

Master Builders Australia

Submission to the Fair Work Commission

on

*4 Yearly Review of Modern Awards –*

*Payment of Wages (AM2016/8)*

30 October 2017



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## 1 Introduction

- 1.1 This submission is made by Master Builders Australia ('Master Builders'). Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890. Master Builders' members are the nine Master Builder State and Territory associations.
- 1.2 Over the past 120 years the association has grown to represent over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.
- 1.3 This submission is filed pursuant to the Commission's Statement and directions dated 19 September 2017<sup>1</sup>, including that interested parties were to file any submissions upon which they seek to rely in relation to:
- (i) *The provisional 'payment of wages and other amounts' model term set out at paragraph [34] of the Full Bench decision dated 1 December 2016 ([2016] FWCFB 8463) ('Decision');*
  - (ii) *The provisional 'payment on termination of employment' model term at paragraph [117] of the Decision; and*
  - (iii) *The issue related to the accrual of payments referred to at paragraphs [19] to [22] of the Statement of the Full Bench issued on 19 May 2017.<sup>2</sup>*
- 1.4 Master Builders maintains an interest in the *Building and Construction General On-Site Award 2010* (On-Site Award) and the *Joinery and Building Trades Award 2010* (Joinery Award) and makes these submissions in response to the Statement and in the context of its application to those two awards.

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<sup>1</sup> [2017] FWCFB 4817

<sup>2</sup> Ibid at Attachment A

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## 2 Provisional ‘payment of wages and other amounts’ model term

- 2.1 Master Builders has filed submissions in this matter dated 22 December 2016<sup>3</sup>, **Attachment A**, and 2 February 2017<sup>4</sup>, **Attachment B**, within which we have advanced in principle support for the provisional ‘payment of wages and other amounts’ model term with industry-specific amendments and their inclusion in the On-Site and Joinery Awards. We continue to rely on those submissions which are annexed to this submission.

## 3 Provisional ‘payment on termination of employment’ model term

- 3.1 In accordance with our comments at paragraph 2.1, Master Builders has previously filed submissions in this matter where we have similarly supported the Commission’s provisional ‘payment on termination of employment’ model term, albeit with industry-specific amendments.<sup>5</sup> We also continue to rely on those submissions as per **Attachment A** and **Attachment B**, which support the standardised approach proposed by the Commission and their inclusion in the On-Site and Joinery Awards.
- 3.2 In addition, we bring to the Commission’s attention that, as part of Award-stage proceedings (AM2016/130), the Full Bench has issued a statement seeking the views of the parties in relation to proposed variations to clause 33 of the On-Site Award. The Commission’s proposal amends existing RDO provisions within that award and prescribes arrangements in relation to entitlements due and payable on termination.<sup>6</sup>
- 3.3 The parties have filed submissions in response to the Commission’s proposed amendments to clause 33 of the On-Site Award, with a hearing date set down

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<sup>3</sup> Master Builders Australia submission - 4 yearly review of Modern Awards – Payment of Wages (AM2016/8) 22 December 2016

<sup>4</sup> Master Builders Australia submission – 4 yearly review of Modern Awards – Payment of Wages (AM2016/8) 2 February 2017

<sup>5</sup> Ibid and also refer to Master Builders Australia submission – 4 yearly review of Modern Awards – Payment of Wages (AM2016/8) 22 December 2016.

<sup>6</sup> [2017] FWCFB 4239 at para [7].

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for oral submissions before the Construction Awards Full Bench next month, the decision relating to which, will likely have a bearing on these proceedings.

## 4 Accrual of wages

- 4.1 Master Builders continues to hold the view that there is no regulatory or legislative 'gap' in relation to the timing of accrual of wages. In the event that one were to be sufficiently demonstrated, we submit that any deficiencies would be more appropriately dealt with via legislative amendments, rather than changes to provisions within modern awards.
- 4.2 Master Builders submits that there is no mischief to be resolved with regard to the provision's practical application of the accrual of entitlements, nor have we been alerted by our members that further clarification is necessary in this regard.

## 5 Conclusion

- 5.1 As per our previously referenced submissions, Master Builders welcomes amendments that provide greater flexibility and more reasonable and commercially practical timeframes with regard to the payment of employee's entitlements.
- 5.2 We re-iterate our point, however, that in the event a lack of clarity is established with regard to the accrual issue, it would be more appropriate for the matter to be dealt with via a legislative amendment, rather than by variation of an award.
- 5.3 Master Builders does not anticipate the need to make further oral submissions in this matter, however, in the event a date for an oral hearing is directed, will seek to reserve our right to appear if deemed necessary.

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## 1 Introduction

- 1.1 This submission is made by Master Builders Australia (Master Builders).
- 1.2 Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890. Master Builders' members are the nine Master Builder State and Territory associations.
- 1.3 Over the past 120 years the association has grown to represent over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.

## 2 Summary

- 2.1 Master Builders takes the general view that matters involving regulatory or legislative deficiencies should be considered and addressed by Parliament. We note this view as there have been matters identified during these proceedings are significant enough to warrant consideration by Government and this should be the appropriate course in the first instance.
- 2.2 Notwithstanding this, Master Builders is generally supportive on an in-principle basis of some key items arising from the Decision dated 1 December 2016.<sup>1</sup> A standardised approach to clause terms, improved clarity and greater flexibility are positive developments.
- 2.3 While this submission proposes improvements with respect to the provisional model terms, these should not be read as to detract from our overall position at para 2.1.

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<sup>1</sup> [2016] FWCFB 8463

### 3 Conceptual considerations

- 3.1 The provisional model terms as proposed include provisions that seek to achieve a number of purposes. These appear to include resolving apparent uncertainty with respect to the timing and accruals of wages and other amounts.
- 3.2 The Full Bench has recognised the existence of an apparent regulatory or legislative 'gap' in relation to the payment of wages.<sup>2</sup> As a broad principle, Master Builders submits that it is the role of Parliament to consider and address any gap as the 'custodian' of the relevant regulation or legislation.
- 3.3 Government should be provided the opportunity to consider its position with respect to any observations about the existence of a so-called gap. In doing so, Government is provided the opportunity to determine whether any deficiency needs to be addressed and the method by which this may occur. Any regulatory or legislative alterations proposed as a result are conventionally the subject of exposure draft publication for broad community consultation. Any decision of Government to address a regulatory or legislative gap is then subject to the scrutiny of Parliament before taking effect.
- 3.4 The gap identified relates to matters that are significant enough in nature (timing of payments on termination and accrual timings) so as to warrant Government consideration.
- 3.5 In light of the above position, and noting that this proceeding also involves considering inserting model terms into all modern awards, we do not make any observation as to addressing gaps as noted.<sup>3</sup>
- 3.6 Master Builders would, however, support the concept that a version of the provisional model terms with appropriate amendments be applied to the Group 4C Construction Awards.

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<sup>2</sup> Ibid at paras 73, 84 and 131

<sup>3</sup> Ibid

- 3.7 There are certain industrial and workplace nuances that exist in the building and construction sector about which the Commission and interested parties have previously noted. To that end, it is appropriate that any model terms developed be crafted in such a way as to account for those nuances.

## 4 Provisional 'payment of wages and other amounts' Model Term

- 4.1 The Provisional 'payment of wages and other amounts' Model Term ('PowMT') is expressed at [117] of 2016 FWCFB 8463 as follows:

### ***X. Payment of wages and other amounts***

#### ***x.1 Pay periods and pay days***

*(a) The employer must pay each employee no later than 7 days after the end of each pay period:*

- (i) the employee's wages for the pay period; and*
- (ii) all other amounts that are due to the employee under this award and the NES for the pay period.*

*(b) An employee's pay period may be:*

- (i) one week;*
- (ii) two weeks; or*
- (iii) subject to paragraph (e), one month.*

*(c) The employer must notify each employee in writing of their pay day and pay period.*

*(d) Subject to paragraph (e), the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.*

*(e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.*

*(f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.*

#### ***x.2 Method of payment***

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*Payments under clause x.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee, or by cash or cheque.*

- 4.2 Noting the observations made earlier at para 2.1, it is our view that a number of alterations to the PowMT should be considered to improve its operation and understanding.
- 4.3 Item x.1 should be titled 'Payment of Wages' or alternatively 'Payment of Wages for the Pay Period' so as to avoid confusion and overlap with any other existing award provisions that deal specifically with payment of amounts or entitlements arising elsewhere or in the NES.
- 4.4 Item x.1 (a) (ii) of the PowMT proposes an obligation to pay "all other amounts due to the employee under this award and the NES for the pay period" in addition to wages.
- 4.5 We submit that this is not necessary and should be deleted, for the reasons noted at paras 2.1 and 4.3 above.
- 4.6 Only were it necessary for this provision to remain, our secondary position is that the words 'and payable' should be included so as to distinguish between those amounts due to be paid and those which may be due but are to be accrued. These words would be inserted so the provision would appear as follows:

*(ii) all other amounts that are due and payable to the employee under this award and the NES for the pay period.*

- 4.7 Item E of the PowMT deals with changing pay periods to a monthly arrangement by agreement with employees. The proposal is expressed as follows:

*(e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly*

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*prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.*

- 4.8 The reference to a 'particular classification' is unnecessary and may restrict the operation of the term as proposed. It may be that monthly pay terms applied employees in a particular section of a business, or even individual employees.
- 4.9 If the words 'particular classification' were removed it would retain the intent of the provision and ensure it is applied appropriately. The provision would then appear as follows:
- 4.10 (e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees monthly without further agreement.

## 5 Payment on termination of employment

- 5.1 The Model terms as proposed is as follows:

### ***Payment on termination of employment***

*(a) Subject to paragraph (b), the employer must pay an employee no later than 7 days after the employee's last day of employment:*

*(i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment; and*

*(ii) all other amounts that are due to the employee under this award and the NES.*

*(b) The requirement to pay an employee no later than 7 days after the employee's last day of employment is subject to s.117(2) of the Act and to any order of the Commission in relation to an application under s.120 of the Act.*

**Note 1:** *Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given*

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*the employee the required minimum period of notice or “has paid” to the employee payment instead of giving notice.*

**Note 2:** *Section 120 of the Act provides that in some circumstances an employer can apply to the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES. In dealing with an application, the Commission could make an order delaying the requirement to make payment until after the Commission makes a decision on the application.*

- 5.2 In relation to this provisional model term, we submit that the inclusion of items as 'notes' is unnecessary. This is a view held by Master Builders generally regarding modern awards. If a term or issue is to be addressed, then it should be specifically included as a modern award term, but only where necessary and only where it is not elsewhere already addressed.
- 5.3 The provisions of s.117 and s.120 are relevant but should not be specifically included in this provision as proposed. There are a number of reasons for this position as noted below.
- 5.4 First, the reference to s.117 seeks to address circumstances that are frequently dealt with in other sections of modern awards. In the On-Site Award, for example, clause 16 already makes it clear that an employer must provide notice to terminate and employee or payment in lieu thereof.
- 5.5 Second, it does not address matters raised by Master Builders in an earlier submission of 21 October 2016 about termination payments in circumstances where an employee does not provide the period of notice as required. As provisionally expressed, the notation and item (b) would provide the Award end user with an impression that notice obligations (and consequential matters arising from a failure to give notice) only apply to termination at the initiative of an employer and not at the initiative of an employee.
- 5.6 Third, the circumstances that might enliven s.120 (or similar provisions in other or earlier legislation) have existed for a considerable time. It is not the experience of Master Builders that there is uncertainty about, or awareness of,

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courses of action like those available under s.120. Whatever utility or benefit may be derived from drawing the attention of the Award end user to s.120 is outweighed by the additional complexity arising from the inclusion of additional words that are arguably unnecessary.

5.7 Fourth, the provisions of s.117 and s.120 exist and operate irrespective of their inclusion on an Award. There is no need for references to them unless there are particular specific circumstances that exist justifying their inclusion (such as their historical inclusion in an award, industry specific nuances, or the structure of the instrument).

5.8 In light of the above items, Master Builders would submit that the following amended model term be considered as preferred:

***Payment on termination of employment***

*(a) Subject to notice being provided, the employer must pay an employee no later than 7 days after the employee's last day of employment:*

*(i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment;*

*and*

*(ii) all other amounts that are due to the employee under this award and the NES.*

5.9 In terms of the *Building and Construction General On-Site Award 2010* (On-Site Award), the provision would appear as follows:

***Payment on termination of employment***

*(a) Where notice is given as required by clause 16 of this Award, the employer must pay an employee no later than 7 days after the employee's last day of employment:*

*(i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment; and*

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(ii) *all other amounts that are due to the employee under this award and the NES.*

- 5.10 The above alternative provision relevant to the On-Site Award would retain the all of the existing elements of both its requirements and those proposed by the provisional model term, and address the concerns raised above and in earlier submissions, while ensuring the Modern Award objectives are appropriately achieved.

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## 1 Introduction

- 1.1 This submission is made by Master Builders Australia (Master Builders). Master Builders is Australia's peak building and construction industry association, federated on a national basis in 1890. Master Builders' members are the nine Master Builder State and Territory associations.
- 1.2 Over the past 120 years the association has grown to represent over 33,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.
- 1.3 Master Builders files this submission pursuant to paragraph [198] of the Decision dated 1 December 2016 ('the decision')<sup>1</sup> and in reply to the submissions of the parties regarding the provisional 'payment of wages and other amounts' and 'payment on termination of employment' model terms.
- 1.4 Master Builders maintains an interest in the *Building and Construction General On-Site Award 2010* (On-Site Award) and the *Joinery and Building Trades Award 2010* (Joinery Award) and makes these submissions in the context of their application to those two awards.
- 1.5 This submission deals primarily with matters raised in the Construction, Forestry, Mining and Energy Union's ('CFMEU') submission, undated and uploaded to the Commission's website on 22 December 2016, within which they make a number of observations that are either incorrect or without regard to all circumstances relevant to this matter.<sup>2</sup>
- 1.6 Master Builders broadly supports, on an in-principle basis, the Commission's provisional model terms and their inclusion, with necessary award-specific amendments as previously submitted, in the On-Site and Joinery Awards.

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<sup>1</sup> [2016] FWCFB 8463

<sup>2</sup> CFMEU Submissions – 4 yearly review of modern awards – Payment of wages – AM2016/8, undated.

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## 2 Provisional ‘payment of wages and other amounts’ model term

- 2.1 The CFMEU’s contention that the Commission’s ‘payment of wages and other amounts’ model term which provides an option for either fortnightly or monthly (by agreement) payment would be unfair to employees is unfounded.
- 2.2 The CFMEU claim, at paragraph [5] misstates that the application of the model term would result in some employees not receiving their entitlements for 5-6 weeks. This claim is misleading for two reasons.
- 2.3 First, the model term clearly proposes under x.1(e) that monthly payments can only occur by agreement between the employee and employer or where such an agreement is already in place.<sup>3</sup>
- 2.4 Second, the model term proposes, under x.1(f), that *‘Where an employee’s pay period is one month, two weeks must be paid in advance and two weeks in arrears’*.<sup>4</sup> As the Commission observes at paragraph [41] of the decision, where monthly payment is made by agreement, an employer would be required to pay an employee two weeks in advance, therefore limiting the amount of entitlements accrued in arrears and ensuring compliance with s.323(1)(c) of the Fair Work Act.<sup>5</sup>

## 3 Provisional ‘payment on termination of employment’ model term

- 3.1 In contrast to the CFMEU’s position expressed at paragraph [7] of its submission, notwithstanding any sector specific nuances that will require appropriate amendment, Master Builders supports the inclusion of the ‘payment on termination of employment’ model term in the On-Site and Joinery Awards.

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<sup>3</sup> Ibid at para [34]

<sup>4</sup> Ibid

<sup>5</sup>[2016] FWCFB 8463

- 3.2 The model term, in particular, remedies a unique issue that currently exists under the On-Site Award where Daily Hire employees are effectively entitled to termination payments at the end of the same day (or only if not practicable within 2 days) they provide notice.<sup>6</sup>

## 4 Conclusion

- 4.1 Providing an option for employers to pay their workers fortnightly (or monthly by agreement), as well as allowing for more reasonable timeframes to calculate and make termination payments, would provide greater flexibility for employers and recognise modern work practices.

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<sup>6</sup> See clause 31.4 of the *Building and Construction General On-Site Award 2010*

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