HOUSING INDUSTRY ASSOCIATION

Submission to the
Fair Work Commission

AM2016/23 – 4 Yearly Review of Modern Awards - Construction Awards Submissions in Reply

28 November 2018

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contents

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1. INTRODUCTION

1.1.1 On 26 September 2018, a Full Bench of the Fair Work Commission (**Commission**) issued its decision in *4 Yearly Review of Modern Awards – Construction Awards [2018] FWCFB 6019* (**Decision**).

1.1.2 At paragraphs 368 – 369 of the Decision the Commission set out a provisional view (**provisional view**) in relation to allowances under the *Building and Construction General Onsite Award 2010* (**Onsite Award**).

1.1.3 The provisional view proposed the consolidation of allowances in clauses 21 and 22 of the Onsite Award, and replacement of those allowances with an enhanced industry allowance, variable in quantum having regard to the particular industry sector in which an employee is engaged.

1.1.4 The Commission also outlined a provisional view concerning the quantum of the enhanced industry allowance and, provided interested parties *'one further opportunity to advance any alternative proposals, make any submissions or confer in relation to the quantum of the proposed sectoral industry allowances*.'

1.1.5 On 1 November 2018, an additional conference (**additional conference**) was held at the request of union parties whereby the unions advanced further materials relating to the Decision and the quantum of the enhanced industry allowance.

1.1.6 On 8 November 2018, the Commission issued directions for the filling of submissions in relation to a number of matters raised in the Decision (**Directions**).

1.1.7 These submissions are filed in accordance with item 2 of the Directions and respond only to the matters outlined in the written submissions of the CFMMEU dated 14 November 2018 (**CFMMEU Submission**) and the submission of the AMWU dated 14 November 2018 (**AMWU Submission**). Given the focus of the submissions of the AWU dated 14 November 2018 (**AWU Submission**) on the civil construction sector and the filing of a number of witness statements, HIAs submission does not deal with the AWU Submission.

1.1.8 As noted in HIAs correspondence to the Commission dated 16 November 2018, HIA was unaware that the filing of additional and new evidence (by way of witness affidavit specifically in the case of AMWU and AWU) in support was contemplated by the Commissions invitation in the Decision.

1.1.9 As such, these submissions do not deal with the evidence submitted.

1.1.10 If the Commission is minded to seek a response to those matters in evidence, or provide an opportunity for parties to file evidence in reply, HIA would await a direction of that nature from the Commission.

1.1.11 HIA continues to rely on submissions dated 9 November 2018 in relation to the Height Work Allowance proposal.

1.2 GENERAL COMMENTS

1.2.1 HIA opposes the Combined Union Proposal (**Combined Union Proposal**) outlined at Appendix 1 of the CFMMEU Submission, and as provided by the unions at the additional conference of 1 November 2018.

1.2.2 HIA supports the Commissions approach to the re-organisation and simplification of allowances.

1.2.3 HIA supports a sectorial approach and the quantum of the enhanced industry allowance proposed for the residential building and construction sector outlined in the Decision.

2. NATURE OF THE REVIEW

2.1.1 The scope and nature of the 4 yearly review is well known and clearly set out in the decision of *4 Yearly Review of Modern Awards -Preliminary Jurisdictional Issues*[1] and various decisions subsequent to that.

2.1.2 HIA is compelled however to highlight that the propositions put by both the CFMMEU and AMWU that, the history, longevity and (unsubstantiated) continued relevance of the allowance provisions in the Onsite Award should be given greater weight than the consideration of the modern awards objectives under section 134 of the *Fair Work Act 2009* (**FWA**), is simply wrong.

2.1.3 Such matters may be relevant, but only to the extent that *'the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.'*[2]

2.1.4 The modern awards of today operate in a context that is both legislatively and societally different from the particular context within which the decisions were made that saw the insertion of a range of specific allowances.

2.1.5 In considering those prior decisions and that previous context, it has also been made clear that a party is not required to substantiate that a *'material change in circumstances has occurred'* in order to justify a variation to a modern award. As outlined in the 4 Yearly Review of Modern Awards - Penalty Rates decision (**Penalty Rates Decision**):

> *'A central contention advanced by the Shop, Distributive and Allied Employees Association (SDA) and United Voice in these proceedings is that before the Commission can vary a modern award in the Review, it must first be satisfied that since the making of the modern award there has been a material change in circumstances pertaining to the operation or effect of the award such that the modern award is no longer meeting the modern awards objective (the 'material change in circumstances test'). If adopted the proposed test would require the proponent of a variation to establish that there has been a material change in circumstances since the modern award was made. The proposed 'material change in circumstances' test seeks to place a constraint on the discretion conferred by s.156 which is not warranted by the terms of this section or the relevant statutory context and purpose. There is no such express or implied requirement in s.156.*
>
> *We reject the proposition advanced by the Unions. The adoption of the proposed 'material change in circumstances test' would obfuscate the Commission's primary task in the Review, determining whether the modern award achieves the modern awards objective. To adopt such a test would add words into s.156 in circumstances where it is not necessary to do so in order to achieve the legislative purpose'.* [3]

[1] [2014] FWCFB 1788
[2] 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at paragraph 27
[3] [2017] FWCFB 1001 at paragraph 42- 43

2.1.6 As such, no case is required to be made as to a 'change in circumstances' in respect of the application of the allowance in questions for the Commission to determine that in its current form, the Onsite Award is not meeting the modern award objectives.

2.1.7 If there remains a question as to the evolution of the regulatory environment within which Modern Awards, employers and employees now operate, HIA sets out below factors that should distance the assessment of the Onsite Award from considerations of the past and attach primacy to consideration of current conditions and the current role of the Commission and the modern Award objectives.

2.2 Award Modernisation And The Review of Modern Awards

2.2.1 Award modernisation signaled a major shift in the award system.

2.2.2 Awards were developed out of disputation and through an arbitral process. The examples of decisions attached to both the AMWU and CFMMEU Submission clearly demonstrates this.

2.2.3 Awards were also made by consent. Another feature of the historically adversarial approach involved in the development of awards.

2.2.4 Award modernisation changed this approach. Now rather than being clearly bound to an award, as a respondent (or within a class of respondents), employers are now required to determine the appropriate award coverage:

> *'Rather than using a concept of parties being 'bound' to awards…adopt two new key concepts which better reflect the new modern workplace relations system. These are:*
>
> - *That an instrument covers an employer and employee or organisation; (that is they fall within the scope of the instrument); and*
> - *The instrument applies to the employer and employee (that is, the instrument that actually regulates rights and obligations).'*[4]

2.2.5 The process of award modernisation also consolidated a variety of pre-modern state and federal based instruments into one modern award. However in HIA's submission, the content of these modern awards were not updated to fit or reflect contemporary needs or circumstances.

2.2.6 This was highlighted by Watson VP in his Minority decision in the Annual Leave Case conducted as part of the 2012 transitional review of Modern Awards:

> *'As a result of the award modernisation process, approximately 1560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards. 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*

[4] [2008] AIRCFB1000 at paragraph 12

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. As the Full Bench explained on a number of occasions, the general approach was as follows:

> *"[3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of the provisions based on the information provided by the parties as to current practices."*

It is important to note the limited nature of the task undertaken by the award modernisation Full Bench.'[5]

2.2.7 Notwithstanding the difficult task faced by the AIRC and the inevitable limitations in a forensic examination of all award conditions in 2008, award modernisation changed the role of awards - no longer are these instruments a result of a dispute settlement process but will evolve through a formal legislated process of 'reviews'[6] and 'variation applications'[7] presided over by the Commission.

2.2.8 Under the FWA the Commission is now not bound by the applications of the parties. As a regulatory function the Commission has a responsibility to ensure the awards are meeting the modern award objectives, irrespective of the views of interested parties. As observed by his Honour Ross J in the context of the Annual Leave Common Matter:

> *'We are not bound by either the terms of the relief sought by a party nor by the scope (i.e. the awards to be varied) of the variations proposed. Context is important in this regard.*
>
> *These issues arise in the 4 yearly review of all modern awards. The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an inter parties industrial dispute—it is reviewing a regulatory instrument.'*[8]

[5] [2013] FWCFB 6266 at 198 – 199
[6] s136 of the FWA
[7] ss157 and 160 of the FWA
[8] [2015] FWCFB 3406 at paragraph 155-156

2.2.9 This approach was also outlined in the Penalty Rates Decision[9] and further confirmed in Family Friendly Working Arrangements decision.[10] In that decision, while the Commission rejected the union claim, that did not *'conclude the matter.'*[11] The Commission observed that:

> *'The Claim has been made in the context of the 4 yearly review of modern awards and, as we have mentioned, the Review is distinguishable from inter partes proceedings. Section 156 imposes an obligation on the Commission to review all modern awards. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application. The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578 of the Act.'*[12]

3. RATIONALISATION OF ALLOWANCES

3.1.1 The need to rationalise the allowances in the Onsite Award was identified well before the commencement of the 4 yearly review process.

3.1.2 During the award modernisation process all interested parties were encouraged by the Australian Industrial Relations Commission (AIRC) to rationalise allowances within the Onsite Award, the AIRC particularly noted:

> *'In a number of industries there are many different allowances in federal awards and NAPSAs, some of quite small amounts. It is often difficult to know the origin and purpose of the allowances and whether they are still relevant. In some cases the allowance will not be appropriate for inclusion in a safety net award because it is outmoded, is the result of enterprise bargaining or for some other reason.*
>
> *In some industries there is a strong case for rationalising allowances. The manufacturing and building and construction industries are examples. We encourage parties to give attention to the number, amount and purpose of allowances with a view to rationalising them and eliminating those that are no longer relevant.'*[13]

[9] [2017] FWCFB 1001 at paragraphs 129 - 132
[10] [2018] FWCFB 1692
[11] Ibid at paragraph 412
[12] [2018] FWCFB 1692 at paragraph 414
[13] [2009] AIRCFB 50 at paragraphs 20 - 21

3.1.3 During the award modernisation process, it was evident that rationalisation of allowances could not be resolved through the award modernisation process, and would need to be contemplated in future reviews of the modern award, and should be given priority:

> *'In the 23 January 2009 statement we referred to the large number of allowances in some industries and raised the possibility of rationalising them. Progress on this issue has not been rapid. While we have not included many allowances which are either obsolete or for one reason or another inappropriate for inclusion in a safety net award, there are large national industries such as manufacturing and building and construction which still have far too many detailed allowance provisions. Despite our urging little has been achieved by consent in those industries. Regrettably further rationalisation will have to await the foreshadowed award reviews'; and*
>
> *'we have not received sufficient material and input from interested parties to allow us to attempt to rationalise allowances at this stage. Such an exercise should, however, be given some priority in any future review of the modern award.'*[14]

3.1.4 During the 2012 transitional review of Modern Awards Senior Deputy President Watson also highlighted the need to consider the rationalisation of allowances in the Onsite Award. It was noted that this would need to be contemplated in the context of the 4 yearly review of modern awards:

> *'The allowance provisions in the Building On-site Award are lengthy and complex, largely reflecting a consolidation of allowances prescribed in pre-modern instruments. The need for rationalisation of the allowance provisions in the Building On-site Award was noted by the Award Modernisation Full Bench. Similar observations were more recently made by the Full Bench which determined an MBA 2012 Review application to remove provisions which purport to regulate work health and safety on the ground that they are not lawful, which concluded':*
>
> > *"**[83]** The desirability of a rationalisation of allowance terms in the On-site Award raised by the Australian Industrial Relations Commission Full Bench in January 2009 remains. This may occur in the context of the 2012 Review of the On-site Award, which remains before Senior Deputy President Watson, to the extent that the particular terms are in issue and there is sufficient material and input from interested parties before him in relation to those particular terms. To the extent that particular terms which might benefit from review are not before his Honour or there is insufficient material for the purpose of the 2012 Review, any outstanding rationalisation of allowances in the On-site Award could occur in the 2014 Review."*[15]

[14] [2009] AIRCFB 345 at paragraphs 40 and 88
[15] [2013] FWC 4576 at paragraph 206

3.1.5 While parties attempted conciliation it became clear that in order to reach any consensus further time would be required, as such no party pressed an application in relation to the rationalisation of allowances.[16]

3.1.6 As part of the 4 yearly review process the Full Bench heard evidence and submissions advanced in support of applications to alter allowances within the Onsite Award.

3.1.7 HIA sees this Decision as a result of the culmination of directions made during and after award modernisation and rejects the baseless assertion that the provisional view of the Commission is a *'reward'* to employers who fail to comply with their obligations.[17]

3.2 Residential Construction Sector

3.2.1 In accordance with previous submissions, HIA maintains the position that a substantial number of allowances in the Onsite Award have little, if no practical application in the residential construction industry.[18]

3.2.2 HIA sees the provisional view outlined in the Decision as a way of supporting small, award reliant businesses in the residential construction sector. These businesses must be able operate under Modern Awards that foster flexible work practices and conditions that promote efficiency and productivity to help sustain employment throughout the ebbs and flows experienced by the industry.

3.2.3 The residential construction industry requires a regulatory environment that provides certainty and does not unnecessarily dull its ability to move the economy forward and employ more workers.

3.2.4 In an attempt to discount this position the CFMMEU Submission provides examples of work relating to some allowances that are said to be experienced across the construction sector.

3.2.5 This information has been extracted from websites and is based on unsubstantiated assumptions as to the nature and operation of those businesses. It cannot be interrogated or further investigated. It should be rejected.

3.2.6 Further, Appendix 5 to the CFMMEU Submission includes a list of special rates not applicable to the residential construction industry. Despite assertions to the contrary there is clearly a difference between the conditions experienced on residential construction sites, compared to those working on other types of construction work.

3.2.7 HIA maintains that a sectorial approach to allowances under the Onsite Award is beneficial.

4. NATURE OF THE UNION SUBMISSIONS

4.1.1 In HIA's view the approach taken by the Unions does nothing to assist the Commission in its task to review the Onsite Award as a part of this 4 yearly review of modern awards.

4.1.2 Not only do those submission ignore aspects of the Decision in relation to the assessment of the modern award objectives but the approach outlined in the Decision was foreshadowed by the Commission in its

[16] [2013] FWC 4576 at paragraphs 13-15
[17] See paragraph 22, CFMMEU Submission
[18] See paragraph 2.2.15, HIA Submission, 15 September 2017

Statements of 17 August 2017 (**August 2017 Statement**) and 6 December 2017 (**December 2017 Statement**).

4.1.3 Parties were provided ample opportunity to put forward their views including through written submissions. Subsequent conferences were convened on 19 December 2017, and 25 January 2018, and further opportunities provided to file submissions regarding categorisation of allowances, and sectorial definitions. During the proceedings members of the Full Bench also took the opportunity to explore the issue of allowances with the parties.

4.1.4 The Decision simply confirms the views already expressed to the parties. Assertions that there is a lack of reasons for this Decision are misplaced.

4.1.5 The Decision clearly determined that clauses 20, 21 and 22 of the Onsite Award do not meet the modern award objectives on the basis that the provisions:

- Are unclear, overly prescriptive and potentially obsolete.[19]
- Are undifferentiated in terms of whether they are payable for the exercise of additional skills, compensate for a disability of reimburse for an expense incurred, including whether they are payable for all-purposes.[20]
- Are obscure or would rarely be paid.
- Are irrelevant to employees working on construction sites.
- Can sometimes make provision for other entitlements and so are not allowances at all.
- Appear to compensate for the disabilities associated with at-risk working environments.
- Do not constitute a fair relevant safety net having regard in particular to their impact on the regulatory burden and the need to ensure a simple, easy to understand, stable and sustainable modern award system.

4.1.6 In light of the history in relation to allowances under the Onsite Award it is also curious that both the CFMMEU and AMWU suggest (respectively) that the Full Bench may not *'fully understand the implications of what is being proposed'*[21] or that '*...the Full Bench has not provided an opportunity for parties to consider and respond to the relevant particular information, facts, rationale or thoughts, upon which the provisional proposal is based.'*[22]

4.1.7 Further, assertions that the rationalisation of allowances is inconsistent with the modern award objectives[23] fails to recognise the continual work by the parties and the Commission since award modernisation to rationalisation and/or simplify the allowances within the Onsite Award. Further, the advancement of this position, not only exceeds the scope of the submission sought in the Directions but

[19] 352-353
[20] Para 354
[21] CFMMEU Submission at paragraph 8
[22] See paragraph 7b, AMWU Submission
[23] See paragraph 19d, AMWU Submission

fails to recognise the Commission task in weighing the modern award objectives that has been set out in numerous decisions,[24] and is also set out at paragraph 17 – 19 of the Decision.

4.1.8 Equally questionable is the argument that the particular purposes of these allowances has not been explored.[25] This view is proffered despite numerous submissions, hearings, conferences and directions concerning an examination of the allowances under the Onsite Award.

4.1.9 Through the Combined Union Proposal the CFMMEU Submission also seeks to re-agitate the method for the rationalisation of allowances through a proposal that would see:

- The adoption of one industry allowance despite the Commission conclusion that a sectorial approach is preferred.
- The retention of a number of allowances for height work. The Commission has already made a determination in relation to those matters and parties have already made submissions on union proposals.[26] As such, those additional materials should be disregarded.
- The retention of a number of allowances that the Commission has determined are outdated, for example, the argument that second hand timber is increasingly being used ignores the Commission conclusion that it is to be abolished because of *'its lack of contemporary relevance.'*[27]

4.1.10 Submissions of the nature filed exceed the scope of the Directions concerning 'quantum' as outlined in the Decision.

4.1.11 HIA also submit that to the extent the materials filed go to matters of the conduct of the Commission, they should be rejected.

4.1.12 Further materials filed by the AMWU concerning a HIA Media Release, wage theft and a 2015 Fair Work Ombudsman audit campaign are irrelevant and should be given no weight by the Commission.

4.2 THE QUESTION OF QUANTUM

4.2.1 HIA rejects the Combined Union Proposal set out at Appendix 1 of the CFMMEU Submission.

4.2.2 The Combined Union Proposal:

- Demonstrates the continuation of an approach to this issue that has been rejected by the Commission in the Decision at paragraph 359.
- Is misconceived as it simply 'adds up' existing allowances and does nothing to rationalise them. This is at odds with the provisional view outlined in the Decision and the historical commentary and directions in relation to the need to rationalise allowances under the Onsite Award.

[24] For example *4 yearly review of modern awards—Annual leave* [2016] FWCFB 3177
[25] See paragraph 19a, AMWU Submission
[26] Paragraphs 21, 28, 32, 60, CFMMEU Submission
[27] See Decision at paragraph 371

- In carrying out this 'adding up' exercise certain unsubstantiated assumptions have been made. For example Appendix 1 identifies an amount of $0.73 per hour as the average of special rates paid to trades. It is not abundantly clear which allowances have been included in this calculation. Also Appendix 7 concludes that an amount of $0.78 per hour is the average of a 'revised list' of special rates application to a tradesperson in the residential construction. It is unclear how the conclusions in respect of those tradespersons listed and the associated 'special rates' was determined.

- Proposes an allowance for 'special building and construction work' for employees engaged on refractory work, asbestos removal work, air-conditioning and refrigeration industry work, and work in compressed air. The proposed allowance is significantly higher than the current allowance, with limited justification for such an increase and fails to recognise the Commissions conclusion that these allowances will be rationalised.

- Applies an *'across the board discount 50% discount'* to the average of the special rates. HIA rejects this approach. It is difficult to envisage a situation in which half of an employee's full time hours would, for example, involve wet work, or dirty work. This approach lacks substantiation and is arguably wrong.

- Seeks compensation for the '*loss of fares on RDO and in leave calculation*.' In the Decision the Full Bench confirmed that there is no requirement to make payment of travel allowance while on an RDO and while on annual leave. The Decision did not contemplate the need for compensation. This proposition should be rejected.

- Paints a somewhat mischievous picture of the current payment of allowances under the Onsite Award. Not all of the allowances that are proposed to be consolidated are currently payable for all-purposes. In fact, the overwhelming majority of those 52 listed at paragraph 369 of the Decision are **not** payable for all-purposes and are only currently payable where those particular conditions arise. The Combined Union Proposal fails to take account of this imposing an unjustifiable cost burden on businesses.

- Is at odds with both the need to take a balanced approach when considering the modern awards objectives and with the Commissions aim of creating a system that will *'generally be cost neutral for workforces over the longer term'*[28].

- Claims to be based on the need to give primacy to the modern award objective that requires consideration of the relative living standards and needs of the low paid. HIA submit that the CFMMEU fail to adequately interrogate the relevance of this objective in terms of its relationship to the quantum of the enhanced industry allowance.

[28] See paragraph 369 of the Decision

Of note are the deliberations of the Full Bench in the Penalty Rates Decision. These deliberations whilst extensive are apposite and HIA seeks to bring the following to the attention of this Full Bench:

> *'The 'needs of the low paid' is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).'*[29]

HIA submit that equally, in this case, the primary purpose of the allowances currently contained in the Onsite Award was not to address the needs of the low paid. In some cases that purpose is unclear, in others the inclusion of a particular allowance may have been the result of an arbitration or the settlement of a dispute. Certainly however, most often these allowance were claimed on the basis of an argued need to provide compensation for some onsite condition, they were not sought to improve the situation of the low paid.

4.2.3 It is HIA's position that the enhanced industry allowance of 4% applicable to the residential construction sector outlined in the Decision provides adequate compensation for the conditions associated with working in the residential construction industry.

[29] Penalty Rates Decision at paragraph 823