HOUSING INDUSTRY ASSOCIATION

Submission to the
Fair Work Commission

Construction Awards (AM2016/23)

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1. INTRODUCTION

1.1.1 On Thursday 17 August the Full Bench of the Fair Work Commission (**Commission**) in matter AM2016/23 issued a Statement outlining a provisional view in relation to applications made to alter Clauses 20.1. 21-22, 24.1-24.3 and 33 of the *Building and Construction General Onsite Award 2010* (**Building Award**).

1.1.2 Please find outlined below HIA's response to the matters raised in the Statement.

1.1.3 In summary:

- HIA is generally supportive of the Commissions provisional approach in relation to the **Tool and Employee Protection Allowance**.
- HIA agrees that **allowances** under the Building Award require review and re-organisation, however is concerned with a proposal that would see the all-purpose rate of pay arbitrarily increased.
- HIA is generally supportive of the Commissions provisional approach in relation to **Hours of Work** provisions, particularly the proposal to introduce a system for the banking of RDO's.

1.1.4 HIA also notes that the Statement indicates that a hearing date has been reserved for Friday 17 November should any party wish to make oral submissions.

1.1.5 HIA is not opposed to a hearing in relation to these matters however without the benefit of seeing the positions of the other parties we are hesitant to put forward a firm view.

1.1.6 The need for a further oral hearing may also depend on the views of the Full Bench in light of the submissions put by the parties.

2. ALLOWANCES

2.1 TOOL AND EMPLOYEE PROTECTION ALLOWANCE

2.1.1 HIA maintains its position as outlined in its December 2016 Submissions at Section 5.

2.1.2 The Tool and Employee Protection Allowance is an expense related allowances and therefore should only be payable when the expense is incurred by the employee in order to reimburse them for the costs associated with purchasing and maintaining tools. Consequentially, HIA submits that the variation proposed at Attachment I to the December 2016 would ensure that the Building Award meets the modern awards objectives.

2.1.3 Notwithstanding this, HIA would make the following observations about the proposal contained within the Statement.

Reimbursement for tools

2.1.4 HIA notes that the proposal would remove the list of specified tools for reimbursement or provision by an employer outlined at current clause 20.1(b)(i) – (viii).

2.1.5 While the concept that an employer will either provide certain tools or reimburse an employee where they have provided those tools is not new, the removal of the list of specified tools from the Building Award may create controversy over a requested reimbursement.

2.1.6 The proposed provision provides that an employee is reimbursed when they have purchased tools *'required for the performance of work'.*

2.1.7 HIA submit that if the proposal is adopted, the employee must be obligated to:

- discuss with the employer a potential tool purchase (for which the employee would be seeking reimbursement);
- have that purchase approved; and
- be required to provide proof of purchase.

2.1.8 This will ensure there is agreement as to those tools and the cost of those tools required for the performance of work for the purpose of a reimbursement.

Provision removed

2.1.9 HIA is supportive of an approach that would see the removal of current clause 20.1(d)(iii).

Other comments

2.1.10 HIA notes that the amounts of the allowances outlined within the Statement seem to differ from those currently in the Building Award.

2.2 ALLOWANCES – CLAUSES 21 AND 22

2.2.1 In the Statement the Full Bench has expressed a provisional view in relation to allowances in Clause 21 and 22 of the Building Award.

2.2.2 Of note it is proposed that:

- Allowances be categorised as expense, disability and skill allowances.
- Those categories of allowances should then be referenced to the sector of the building construction industry to which they apply.
- Allowances should be re-ordered in the Building Award in accordance with those categories.
- The lift industry allowance should be abolished.
- Skill related allowances be retained.
- The industry allowance be increased and replace all other disability related allowances however the quantum of the industry allowance should vary as existing disability related allowances do not apply uniformly across various sectors of the industry.

2.2.3 HIA supports the rationalisation of allowances and the deletion of irrelevant and outdated allowances however has some concerns with the proposed approach outlined above.

Allowances – Categorisation – Skill, Disability and Expense

2.2.4 HIA supports a re-catgorisation of allowances as expense, disability and skill. However, there may be differing views as to these categorisations.

2.2.5 In HIA's view the following allowances categorised as disability related allowances should be classed as skill related allowances:

- Explosive powered tools allowance (cl. 22.2(f)).
- Pile driving allowance (cl. 22.2(t)).
- Dual lift allowance (c. 22.2(u)).
- Spray application – painters (cl. 22.3(n)).

Allowances – Categorisation – Construction Sector

2.2.6 In principle, HIA supports the further categorisation of allowances with reference to the sector of the building construction industry to which they apply.

2.2.7 However, HIA opposes the approach proposed by the Full Bench that would see the residential construction sector encompassing both cottage construction (single, 2-storey dwelling construction, row housing etc) and multi-unit apartment buildings.

2.2.8 Multi-unit apartment construction is more akin to commercial construction which attracts very different allowances to those applicable to single storey residential construction.

2.2.9 At paragraph 5(a) of the Statement, the Full Bench seeks consideration of *'the appropriate definition of each sector identified (above) having regard to the coverage definitional provisions in clause 4.10 of the Award'*.

2.2.10 In response, HIA submits that 'Residential Building and Construction' could be defined in a new clause 4.10(d) as:

i. Work involved in the construction, alteration, extension, restoration, repair, demolition or dismantling of residential buildings, with the exception of multi-storey buildings as defined in clause 21.4(c);

ii. maintenance undertaken by employees of employers covered by clause 4.1 on such buildings or works described in clause 4.10(d)(i), provided such work is carried out in an on-site environment;

iii. site clearance, earth-moving, excavation, site restoration, landscaping and the provision of access works associated with the activities within clause 4.10(d)(i); and

iv. the installation of fittings and services in any building or works described in clause 4.10(d)(i).

Disability and Industry allowance - Quantum

2.2.11 At paragraph 5(b) of the Statement, the Full Bench seeks consideration of *'the quantum of the industry allowance that should apply to each sector'.*

2.2.12 HIA opposes an approach that would simply abolish all disability allowances and increase the industry allowance.

2.2.13 Firstly, the industry allowance is an all-purpose allowance whereas the majority of the disability allowances are not. The proposed approach would increase the all – purpose rate of pay adding unjustifiable costs to employers at odds with the modern awards objectives.

2.2.14 Secondly, increasing the industry allowance to compensate for the removal of disability allowances would conflate the purposes of those allowances. Of note the current disability allowances are only payable when a specific disability arises, for example, the hot work allowance (cl 22.2(b)) is only paid when an employee works *'in a place where the temperature has been raised by artificial means to between 46 degrees and 54 degrees Celsius'*. In contrast, the current industry allowance covers a range of circumstances that arise in the onsite construction environment.

2.2.15 Finally, HIA agrees that the quantum of the industry allowance should vary as existing disability related allowances do not apply uniformly across various sectors of the industry. Feedback from HIA members indicates that the majority of the disability allowances are not payable on residential construction sites. As such, if the Commission proceeds with its proposed approach HIA submit that, even if

disability allowances are removed from the Building Award, there is no rationale for increasing the industry allowance that would apply to the residential construction sector.

2.3 Living Away from Home – Distant Work Entitlement – Clauses 24.1-24.3

Employee Address

2.3.1 HIA opposes the proposed changes to clause 24.2 that would:

- See additional requirements placed on an employer to take reasonable steps to verify an employee's address.
- Require an employer to pay the Living Away From Home Allowance (**LAFH Allowance**) even if an employee failed to provide the correct address details but the employer failed to take reasonable steps to verify the address. This significantly changes the current situation in which an employer is not required to pay the LAFH Allowance if an employee has knowingly made a false statement regarding the details of the employees address.
- Entitle an employee who subsequently changes their address to the LAFH Allowance, reversing the current position under the Building Award.

Entitlement

2.3.2 HIA does not oppose the approach outlined in relation to clause 24.3.

3. HOURS OF WORK

3.1.1 HIA maintains its position as outlined in its December 2016 Submission at Section 8 and is supportive of the provisional view outlined in the Statement that would see the insertion of:

- Provisions enabling an employer to choose whether to fix one day in the cycle for all employees to take an RDO or to roster employees to take their RDO on different days during the cycle or other such method as agreed.
- Provisions enabling the banking of RDO's.

3.2 General Comments

Deletion of clause 33.1(a)(vii)

3.2.1 Current clause 33.1(vii) provides:

> *(vii) Agreement on working other than the rostered day off cycle*
>
> *Where an employer and the majority of employees employed at a particular enterprise agree that due to the nature of an employer's operations it is not practicable for the foregoing four week cycle to operate, they may agree to an alternate method of arranging working hours, provided that the ordinary hours worked in any one week from Monday to Friday are within the spread of hours set out in clause 33.1 and that no more than eight ordinary hours are worked in any one day.*

3.2.2 Clause 33 outlined in the Statement does not include the above provision.

3.2.3 HIA strongly opposes the deletion of clause 33.1(vii).

3.2.4 Clause 33.1(vii) provides employers, on agreement with the majority of employees, with the ability to opt out of the RDO system. To remove this facilitative provision would represent a significant change to the Building Award and would be at odds with the modern awards objectives, having a negative impact on:

- the need to promote flexible modern work practices and the efficient and productive performance of work (s134(d)); and
- business, including on productivity, employment costs and the regulatory burden (s134(f)).

3.2.5 Further HIA is unaware of a variation application specifically seeking to remove this provision.

3.2.6 Of note, HIA's proposed variation at Attachment N to the 2016 December Submission seeks to replace this provision with a system that would enable the averaging of hours where an RDO cycle is not practical.

Clause 33.1(a)(ii)

3.2.7 HIA supports the deletion of clause 33.1(a)(ii).

Averaging of hours

3.2.8 In its December 2016 Submission HIA proposed the insertion of provisions that would allow for the implementation of a system for the averaging of hours of work.

3.2.9 In contrast to that proposed by HIA the following words in parenthesis have been included in proposed provision 33(a):

> *'(averaged over a 20 day four week cycle to allow for the accrual and taking of rostered days off)'*

3.2.10 If the Commission is not intending to propose an 'averaging of hours' system akin to that proposed by HIA, then these words would seem to have no work to do, are potentially confusing and should be deleted.

3.2.11 Proposed subsections (i) explains the operation of the RDO cycle and could be amended to include a reference to the requirement that the RDO is to be taken during a 20 day, four week cycle, or words to that effect. Alternatively, such an explanation may not be necessary in light of proposed clause 33(a)(iii).

Written roster

3.2.12 Proposed clause 33(a)(iii) requires that in scenarios outlined at sub clauses (A)(1) and (2) a written roster must be published 7 days before the commencement of the 20 day, 4 week cycle.

3.2.13 HIA has concerns with the new requirement to provide a written roster. The use of rosters does not reflect the practices of all businesses in the construction sector, particularly those small businesses in the residential construction sector.

3.2.14 HIA submits that there are a number of ways that an employer can advise employees of the RDO system without the need for a formal roster.

3.2.15 HIA also submit that clarification would be of benefit in relation to the meaning of 'published', for example, would notice by email satisfy the requirement?

3.2.16 Finally HIA submit that this requirement should not apply where the system of fixing an RDO remains the same over a number of 4 week cycles.

Requirement to work on an RDO

3.2.17 Current clause 33.1(vi) provides:

> *Except where agreement has been reached in accordance with clauses 33.1(a)(ii) and 33.1(a)(iii), the prescribed rostered day off or any substituted day may be worked where it is required by the employer and such work is necessary:*
>
> - *to allow other employees to be employed productively; or*
> - *to carry out out-of-hours maintenance; or*
> - *in the case of unforeseen delays to a particular project or a section of it or other reasons arising from unforeseen or emergency circumstances on a project;*
>
> *in which case, in addition to accrued entitlements, the employee will be paid penalty rates and provisions as prescribed for Saturday work in clause 37—Penalty rates.*

3.2.18 Proposed clause 33(a)(v) would introduce a new obligation on employers to provide an employee with not less than 48 hours written notice of the need to work on an RDO.

3.2.19 HIA opposes the imposition of this new requirement, particularly when, in circumstances of *'unforeseen delays'* and *'unforeseen or emergency circumstances'* on a project, such notice may not be able to be provided as the circumstances may be outside of the employers control.

3.2.20 HIA is also unaware of any variation application on foot in these proceedings seeking a change of this nature.

Payment for an RDO

3.2.21 HIA maintains its position outlined at Section 6.2 of its December 2016 Submission that payment of the various fares and travel patterns allowances should not be paid on an RDO. As such HIA opposes the inclusion of clause 33(a)(vi) in the proposed provision.

3.3 BANKING OF RDO'S

3.3.1 HIA supports the adoption of provisions that would enable employees to bank RDO's.

3.3.2 HIA notes that under the proposal outlined within the Statement, an employer must not unreasonably withhold an agreement for an employee to take an accrued banked RDO.

3.3.3 HIA submit that the proposed provision should require that an employee provide written notice to the employer of the employees request to take a banked RDO at least 5 days before taking the banked RDO.

3.4 ENTITLEMENT ON TERMINATION

3.4.1 Current clause 33.1(v) deals with the payment of RDO's in circumstances in which a complete 20 day, 4 week cycle is not worked. The Statement indicates that clause 33.1(v) has been deleted and replaced with proposed clause 33(vii) - Entitlement on Termination of Employment.

3.4.2 The current provision provides that:

> *'An employee who has not worked, or is not regarded by reason of clause 33.1(a)(iv) as having worked a complete 19-day four week cycle, will receive pro rata accrued entitlements for each day worked or regarded as having been worked in such cycle, payable for the rostered day off, or in the case of termination of employment, on termination'*

3.4.3 This is generally understood to mean that if an employee has not worked a complete RDO cycle but has accrued entitlements towards an RDO:

- The employee is entitled to pro rata accrued entitlements.
- These accrued entitlements will be paid on termination.

3.4.4 In light of this, and the proposal to include provisions that would facilitate a system for the banking of RDO's (proposed clause 33(a)(iv)) and provisions that enable the fixing of an RDO (proposed clause 33(a)(iii)) HIA understands that any redrafted provisions would need to contemplate four scenarios:

(1) The employee has not worked a complete RDO cycle, in which case the employee receives pro rata accrued entitlements towards an RDO (i.e. 0.4 of one hour for each day worked) to be taken at the time when the RDO would ordinarily have been taken.
(2) The employee has not worked a complete RDO cycle and the employees employment comes to an end, the employee is entitled to pro rata accrued entitlements towards an RDO at the ordinary time hourly rate (i.e. 0.4 of one hour for each day worked) up to the date of termination.
(3) RDO's not banked but accrued that may not have yet been taken (due to an arrangement under proposed clause 33(a)(iii)) at the ordinary time hourly rate at the dated of termination.
(4) Payment for any banked RDO's on termination at the ordinary time hourly rate.

3.4.5 HIA is concerned that the proposed provision does not clearly reflect all of these matters.

3.4.6 HIA also notes that AM2016/8 – Payment of Wages is contemplating a model term for the payment of wages on termination.

3.4.7 In light of this and that the first scenario above contemplates a situation in which employment is ongoing it may be of value to deal with scenario (1) separately for those scenarios that deal with payments on termination.