SUBMISSION BY THE

Housing Industry Association

to the

Fair Work Commission

on the

AM2014/65 - Category 5 – NES Inconsistency

23 January 2015

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members

1 Introduction

1.1.1 By way of submission dated 21 November 2014, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) (**November Submission**) identified Clause 17.7 of the *Building and Construction General Onsite Award 2010* (**Onsite Award**) as giving rise to a potential inconsistency with the National Employment Standards. Specifically, Section 91(1) of the *Fair Work Act 2009* (the **'Act'**) as identified by the National Farmers Federation (**NFF**) in submissions dated 25 September 2014 and AIG in submissions dated 15 October 2014 in relation to a number of other awards.

1.1.2 HIA seeks to express an interest in the Onsite Award.

1.1.3 On 31 October 2014, the Fair Work Commission (**FWC**) issued a Statement in relation to alleged inconsistency with the NES. At paragraph 3, the Statement identified five categories of inconsistencies including:

Category 1	*Provisions which are concerned with restrictions on the payment of annual leave loading upon termination of employment.*
Category 2	*Textile, Clothing, Footwear and Associated Industries Award 2010 provisions.*
Category 3	*Provisions about which there appears to be agreement as to both the existence of an inconsistency with the NES and the award variation appropriate to remedy that inconsistency.*
Category 4	*Provisions about which there appears to be agreement as to the existence of an inconsistency with the NES, but no agreement as yet concerning the appropriate remedial award variation.*
Category 5	*Provisions about which there is, as yet, no agreement as to the existence of an inconsistency with the NES.*

1.1.4 Alleged NES inconsistencies were further considered in the decision of 23 December 2014[1]. In considering the CEPU's November Submission the FWC determined that Clause 17.7 of the Onsite Award would be added to Category 5 matters.

1.1.5 These submissions are made in accordance with the timetable for Category 5 matters as outlined in the 31 October Statement.

2 NES Inconsistency

2.1.1 HIA notes that the clauses identified by the NFF and the AIG relate to the calculation of annual leave on a transfer of business.

2.1.2 The NFF and AIG argue that an inconsistency arises with provisions of this nature and Section 91(1) of the Act to the extent that the award provisions excludes the right of the new employer (for the purposes of the transfer of business) to choose not to recognise the service of the transferring employee.

2.1.3 The Background Paper dated 14 January 2015, issued by the FWC provides further detail as to the specific award provisions raised by the NFF and AIG.

2.2 Clause 17 of the Onsite Award

2.2.1 Clause 17 of the Onsite Award provides an industry specific redundancy scheme.

2.2.2 Specifically Clause 17.1 provides

> *The following redundancy clause for the on-site building, engineering and civil construction industry (as defined) is an industry specific redundancy scheme as defined in s.12 of the Act. In accordance with s.123(4)(b) of the Act the*

[1] [2014]FWCFB 9412

provisions of Subdivision B—Redundancy pay of Division 11 of the NES do not apply to employers and employees covered by this award.

2.2.3 Clause 17.7 provides

> *17.7 Transfer of business*
>
> *(a) Where a business is, before or after the date of this award, transferred from an employer (in this subclause called the old employer) to another employer (in this subclause called the new employer) and an employee who at the time of such transfer was an employee of the old employer in that business becomes an employee of the new employer:*
>
> *(i) the continuity of the employment of the employee will be deemed not to have been broken by reason of such transfer; and*
>
> *(ii) the period of employment which the employee has had with the old employer or any prior old employer will be deemed to be service of the employee with the new employer*

2.2.4 Notably, Section 122 of the Act deals with *transfer of employment situations that affect the obligation to pay redundancy pay* and is similar to Section 91 of the Act in that it allows an employer to choose not to recognise an employee's service for the purposes of (in this case) redundancy pay where there has been a transfer of employment between non-associated entities.

2.2.5 Yet by the operation of Section 123(4)(a) of the Act Subdivision B, which includes Section 119 – 122, does not apply to *'an employee to whom an industry-specific redundancy scheme in a modern award applies'.*

2.2.6 HIA therefore submit that while Section 122 of the Act provides rights and obligations in similar terms to that under Section 91(1), Clause 17 of the Onsite Award provides an industry specific redundancy scheme, consequentially, Subdivision B —Redundancy Pay of Division 11 of the NES which includes Section 122 does not apply to employers covered by the Onsite Award.

2.2.7 As such, clause 17.7 of the Onsite Award is not inconsistent with the NES.

2.2.8 HIA submit that the Onsite Award be removed from consideration during these proceedings.