



**In the Australian Industrial Relations Commission
C2006/173 & others**

**National Building and Construction Industry Award 2000
& others**

Submission

by

Master Builders Australia Inc

November 2006

Master Builders Australia Inc ABN 701 134 221 001

building australia



1. INTRODUCTION

- 1.1 Master Builders Australia Inc (Master Builders) acts for its members who are registered under the *Workplace Relations Act 1996* (Cth) (WR Act).
- 1.2 The registered organisations are respondent to the *National Building and Construction Industry Award 2000* (the Award) and have members who are respondent to the Award. The registered organisations and their members are respondent to other awards, but the Award is the most prevalent in the industry and will therefore be focused upon in this submission.
- 1.3 The registered organisations are as follows:
- Master Builders Association of Victoria (MBAV);
 - Master Builders Association of South Australia (MBA SA);
 - Master Builders Association of New South Wales (MBA NSW);
 - Master Builders Association of Tasmania (MBA Tas); and
 - Master Builders Association of the Australian Capital Territory (MBA ACT).
- 1.4 Master Builders received notices of listing of the matters in C2006/173 and others, the subject of these proceedings. This submission has been made to assist the Australian Industrial Relations Commission (Commission) in respect of the hearings on 4 and 5 December 2006 in the matters that relate to the building and construction industry. Master Builders will appear at the hearing.
- 1.5 In these matters, the Construction, Forestry, Mining and Energy Union (CFMEU) has sought the following pursuant to section 553(1) and clause 29 schedule 6 WR Act:
- increases to the allowances that are expressed as separately identifiable payments in the pre-reform Award;
 - increases to the allowances that are expressed as separately identifiable payments and loaded rates of pay in the transitional Award; and
 - a flow on of the Australian Fair Pay Commission's (the AFPC) recent decision to wages in the transitional Award.
- 1.6 This submission will address the following matters:
- variation of allowances in transitional awards;
 - variation of separately identifiable allowances in pre-reform awards;
 - variation of amounts shown as loaded rates of pay in pre-reform awards;

- the status of the 'follow the job loading' following the WorkChoices reforms;¹
 - administrative convenience; and
 - date of operation of increase.
- 1.7 Master Builders supports the Commonwealth's submission on transcript² that allowances in pre-reform and transitional awards should be clearly dealt with by the Commission as separate matters to be considered. This approach will assist in ensuring that the applicable legal considerations are not conflated.
- 1.8 Master Builders supports the Commonwealth's written submission regarding the supported wage system covering employees with a disability and the coverage of awards for school-based apprentices. However, the litigation that occurred in respect of the Award, which is alluded to in paragraphs 4.17 to 4.19 of the Commonwealth's submission, may require a modification of the terms of the Commonwealth's pro forma clause. This modification would assist in achieving consonance with the clauses that were arbitrated for inclusion in the Award. This matter has not yet been subject to discussions with the CFMEU but could be addressed in a hearing to settle any orders.

2. VARIATION OF ALLOWANCES IN TRANSITIONAL AWARDS

- 2.1 Clause 28 schedule 6 provides that the Commission may make an order varying a transitional award only as permitted by clause 29 or on a ground set out in clause 30.³
- 2.2 The CFMEU's application to vary the transitional Award is expressed inter alia to be for the purpose of maintaining minimum safety net entitlements in that reliance is placed upon clause 29 schedule 6.
- 2.3 Pursuant to clause 29(1), where there is an industrial dispute,⁴ the Commission has power to vary a transitional award in the following ways:

¹ Clause 18.3.1 of the Award.

² The Commission, Guidice J & others, *Application by CFMEU & Others, Transcript of Proceedings 16160-1, C2006/173*, 20 November 2006.

³ Clause 30 schedule 6 also provides that an application may also be varied for any of the following reasons:

- ambiguity or uncertainty; or
- discrimination.

⁴ Clause 2 schedule 6 WR Act:

An 'industrial dispute' means:

a. an industrial dispute (including a threatened, impending or probable industrial dispute):

i. extending beyond the limits of any one State;

- to provide minimum safety net entitlements for the matters referred to in subclause 29(2) (see sub-paragraph 2.4 below);
- to do anything the Commission is permitted to do by regulations made under subclause 29(3);⁵ and
- to include incidental and machinery terms, as permitted by clause 24,⁶ relating to the matters that may be varied.⁷

2.4 Subclause 29(2) lists the following matters that a minimum safety net may be provided for:

- rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements

ii. that is about allowable transitional award matters pertaining to the relationship between transitional employers and transitional employees; or

b. a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph a.

⁵ Subclauses 29(3) and (4) schedule 6 relevantly provided as follows:

(3) If the Commission considers it appropriate to vary a transitional award in respect of rates of pay for part-time transitional employees, junior transitional employees or transitional employees to whom training arrangements apply, the Commission may, if it considers it appropriate, also vary the application of the terms of the award to those employees in accordance with the regulations.

(4) Regulations under subclause (3) may specify:

(a) the matters in respect of which a transitional award may be varied as mentioned in that subclause, which must be matters referred to in subclause 17(1); and

(b) the circumstances in which a transitional award may be varied as mentioned in that subclause.

Example: For example, regulations under subclause (4) could permit the Commission to vary a transitional award, if it considers it appropriate, to ensure that certain conditions to which a part-time transitional employee is entitled are determined in proportion to the hours worked by the part-time employee.

Regulation 3.3.1 *Workplace Relations Regulations 2006* (Cth) provide that the Commission may vary a transitional award to provide rates of pay for part-time transitional employees where these rates of pay have not previously been provided.

⁶ Clause 24 schedule 6 provides as follows:

24 Incidental and machinery terms

(1) A transitional award may include terms that are:

(a) incidental to an allowable transitional award matter about which there is a term in the award; and

(b) essential for the purpose of making a particular term operate in a practical way.

(2) For the purposes of this clause, to the extent that a term of a transitional award provides for a matter that is not an allowable transitional award matter because of the operation of clause 18, 19, 20 or 21, the term is not, and cannot be, incidental to a term in the award providing for an allowable transitional award matter, and is of no effect to that extent.

(2A) However, to avoid doubt, paragraph 18(1)(g) does not limit the operation of subclauses (1) and (3) to the extent that those subclauses relate to the matter referred to in paragraph 17(1)(q).

(3) A transitional award may include machinery provisions including, but not limited to, provisions providing for the following:

(a) commencement;

(b) definitions;

(c) titles;

(d) arrangement;

(e) transitional employers, transitional employees and organisations bound;

(f) term of the award.

⁷ Clause 29 schedule 6 WR Act.

apply, and rates of pay for transitional employees under the supported wage system,⁸

- incentive-based payments, piece rates and bonuses;
- annual leave loadings;
- monetary allowances described in paragraph 17(1)(j);⁹
- loadings for working overtime or for casual or shift work;
- penalty rates;
- pay for outworkers;
- any other allowable transitional award matter prescribed by the regulations.¹⁰

2.5 A matter referred to in subclause 29(2) is only an industrial matter for the following reasons:

- dealing with an industrial dispute by arbitration; and
- preventing or settling an industrial dispute, and maintaining the settlement of an industrial dispute by varying a transitional award.¹¹

2.6 The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) states the following regarding the concept of transitional awards:

*The Schedule would not create a new instrument in the same terms as the existing award (as with awards under Part VI), but rather provide that existing awards made to prevent or settle industrial disputes continue to operate and continue to bind those employers and employees (as well as registered organisations) that are in the transitional system.*¹²

2.7 Therefore a variation of a transitional award would be to maintain the settlement of an industrial dispute encapsulated in the Award as the artefact of that dispute.

⁸ The definition 'part-time transitional employee' includes a part-time junior and a part-time employee to whom training arrangements apply: Regulation 3.3.1 *Workplace Relations Regulations 2006* (Cth).

⁹ Subclause 17(1) schedule 6 provides as follows:

(j) *monetary allowances for:*

- (i) *expenses incurred in the course of employment; or*
- (ii) *responsibilities or skills that are not taken into account in rates of pay for transitional employees; or*
- (iii) *disabilities associated with the performance of particular tasks or work in particular conditions or locations.*

¹⁰ The Regulations have not prescribed other allowable transitional award matters.

¹¹ Clause 16(1) schedule 6 WR Act.

¹² Commonwealth of Australia, *Explanatory Memorandum – Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) at para 3016.

2.8 The note to the relevant subclause provides that the Commission must have regard to matters referred to in clauses 8 and 9¹³ in exercising its function under the subclause, that is, consider the following:

- the objects of Schedule 6;¹⁴

¹³ Clauses 7 to 9 schedule 6 WR Act relevantly provide as follow:

7 General functions of Commission

(1) The functions of the Commission under this Schedule are to prevent and settle industrial disputes:

(a) so far as possible, by conciliation; and

(b) as a last resort and within the limits of the Commission's powers under this Schedule, by arbitration.

(2) In performing its functions under paragraph (1)(b), the Commission may vary a transitional award as permitted by clause 29.

(3) However, the Commission must not make any new awards.

8 Performance of Commission's functions under this Schedule

(1) The Commission must perform its functions under this Schedule in a way that furthers the objects of this Schedule.

(2) In performing its functions under this Schedule, the Commission must ensure that minimum safety net entitlements are maintained for wages and other specified monetary entitlements, having regard to:

(a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and

(b) the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of employees (within the meaning of subsection 5(1)); and

(c) the principle that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage in relation to employers (within the meaning of subsection 6(1)).

(3) In having regard to the factors referred to in paragraph (2)(a), the Commission must have regard to:

(a) wage-setting decisions of the AFPC; and

(b) in particular, any statements by the AFPC about the effect of wage increases on productivity, inflation and levels of employment.

(4) In performing its functions under this Schedule, the Commission must have regard to:

(a) the desirability of its decisions being consistent with wage-setting decisions of the AFPC; and

(b) the importance of providing minimum safety net entitlements that act as an incentive to bargaining at the workplace level.

9 Anti-discrimination considerations

(1) Without limiting clause 8, in exercising any of its powers under this Schedule, the Commission must:

(a) apply the principle that men and women should receive equal remuneration for work of equal value; and
(b) have regard to the need to provide pro-rata disability pay methods for transitional employees with disabilities; and

(c) take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992 and the Age Discrimination Act 2004 relating to discrimination in relation to employment; and

(d) take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:

(i) preventing discrimination against workers who have family responsibilities; or

(ii) helping workers to reconcile their employment and family responsibilities; and

(e) ensure that its decisions do not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(2) For the purposes of the Acts referred to in paragraph (1)(c) and paragraph (1)(e), the Commission does not discriminate against a transitional employee or transitional employees by (in accordance with this Schedule) determining or adjusting terms in a transitional award that determine a basic periodic rate of pay for:

(a) all junior transitional employees, or a class of junior transitional employees; or

(b) all transitional employees with a disability, or a class of transitional employees with a disability; or

(c) all transitional employees to whom training arrangements apply, or a class of transitional employees to whom training arrangements apply.

- the maintenance of minimum safety net entitlements;
- the AFPC's wage-setting decision(s); and
- anti-discrimination considerations.

In regard to the third dot point, we adopt the submissions of ACCI: that is formal opposition to the extent of the flow on only.

- 2.9 Vice President Watson in *CFMEU re Building Materials and Quarrying Industries (Northern Territory) Award 2002*¹⁵, (the Allowances Decision) granted applications to increase expense related allowances in the pre-reform and transitional awards using the Consumer Price Index (CPI). Vice President Watson stated the following:

*Having regard to the provision of Schedule 6, I am also of the view that the application to vary the transitional award should be granted. The application of a traditional formula to keep the level of expense related allowances in line with the actual expenses is justified on merit, in the context of the factors required to be taken into account in clause 8. It is clearly desirable that the expense related allowances in the pre-reform award and the transitional award remain the same.*¹⁶

- 2.10 The application in the Allowances Decision was made to increase expense related allowances which are separately identifiable payments. Pay rates in transitional awards are also minimum safety net entitlements that may be varied by the Commission. Further, in respect of transitional awards, particularly the Award, the manner in which the formula for increasing wages is established, delivers a problem of how to treat allowances and other amounts that act directly to increase a base wage rate, albeit that the allowances are clearly identifiable as such.
- 2.11 With the exception of the follow the job loading discussed below in section 5 of this submission, Master Builders submits that the allowances which increase the wage rates in clause 18.1.1 of the Award should be increased in line with any flow

¹⁴ Schedule 6 Subclause 1(2) provides as follows:

The objects of this Schedule are to ensure that, during the transitional period:

- (a) transitional awards continue in operation and are maintained by the Commission, within the limits specified in this Schedule; and*
- (b) transitional employers and their employees are able to cease to be bound by a transitional award in appropriate circumstances, including by making agreements under State laws; and*
- (c) the Commission's functions and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC; and*
- (d) appropriate compliance and enforcement mechanisms remain available.*

¹⁵ PR974478.

¹⁶ Note 15 at 10.

on ordered by the Commission. These allowances should be shown in employers' records and employees' payslips as separately identifiable amounts payable by way of monetary allowance, as discussed below in section 6 of this submission. For convenience in the understanding of this argument and the arguments below, we have extracted clause 18 of the transitional Award in its entirety and that clause is shown at Attachment A1 to this submission.

3. VARIATION OF SEPARATELY IDENTIFIABLE ALLOWANCES IN PRE-REFORM AWARDS

3.1 The question of whether or not the proposition in paragraph 2.11 then stands for pre-reform awards directly follows. Monetary allowances for expenses incurred in the course of employment remain in pre-reform awards as allowable award matters.¹⁷ Rates of pay are not allowable award matters – this issue is discussed further in section 4 of this submission. Allowable matters only remain in awards to the extent to which they provide minimum safety net entitlements.¹⁸

3.2 The CFMEU seeks to vary allowances pursuant to subsection 553(1) based upon its application that this step will maintain minimum safety net entitlements. Section 553 provides as follows:

(1) An employer, employee or organisation bound by an award may apply to the Commission for an order varying the award on the ground that that the variation is essential to the maintenance of minimum safety net entitlements.

(2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.

(3) The Minister may intervene in relation to the application.

(4) The Commission may make an order under this subsection varying the award only if the Commission is satisfied that:

(a) the variation is essential to the maintenance of minimum safety net entitlements; and

(b) all of the following conditions are met:

(i) the award as varied would not be inconsistent with decisions of the AFPC;

(ii) the award as varied would provide only minimum safety net entitlements for employees bound by the award;

¹⁷ Section 513(1)(h)(i) WR Act.

¹⁸ Section 513(3) WR Act.

(iii) the award as varied would not be inconsistent with the outcomes (if any) of award simplification and award rationalisation;

(iv) the making of the variation would not operate as a disincentive to agreement-making at the workplace level;

(v) such other requirements prescribed by the regulations (if any) for the purposes of this paragraph have been satisfied.¹⁹

3.3 The phrase “maintenance of minimum safety net entitlements” is not defined in the WR Act. In the Allowances Decision, Vice President Watson stated the following:²⁰

Expense related allowances in the original award were amended on an annual basis using a formula of relevant Consumer Price Index components which had been in place and accepted by the parties and the Commission for many years. The applications seek increases derived from the use of this traditional formula. The allowances are expressed in terms of monetary amounts and are genuinely in the nature of reimbursing employees for expenses incurred in the course of employment. Unless they are adjusted with regard to movements in the cost of relevant goods and service, the allowances will cease to reimburse employees for their expenses at the level previously applicable. I am therefore of the view that the adjustments sought are essential to the maintenance of the minimum safety net entitlements reflected in these expense related allowances. The variation merely brings the award into line with the original intent of the clause having regard to the movements in the level of relevant expenses. In these circumstances, I am further satisfied that each of the conditions in s 553(4)(b) are met.

3.4 The performance of functions by the Commission is dealt with in section 511 which provides as follows:

(1) The Commission must perform its functions under this Part in a way that furthers the objects of this Act²¹ and, in particular, the objects of this Part.²²

¹⁹ There are currently no regulations that prescribe further requirements for the purpose of that paragraph.

²⁰ Note 15 at 9.

²¹ Section 3 WR Act states that:

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(b) establishing and maintaining a simplified national system of workplace relations; and

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

2) *In performing its functions under this Part, the Commission must have regard to:*

- (a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and*
- (b) decisions of the AFPC, and, in particular, the need to ensure that Commission decisions are not inconsistent with AFPC decisions; and*
- (c) the importance of providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level.*

3.5 Despite ACTU arguments to the contrary, Master Builders submits that the Principles of Wage Fixation are not relevant to these applications in respect of timing and should not be used in the context of a completely changed wage fixing legislative structure to affect issues of timing. This point has already been applied by the Commission. Senior Deputy President O'Callaghan in *Australian Municipal, Administrative, Clerical and Services Union re Salaried, Professional and Technical (TransAdelaide) Award 2001*²³:

I am unable to accept the TransAdelaide argument that Principles of Wage Fixation developed by the Commission and last articulated by the

(g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

(h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and

(i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards.

²² Section 510 WR Act states that:

The objects of this Part are:

(a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission; and

(b) to ensure that awards are rationalised and simplified so they are less complex and are more conducive to the efficient performance of work; and

(c) to ensure that the Commission performs its functions under this Part in a way that:

(i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and

(ii) protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment.

²³ 15 November 2006, PR974647.

Commission in the 2005 Safety Net Review decision should in some way apply to the "minimum safety net entitlements" specified in section 553(4).²⁴

- 3.6 This reasoning would also apply to applications pursuant to clause 29 schedule 6. However, we submit that in order to maintain an appropriate safety net for allowances that are allowable under the WR Act, the wage related allowances set out in pre-reform instruments should be adjusted by the formulae that previously applied under the Wage Principles. In other words, Master Builders submits that the substance of the relevant wage principles applying to allowances should be specifically adopted by this Full Bench.
- 3.7 This approach is not inconsistent with the TransAdelaide decision in that the learned Senior Deputy President adjusted the relevant expense related allowances by adjusting for CPI movements. Further, in respect of maintenance of the safety net that comprises allowances paid to building and construction industry workers, Master Builders submits that there is equity in increasing the non-expense related allowances by the percentage increase adopted by the CFMEU. To the extent that this is an emulation of the calculation otherwise derived from Principle 5(d) then we would submit that for the purposes of equity and consistency, this formula should be formally adopted by the Commission. We note that the applicable percentage, 4.7% per the application, is derived dividing the former base rate in Clause 18.1.1 for CW3 of \$578.30 by the AFPC increase of \$27.36 per week.

4. VARIATION OF ALLOWANCES THAT ARE DETERMINED BY REFERENCE TO RATES OF PAY IN PRE-REFORM AWARDS

- 4.1 The application regarding the pre-reform Award seeks to increase allowances that are expressed as a separate payment, as well as those allowances which are increased by reason of a calculation derived from the rate of pay. We agree with this approach. This is taken to mean that the CFMEU believes that the allowances calculated by reference to the pay rate in Clause 18.1.1 do not form part of the basic periodic rate of pay. We submit that this is the correct approach in that whilst the allowances are calculated by reference to the basic periodic rate of pay, the relevant allowances stand as separately identifiable monetary allowances and they are not paid "in relation to wages." They are merely calculated on a basis

²⁴ Note 23 at para 17

that relies upon the starting point of the basic periodic rate of pay to determine the amount to be paid.

- 4.2 In the recent decision of *Minister for Employment and Workplace Relations, re Transport Workers' (Amoured Vehicles) Award 2004, Information Technology Industry (Professional Employees) Award 2001 & Nurses (Victorian Health Services) Award 2000*²⁵ (the Transport Workers' Decision), the Full Bench of the Commission stated at that:

*Wages are not specified in s.513 and are not an allowable matter. It is clear, therefore, that the Commission does not have the power to vary a pre-reform award in relation to wages.*²⁶

- 4.3 In *Jeffrey James Prebble Pty Ltd v FCT*²⁷ Hill and Hely JJ examined the meaning of "in relation to" in the context of interpreting tax legislation:

*We find little assistance from the numerous cases which have concerned the word "in relation to" for the meaning of the expression must be found from the context in which it appears. To say that the words require "a relationship between two subject matters" will usually be true.*²⁸

- 4.4 The relationship in the current context is not one where the Commission is asked to increase wages; the Commission is asked to increase a monetary allowance that is calculated by reference to the applicable wage rate previously set out in Clause 18.1.1 of the pre reform Award but that can be identified separately and hence maintain its character as an allowance.
- 4.5 The Transport Workers' Decision concerned the illegitimate variation of a number of pre-reform awards pursuant to sections 553 and 554. Although the Commission has power to vary pay rates in transitional awards,²⁹ the Commission does not have power to vary pay rates for employees in the federal industrial relations system, including those covered by pre-reform awards.³⁰ That case shows the prescription operating in the current legislative context: the adjustment of pay rates per se differs in character from the adjustment of monetary allowances that are separately identifiable as such and which are not part of the wage albeit calculated by reference to that wage. Pay rates from pre-reform awards constitute Australian Pay and Classification Scales (APCSs) for

²⁵ PR974467.

²⁶ Note 25 at [10].

²⁷ (2003) ATC 2770.

²⁸ Note 27 at 477.

²⁹ Clause 29(2) schedule 6 WR Act.

³⁰ Section 513 WR Act.

employers in the federal industrial relations system, as dealt with in section 5 of this submission.³¹

5. THE STATUS OF THE 'FOLLOW THE JOB LOADING' FOLLOWING THE WORKCHOICE REFORMS

5.1 The status of follow the job loading after the introduction of the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) (WorkChoices) is uncertain.

5.2 As is evident from Attachment A2 that extracts clause 18 of the pre-reform Award in its entirety, clause 18.3.1 deals with this subject and states as follows:

18.3.1(a) *The calculation of the hourly rate shall take into account a factor of eight days in respect of the incidence of loss of wages for periods of unemployment between jobs.*

18.3.1(b) *For this purpose the hourly rate, calculated to the nearest cent, (less than half a cent to be disregarded) shall be calculated by multiplying the sum of the appropriate amounts prescribed in 18.1.1, 24.1, 24.2, 24.3 and 24.5.2 of this award, by fifty-two over fifty point four (52/50.4) rounded to the nearest cent, adding to that subtotal the amount prescribed in 18.2 hereof and dividing the total by 38. Provided that in the case of a carpenter-diver, the divisor shall be 31, and for refractory bricklayers and their assistants the allowance contained in 18.10 hereof shall be added to the hourly rate.*

5.3 To calculate the follow the job loading, the hourly rate must be worked out including the industry, tool and other allowances.³² However, once this hourly rate is ascertained, then special allowances and other allowances are added to the resultant amount.

5.4 Section 208(1) WR Act which deals with APCs deriving from pre-reform wage instruments,³³ that include pre-reform awards, states as follows:

³¹ Section 208 WR Act.

³² Relevantly, clause 18.1.1 is the base rate of pay, clause 24.1 is the industry allowance, clause 24.2 is the underground allowance, 24.3 is tool and employee protection allowance and 24.5.2 are location allowances specific to Queensland.

³³ A pre-reform wage instrument is defined in section 178 to mean:

a pre-reform federal wage instrument or a pre-reform non-federal wage instrument.

A pre-reform federal wage instrument is also defined in section 178 to include an award as defined in subsection 4(1) WR Act. Subsection 4(1) defines an award to include a pre-reform award, which is further defined in that subsection, as:

an instrument that has effect after the reform commencement under item 4 of schedule 4 to the Workplace Relations Amendment (Work Choices) Act 2005.

Item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005* states that an award in force before reform commencement are replaced by pre-reform awards in the same terms as the original award.

(1) If a pre-reform wage instrument contains rate provisions determining one or more basic periodic rates of pay, or basic piece rates of pay, payable to employees, then, from the reform commencement, there is taken to be a preserved APCS that includes (subject to this Subdivision):

(a) those rate provisions; and

(b) if those rate provisions determine different basic periodic rates of pay, or different basic piece rates of pay, for employees of different classifications—the provisions of the instrument that describe those classifications; and

(c) any casual loading provisions of the instrument that determine casual loadings payable to employees, other than employees for whom the instrument provides basic piece rates of pay; and

(d) if the casual loading provisions determine different casual loadings for employees of different classifications—the provisions of the instrument that describe those classifications; and

(e) any provisions of the instrument that determine, in relation to employees to whom training arrangements apply, whether hours attending off-the-job training (including hours attending an educational institution) count as hours for which a basic periodic rate of pay is payable; and

(f) any frequency of payment provisions for the instrument; and

(g) the coverage provisions for the instrument.

5.5 Section 181 defines 'rate provisions' as follows:

(1) For the purposes of this Division, **rate provisions**, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a basic periodic rate of pay, or basic piece rates of pay, payable to an employee, or an employee of a particular classification.

(2) The means by which such provisions may determine a basic periodic rate of pay, or a basic piece rate of pay, include the following, or any combination of any of the following:

(a) direct specification of a rate;

(b) identification of a rate by reference to other provisions (whether or not of the same instrument or APCS);

(c) direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating a rate.

(3) Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a rate in a particular way. For the purposes of this Division, a rate determined by the person or body in that way is taken to be a rate determined by the provisions that specify or identify the method.

5.6 To determine what constitutes a rate of pay in the Award, it is necessary to ascertain what clauses specify or identify the rate of pay. Clearly, there is a direct specification of a rate in clause 18.1.1 of the Award as per subsection 181(2)(a).

However, it must be determined whether the follow the job loading falls within subsections 181(2)(b) and (c), by identifying the rate of pay.

- 5.7 The term 'identification' is not defined in the WR Act, however the definition in the *Macquarie Dictionary* is as follows:

*1. The act of identifying. 2. something that identifies one, such as a driver's license, passport, etc.*³⁴

- 5.8 'Identify' is defined in the *Macquarie Dictionary* as follows:

*1. to recognise or establish as being a particular person or thing; attest or prove to be as purported or assert: to identify the bearer of a cheque. 2. to serve as a means of identification for: this card identifies the bearer as a member.*³⁵

- 5.9 These words must be given their plain English meaning, as stated in Pearce and Geddes' *Statutory Interpretation in Australia*:

*If general words are used, they will be given their plain and ordinary meaning unless the contrary is shown: Cody v JH Nelson Pty Ltd (1947) 74 CLR 629 per Dixon J at 647; Maunsell v Olins [1975] AC 373 at 382 per Lord Reid.*³⁶

- 5.10 Section 15AA(1) *Acts Interpretation Act 1901* (Cth) states:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

- 5.11 Interpretation the legislation in this manner is in accordance with the object of the WR Act to establish and maintain 'a simplified national system of workplace relations',³⁷ without prejudicing the status of awards as a minimum safety net for award-reliant employees.³⁸ Seeking to examine the derivation of certain clauses in awards, rather than rely on the plain English meaning of the words in question as an aid to the promotion of some measure of simplicity has the potential to lead to lengthy proceedings.

³⁴ Yallop C & others, *Macquarie Australia's National Dictionary – Concise Dictionary*, 4th ed, the Macquarie Library Pty Ltd, 2006, p593.

³⁵ Note 34.

³⁶ Pearce, DC & Geddes RS, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Australia, 2006, p43 at [2.20].

³⁷ Section 3(b) WR Act.

³⁸ Section 3(g) WR Act.

- 5.12 Based on the above reasoning, there is no “identification” by reference to other provisions of a basic periodic rate of pay of a method for calculating the rate in Clause 18.1.1 of the Award. The Award does not vindicate the other methods of calculating the basic rate of pay set out in the provision extracted in 5.5 of this submission. The allowances are increased by applying a calculation taking into account the basic periodic rate of pay but there is no identification of another amount that could rightly stand as the basic periodic rate of pay. The rate per hour is increased by reference to a number of the Award allowances (e.g. industry allowance, Clause 24.1; tool allowance Clause 29.3) but these amounts are able to be separately identified and separately calculated and are not of themselves pay rates but clearly expressed as allowances.
- 5.13 In contrast, Master Builders submits that the follow the job loading is not an allowance. It might be argued that it falls under the definition of a rate provision in section 181(2)(c) as it is a method of calculating the hourly rate but this is not its purpose, as it operates to fulfill the purpose set out below.
- 5.14 Further, the definition of a rate provision is affected by the definition of ‘basic periodic rate of pay’, which is defined in section 178 as follows:
- a rate of pay for a period worked (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements.*
- 5.15 Rate provisions are used to determine a rate of pay and therefore loadings are excluded from being part of a rate provision. So, logically, follow the job loading is not part of an APCS and this line of reasoning is also consistent with excluding amounts from a basic periodic rate of pay that are clearly expressed as monetary allowances.
- 5.16 The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) states the following in regard to the definition of ‘basic periodic rate of pay’:
- Basic periodic rate of pay would be defined to exclude incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements. This reflects the division between what matters can be contained in an APCS and what can remain in awards as allowable matters.³⁹*
- 5.17 Further, the legislative note following this definition states as follows:

³⁹ Note 12 at [342].

Most of the kinds of entitlement excluded from this definition are allowable award matters (see section 513).

5.18 This note is confusing save where it appears that loadings akin to the follow the job loading (that are expressed as operating for the purposes that are non-allowable) are considered. Hence, the use of the word “most” in the context of the legislative note is explicable by reason of the discussion which follows.

5.19 Accordingly, to illustrate the point made in paragraph 5.18 of this submission, we now consider in detail whether or not clause 18.3.1 of the Award, that expresses the means by which the follow the job loading is to be calculated, is an allowable transitional matter or an allowable pre-reform award matter.

5.20 Allowable transitional award matters are listed in clause 17 schedule 6 and are as follows:

- (a) classifications of transitional employees and skill-based career paths;*
- (b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;*
- (c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system;*
- (d) incentive-based payments, piece rates and bonuses;*
- (e) annual leave and annual leave loadings;*
- (f) personal/carer's leave;*
- (g) ceremonial leave;*
- (ga) leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;*
- (h) parental leave, including maternity and adoption leave;*
- (i) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of transitional employees to payment in respect of those days;*
- (ia) days to be substituted for, or a procedure for substituting, days referred to in paragraph (i);*
- (j) monetary allowances for:*
 - (i) expenses incurred in the course of employment; or*
 - (ii) responsibilities or skills that are not taken into account in rates of pay for transitional employees; or*
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;*
- (k) loadings for working overtime or for casual or shift work;*

- (l) penalty rates;*
- (m) redundancy pay, within the meaning of subclause (3);⁴⁰*
- (n) stand-down provisions;*
- (o) dispute settling procedures;*
- (p) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;*
- (q) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant transitional award or transitional awards for transitional employees who perform the same kind of work at a transitional employer's business or commercial premises.*

5.21 Follow the job loading could potentially fall under the categories of allowances or redundancy pay. We submit, however, that neither category saves the loading from being non-allowable. We submit that the loading is not an allowance for expenses incurred, additional responsibilities or skills, or disabilities associated with the performance of work. None of those categories relate to the payment of monies that would compensate a daily hire worker for the itinerant nature of their employment. Further in a highly persuasive majority decision of the Full Court of the Supreme Court of Western Australia, *GWK Constructions Corporation Pty Ltd v Leif Shahi*,⁴¹ the majority of Burt CJ and Smith J held that the follow the job

⁴⁰ Subclause 3 states as follows:

For the purposes of paragraph (1)(m), redundancy pay means redundancy pay in relation to a termination of employment that is:

(a) by a transitional employer of 15 or more transitional employees; and

(b) either:

(i) at the initiative of the transitional employer and on the grounds of operational requirements; or

(ii) because the transitional employer is insolvent.

Subclause 4 relevantly states:

For the purposes of paragraph (3)(a):

(a) whether a transitional employer employs 15 or more transitional employees, or fewer than 15 transitional employees, is to be worked out as at the time (the relevant time):

(i) when notice of the redundancy is given; or

(ii) when the redundancy occurs;

whichever happens first; and

(b) a reference to transitional employees includes a reference to:

(i) the transitional employee who becomes redundant and any other transitional employee who becomes redundant at the relevant time; and

(ii) any casual transitional employee who, at the relevant time, has been engaged by the transitional employer on a regular and systematic basis for at least 12 months (but not including any other casual transitional employee).

⁴¹ Supreme Court, WA, Full Court, 6 December 1982, App No 374/81. The court was examining what constituted a worker's weekly earnings under clause 2(d) schedule 1 of the *Workers' Compensation Act 1912-1979* (WA), that excluded from weekly earnings 'any bonus, incentive (except over award payment), shift allowance, weekend or public holiday penalty allowance, district allowance, meal allowance, living allowance, clothing allowance, traveling allowance, or other allowance.'

loading under the *Building Construction Employees and Builders Labourers Award 1978* was not an allowance.

5.22 In regard to redundancy pay, the relevant legislative provision, clause 17(3) schedule 6, refers to redundancy pay that is payable by a transitional employer of 15 or more transitional employees where the redundancy is:

- At the initiative of the transitional employer and on the grounds of operational requirements; or
- Because the transitional employer is insolvent.

5.23 The Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) states the following regarding this provision:

*Some current awards define redundancy as occurring when an employee ceases to be employed by an employer in any situation, other than for reasons of misconduct or refusal of duty. This broad definition of redundancy may lead to redundancy payments being paid in some circumstances where termination of employment was not at the initiative of the employer and on the grounds of operational requirements. This includes, for example, to the estate of an employee that has died while still employed. Award terms providing for redundancy payments in ordinary resignation situations are also not to be treated as a redundancy.*⁴²

5.24 Follow the job loading, however, is not within the terms of the clause 17(3) as it is payable:

- to all transitional employees that come under the Award, regardless of whether their employer employs 15 or more employees;
- not only in the case of redundancy at the initiative of the transitional employer and on the grounds of operational requirements or because the transitional employer is insolvent.

5.25 Therefore the loading is not an allowable transitional award matter. Further, the loading is not a preserved transitional award term as it does not come within the terms of the matters specified in clause 22 that is long service leave, notice of termination, jury service and superannuation.

5.26 Allowable awards matters cover similar categories in the same terms to allowable transitional award matters.⁴³ The follow the job loading does not come within the

⁴² Note 12 at [1610]; [3082].

⁴³ Section 513 lists allowable award matters which are as follows:

(a) ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours;

(b) incentive-based payments and bonuses;

(c) annual leave loadings;

terms of the allowable award matters. The follow the job loading is not a preserved award term.⁴⁴

5.27 Master Builders calculates that the effective abolition of the follow the job loading because it is not an allowable award matter, means that the overall loss of pay for a daily hire worker whose employer is covered by the award and who is receiving the award minimum is around 3%. See Attachment B1 and B2 which are spread sheets used in calculating wages and allowances under the Award. Attachment B2 shows the reduction in the relevant allowances from not including the follow the job load component as part of the calculation.

5.28 Consequently, the follow the job loading does not form part of an APCS. It is not an allowable award or an allowable transitional award matter.

5.29 If, as indicated in the Commonwealth's written submission, payment by way of a basic periodic rate of pay includes items which appear to 'migrate' to a different category per the Commonwealth's submission part of which is extracted in paragraph 5.30 below, then the Full Bench could determine that follow the job loading forms part of the basic periodic rate of pay. However, this interpretation,

(d) ceremonial leave;

(e) leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;

(f) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;

(g) days to be substituted for, or a procedure for substituting, days referred to in paragraph(f);

(h) monetary allowances for:

(i) expenses incurred in the course of employment; or

(ii) responsibilities or skills that are not taken into account in rates of pay for employees; or

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(i) loadings for working overtime or for shift work;

(j) penalty rates;

(k) redundancy pay, within the meaning of subsection (4);

(l) stand-down provisions;

(m) dispute settling procedures, but only as provided by section 514;

(n) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;

(o) conditions for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

⁴⁴ Section 527 lists preserved award terms, which are the following:

(a) annual leave;

(b) personal/carer's leave;

(c) parental leave, including maternity and adoption leave;

(d) long service leave;

(e) notice of termination;

(f) jury service;

(g) superannuation.

calls into question each and every allowance and its status as part of the basic periodic rate of pay or otherwise. An inquiry of some length and complexity about each and every allowance would thus appear to be needed. However, Master Builders would characterize any such inquiry as is one about derivation, rather than identification.

5.30 In the alternative, the following the job loading is a component of the basic periodic rate of pay. This interpretation appears to accord with an element of the Commonwealth's written submission, which states the position as follows:

However, the Commonwealth notes that in a small number of pre-reform federal awards some payments may now form part of the basic rate of pay, where those payments were treated in the award as part of the base rate. This is, certain allowances may not be treated, in the award, as payments that are 'in addition to' or 'above' the basic wage. In other words, the fact that a payment is labeled as an "allowance" may not be determinative of the character of the payment. In some cases, an amount that was initially inserted into the award as an allowance, may have become, and treated as part of the basic periodic rate of pay and have been adjusted accordingly.

Ultimately, the question is whether the pre-reform award treats the payment as a base rate or not – that is, whether the payment is genuinely an allowance. The pre-reform award needs to be interpreted to work this out. This involves taking into account all the indications given by the language and structure of the pre-reform award. There is no 'one-size-fits-all' approach.

In particular, the Commonwealth considers that some or all of the following features may indicate that some particular industry allowances are part of the basic wage:

- *It is paid for all purposes;*
- *It applies to all employees;*
- *Award wage increases apply to the aggregate rate of pay (if payments are increased under separate procedures or at different times to the basic wage, this may indicate the payment is not part of the basic periodic rate of pay):*
- *It is expressed to be part of the 'minimum wage' or 'base' wage;*
- *It is a flat rate that does not vary from week to week by reference to features peculiar to the hours worked or varying nature of the conditions of work; and*
- *Its size.*⁴⁵

Master Builders submits that these criteria are articulated without taking into account that the interpretation of the Award should follow the rules of statutory interpretation. In this regard, section 576 WR Act is relevant where it is stipulated

⁴⁵ Note 12 at [5.18] – [5.20].

that unless the contrary intention appears in an award, an expression used in an award has the same meaning as it has in an Act or it has in the WR Act. Hence, if the Award describes an item as an allowance then in Master Builders' submission the item should be treated as an allowance. If it is not so described, the manner in which it is treated in the WR Act should then be relied upon.

6. ADMINISTRATIVE CONVENIENCE

- 6.1 The amendments to the WR Act introduced by WorkChoices separated pay rates from allowances. The AFPC has the power to increase pay rates under the Australian Fair Pay and Conditions Standard, whilst the Commission can increase wages in transitional awards and allowances in transitional and pre-reform awards.
- 6.2 Pursuant to the *Workplace Relations Regulations 2006* (Cth) (WR Regulations), employers' records relating to an employee and employee's payslips must separately list basic rates of pay and allowances.⁴⁶
- 6.3 There are over 200 allowances under the Award as demonstrated in Attachment C1 and C2. All of these allowances can be separately identified.
- 6.4 Clause 18.3 list rates of pay but they clearly include the separately identifiable "industry allowance, tool allowance and the respective special allowance and the allowances in clauses 18.5 and 18.14." It would be simple for Master Builders to argue that the aggregation of these allowances should be shown as the weekly wage rate but the administrative convenience of that step does not have a bearing on the clear separation of allowances, able to be expressed as a separate hourly or flat amount, from a clearly expressed basic periodic rate of pay in Clause 18.1.1. Administrative convenience is not a matter that impinges upon the manner in which an Award or a statute should be interpreted. The long held traditional approach to Award interpretation is to consider the natural and ordinary meaning of the words of the Award.⁴⁷
- 6.5 Accordingly, Master Builders believes that in establishing its jurisdiction in these matters, not in the exercise of judicial power, the Commission should interpret its jurisdiction and the boundaries between matters about which it has carriage from

⁴⁶ Regulations 2.19.11(1) and 2.19.23(1) WR Regulations.

⁴⁷ *Re Clothing Trades Award* (1950) 68 CAR 597

those vested in the AFPC by examining the natural and ordinary meaning of the Award.