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Vice President Hatcher
Deputy President Hamilton
Deputy President Gostencnik
Commissioner Gregory
Commissioner Harper-Greenwell
Fair Work Commission
80 William Street
East Sydney NSW 2011

By email: amod@fwc.gov.au

Your Honours

Building and Construction General Onsite Award 2010 (Onsite Award) Decision [2018] FWCFB 6019 (Decision)

HIA refers to the Directions dated 23 November 2018 (**Directions**) issued in relation to the Full Bench Decision of 26 September 2018.

In accordance with the Directions, HIA provides the following comments in relation to the Draft Determination (**Draft Determination**) varying the Onsite Award.

1. Clause 24- Living Away from home – distant work

- 1.1. HIA refers to the Draft Determination item 7.
- 1.2. HIA submit that each subparagraph of proposed clause 24.3(a) include 'or' between them to ensure consistency with the drafting in the Onsite Award.
- 1.3. HIA refers to Draft Determination item 9.
- 1.4. HIA submit that the inclusion of the word 'above' at the end of proposed clause 24.7(f)(i) is unnecessary, and is inconsistent with the drafting in the Onsite Award. Accordingly, HIA recommends the deletion of the word 'above' for the proposed clause.

2. Clause 25 - Travelling time entitlements

- 2.1. Item 10 of the Draft Determination sets out proposed new clause 25, Travelling time entitlements.
- 2.2. HIA makes the following comments in relation this proposed new clause.

Proposed clause 25.4 - Distant work payment

- 2.3. There is inconsistency between proposed clause 25.4(a) which refers to 'metropolitan radial zone', and clause 25.4(d) which defines 'metropolitan radial area'.
- 2.4. HIA submit that proposed clause 25.4(a) is varied to replace the word 'zone', with 'area', to ensure consistency with the whole of proposed clause 25.4.

Proposed clause 25.5 - Apprentices

- 2.5. HIA is concerned that the proposed clause 25.5 removes clarity as to the treatment of the fares and travel pattern allowance on a day in which an apprentice attends an RTO for training and assessment in accordance with the contract of training.
- 2.6. HIA submit that the current clause 25.12(b)(ii) of the Onsite Award be retained.
- 2.7. Current clause 25.12(b)(ii) provides:

'Apprentices will not be paid the allowance in clause 25.12(a) for days they attend an RTO for training and assessment in accordance with the contract of training.'
- 2.8. If the Commission is minded to adopt this approach a consequential amendment will be required and the reference to clause 25.12(a) should be 25.5(a).
- 2.9. Further, the wording in clause 25.5(a) *'An apprentices'* reads inaccurately, accordingly HIA suggests the singular *'apprentice'* be used.

Proposed clause 25.1(b) - Payment of Fares and travel patterns allowance

- 2.10. HIA acknowledges the Decision that the payment of the fares and travel patterns allowance is not made where an employee is absent from work for any reason, including for leave and RDO's¹.
- 2.11. Proposed clause 25.1(b) reflects two of the four scenarios in which the fares and travel patterns allowance will not be payable listed in the Decision at paragraph 182.
- 2.12. HIA submits that in order to accurately reflect the Decision and to provide clarity for industry participants proposed new clause 25.1(b) read as follows:

- (b) 'An employee will not be entitled to the allowance in paragraph (a) on any day where:*
- i) The employer provides or offers to provide transport free of charge from the employees home to the place of work and return; or*
 - ii) The employer provides a fully maintained vehicle free of charge to the employee; or*
 - iii) The employee is absent from work for any reason including leave and RDO's; or*
 - iv) The employee is not required to start and finish work at the construction site but rather another fixed location.'*

- 2.13. This is also consistent with item 11 of the Draft Determination which removes the reference to the payment of the travel allowances whilst on a RDO.

Removal of current clause 25.10(c)

- 2.14. Current clause 25.10(c) of the Onsite Award provides clarity by specifying that allowances provided under the fares and travel pattern allowance clause are not taken into account when calculating overtime, penalty rates, annual or personal/carer's leave entitlements.
- 2.15. For the sake of clarity, and in light of the Decision HIA recommends the inclusion of a new subclause 25.1(c):

'The allowances prescribed by this clause will not be taken into account for calculating overtime, and penalty rates.'

3. Clause 38- Annual Leave

- 3.1. Item 16 of the Draft Determination proposes a new clause which deals with the calculation of annual leave loading.
- 3.2. Proposed new clause 38.2(b) requires the application of the 17.5% leave loading to the *'base rate payable under clause 38.2(a)'*

¹ Paragraph 182

3.3. HIA is concerned that the use of the words *'base rate'* is inconsistent with the terminology in the Onsite Award. In fact, current clause 38.2(a) specifically distinguishes the application of the **base rate of pay** referred to in s90(1) of the *Fair Work Act 2009* and instead requires that the annual leave calculation be based on the amount the employee would have received for working ordinary time hours if they had not been on leave.

3.4. In light of this and the intention of the variation as outlined at paragraph 441 of the Decision, HIA suggests the following amendment (underlined) to the proposed new clause 38.2(b):

'In addition to the payment prescribed in clause 38.2(a), an employee must receive during a period of annual leave a loading of 17.5% calculated and paid based on the amount determined in accordance with clause 38.2(a).'

Yours sincerely

HOUSING INDUSTRY ASSOCIATION LIMITED

A handwritten signature in black ink, appearing to read 'M. Adler', written in a cursive style.

Melissa Adler
Executive Director- Industrial Relations and Legal Services