

Master Builders Australia

## Submission to the Fair Work Commission

On

*Alleged Inconsistency with the National Employment  
Standards – Building and Construction General On-Site  
Award 2010*

23 January 2015



© Master Builders Australia Limited 2014.

Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, [enquiries@masterbuilders.com.au](mailto:enquiries@masterbuilders.com.au), [www.masterbuilders.com.au](http://www.masterbuilders.com.au)

This submission is copyright and all rights are reserved. No part of it may be reproduced, stored, transmitted or otherwise distributed, in any form or by any means without the prior written permission of the copyright holder. Images on the cover are winners of Master Builders National Excellence in Building and Construction Awards.

## CONTENTS

1	Introduction .....	2
2	Purpose of Submission .....	2
3	Alleged Inconsistency .....	4
4	Conclusion .....	5

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b> 02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b> 02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>

## 1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

## 2 Purpose of Submission

- 2.1 As identified in the decision of the Fair Work Commission (Commission) dated 23 December 2014<sup>1</sup> (the December Decision) the Commission has received submissions from the Fair Work Ombudsman (FWO) identifying a number of provisions in modern awards which, it is contended, are inconsistent with the provisions of the NES. A number of other stakeholders have also made submissions identifying alleged inconsistencies with the NES in certain modern awards. The Commission has proposed to consider and, if necessary, remedy the alleged inconsistencies with the NES identified by the FWO as well as by other stakeholders. In the December Decision the Commission determined that consideration of this matter will extend to all 122 modern awards.
- 2.2 In a Statement issued by the Commission on 31 October 2014<sup>2</sup> the identified inconsistencies were allocated into one of the following five categories:

---

<sup>1</sup> [2014] FWCFB 9412

<sup>2</sup> [https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB9412.htm#P458\\_36576](https://www.fwc.gov.au/documents/decisionssigned/html/2014FWCFB9412.htm#P458_36576)

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b>	02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b>	02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>	

- (1) Provisions which are concerned with restrictions on the payment of annual leave loading upon termination of employment.
- (2) *Textile, Clothing, Footwear and Associated Industries Award 2010* provisions.
- (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.
- (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.
- (5) Provisions about which there is, as yet, no agreement as to the existence of an inconsistency with the NES.

2.3 The current matter has been allocated to category 5. In the December Decision the Commission determined that a further Full Bench hearing as to category 5 will occur on 26 February 2015. This submission is lodged in advance of that hearing. It is noted that the Commission requires submissions in relation to category 5 matters to be lodged by 23 January 2015.

2.4 The Commission has issued a background paper around category 5 matters<sup>3</sup> (Background Paper). At page 27 et seq of the Background Paper the issue concerning the *Building and Construction General On-Site Award 2010* (On-Site Award) is set out. It relates to clause 17.7 of the On-Site Award which is as follows:

*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:*

---

<sup>3</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/FWCPaper-NES-Category-5-140115.pdf>

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b>	02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b>	02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>	

*(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.*

*(b) In this subclause, business includes trade, process, business or occupation and includes part of any such business and transfer includes transfer, conveyance, assignment or succession whether by agreement or by operation of law. Transferred has a corresponding meaning.*

2.5 The Background Paper articulates that the effect of this clause is as follows:

*Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for.*

2.6 In this submission, the interpretation set out in the Background Paper is questioned.

### 3 Alleged Inconsistency

3.1 The Background Paper sets out the alleged inconsistency with the NES as follows:

*The National Farmers' Federation (NFF) submits that s.91 allows an employer to choose not to recognise an employee's service for the purposes of annual leave where there has been a transfer of employment between non-associated entities. The NFF submits that this award requires that service with the old employer must be deemed to be service with the new employer, excluding the right of the new employer to choose not to recognise the service.*

3.2 The contention that clause 17.7 is inconsistent with section 91 *Fair Work Act, 2009 (Cth)* (FW Act) dealing with annual leave is not accepted by Master Builders. Clause 25.9 of the Horticulture Award 2010 (Horticulture Award) is inconsistent with s.91(1) because it refers specifically to annual leave. In the current context, clause 17.7 is part of a provision that deals with an industry specific redundancy scheme; it is Master Builders' submission that clause

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b>	02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b>	02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>	

17.7 does not affect annual leave entitlements or operate inconsistently with those provisions. Custom and practice in the industry is to read down<sup>4</sup> the effect of clause 17.7 to apply in the context of that scheme.

3.3 The interpretation confining the effect of clause 17.7 to redundancy entitlements arises in part because of the fact that clause 17.7 of the On Site Award is in the same terms of the prior clause 16.4 *National Building and Construction Industry Award 2000* which was the predecessor instrument containing an industry specific redundancy scheme in the terms adopted during the award modernisation process. This is especially the case when considering that provisions such as section 122 FW Act do not apply to industry specific redundancy schemes established under section 141 FW Act. The scheme established by clause 17 On-Site Award falls into the latter category.

3.4 It is suggested that the custom and practice referred to in the prior paragraph could be clearly set out in clause 17.7 so that no inconsistency with the terms of Part 2-8 of Chapter 2 of the FW Act or section 91 FW Act might be said to be at issue. Master Builders suggests that the words “For the purposes of the industry redundancy scheme established by this clause 17:” precede current clause 17.7(a) and (b). That would add to the clarity of the provisions and also cure any allegation that there is an inconsistency associated with section 91.

## 4 Conclusion

4.1 Master Builders submits that no inconsistency of the type identified in respect of the Horticulture Awards exists in respect of clause 17.7 of the On-Site Award because clause 17.7 only relates to the industry specific redundancy scheme established in clause 17 of the On-Site Award. If that interpretation is rejected, we submit that the Commission should act to effect that interpretation.

---

<sup>4</sup> Taken to reflect the approach to interpretation described by Pearce and Geddes as follows:

“The term ‘reading down’ refers to the process of giving general words a more specific meaning, as demanded having regard to the underlying purpose or object of the provision in question.” DC Pearce and RS Geddes *Statutory Interpretation in Australia* LexisNexis 8<sup>th</sup> Edition at p72 – 73

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b>	02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b>	02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>	

- 4.2 Master Builders has placed before the Commission a proposed variation to clause 17.7 that will emphasise that its terms are confined to the industry specific redundancy scheme created by clause 17 of the On Site Award under the authority provide by s 141 FW Act. We submit that the Full Bench should make that variation.

\*\*\*\*\*

<b>Lodged by:</b> Richard Calver, Master Builders Australia Ltd	<b>Telephone:</b> 02 62028888
<b>Address for Service:</b> Level 1, 16 Bentham Street, Yarralumla, ACT 2600	<b>Fax:</b> 02 62028877
<b>Email:</b>	<a href="mailto:rcalver@masterbuilders.com.au">rcalver@masterbuilders.com.au</a>