building and construction industry as one with:

*'...a high proportion of small businesses and a complexity in the current award that needs to be addressed.'*<sup>2</sup>

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<sup>1</sup> A Qualitative Research Report on: CITIZEN CO-DESIGN WITH SMALL BUSINESS OWNERS, Sweeney Research, 13 August 2014 at page 17.

<sup>2</sup> "'Tortuous' language in industrial awards needs to go, says Fair Work Boss" RN ABC Updated 6 June 2018, 4:34pm.

7. In light of the above observations, Master Builders makes the following submissions with respect to the Construction Awards.

## **B. SUBMISSION ON SPECIFIC ITEMS**

### Proposed clause 16 – Termination of employment – On-Site Award

8. Master Builders notes that there are outstanding claims before the Commission relevant to this clause in the Payment of Wages matter (AM2016/8) which, upon their settlement, may impact upon the construction of those proposed within clause 16 of the Determination. Master Builders continues to rely on our submissions in that matter<sup>3</sup> and seeks that the Commission have regard to the interaction of proposed changes to clause 16 and that the matters under consideration in AM2016/8.

9. Notwithstanding, proposed clause 16.1(a) states:

*'This clause applies to all employees except those identified in ss.123(1) and 123(3) of the Act.'*

10. The proposed wording differs from existing clause 16.1 within the On-Site Award which states:

*'Notice of termination is provided for in the NES. The notice provisions of the NES do not apply to a daily hire employee working in the building and construction industry'.*

11. Master Builders submits the existing provision is adequate and that it should be retained. We submit that proposed clause 16.1(a) is more complex and would be difficult to understand for Award end-users.

12. Retention avoids requiring users to have regard to the Act *and* the Award, something that the current Award provision does not require.

### Proposed clause 17 – Redundancy – Joinery Award

13. Proposed clause 17.1(c) states that:

*'If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.'*

14. Proposed clause 17.1(c) is inconsistent with clause 17.3 of the Joinery Award which states:

*'Where an employee is transferred to lower paid duties by reason of redundancy the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks of notice still owing.'*

15. The proposed clause now provides for payments that include other entitlements other than the employee's base rate of pay for his or her ordinary hours of work.

16. Master Builders therefore submits that proposed clause 17.1(c) be amended as follows:

*'If the employer acts as mentioned in paragraph (b)(ii), the employee is entitled to payment of an amount equal to the difference between the ordinary rate of pay of the employee ~~(inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours)~~ for the hours of work the employee would have worked in the first role, and the ordinary rate of pay ~~(also inclusive of all-purpose allowances, shift rates and penalty rates~~*

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<sup>3</sup> Master Builders Australia Correspondence – 4 Yearly Review of Modern Awards – Payment of Wages – AM2016/8, 6 September 2018, Master Builders Submission – 4 Yearly Review of Modern Awards – Payment of Wages – AM2016/8, 30 October 2017.

*applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.'*

17. Proposed clause 17.4(e) states that:

*'In paragraph (d) **continuous service** has the same meaning as in s.119 of the Act'.*

18. Existing clause 17 does not contain a reference to the meaning of **continuous service** and our primary position is that remains appropriate.

19. In the event the Commission is minded to include such a reference, we submit that the proposed provision be amended to include a signpost to the correct provision within the Act.

20. It may simply be an oversight, however, we note that s. 119 of the Act does not define **continuous service**, but rather prescribes the amount of redundancy pay payable for periods of an employee's continuous service. If proposed clause 17.4(e) were to be implemented, we submit the following amendments would be appropriate:

*'In paragraph (d) continuous service has the same meaning as in ~~s. 119~~ s. 22 of the Act'.*

**MASTER BUILDERS AUSTRALIA**

**25 JANUARY 2019**