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Fair Work Commission  
80 William Street  
East Sydney NSW 2011

By email: [amod@fwc.gov.au](mailto:amod@fwc.gov.au)

Your Honour

#### **4 Yearly Review of Modern Awards – Plain Language- Plain Language Light Touch- Gardening and Landscaping Services Award (AM2016/15)**

HIA refers to the Fair Work Commission (**Commission**) Statement dated 2 May 2019, and conference (**conference**) as convened on 29 April 2019 regarding the scope of the plain language light touch process (**light touch process**).

As noted in paragraph 4 of the Statement, the Commission has provided an opportunity for interested parties to file written submissions in relation to the example Gardening and Landscaping Services Award (**Gardening Award – Exposure Draft**) as published on 18 April 2019 which has been through the light touch process.

HIA notes as per paragraph 5 of the Statement, the Construction Group of Awards will not go through the light touch process until such time as the substantive issues in the Construction Awards have been finalised. HIA maintains an interest in the Construction Group of Awards, specifically the *Building and Construction General Onsite Award 2010 (Onsite Award)*, and the *Joinery Building Trades Award 2010 (Joinery Award)*.

HIA provides the following comments in light of the potential for the highlighted changes to flow through to the Construction Group of Awards. HIA recognises that there may be Award specific reasons for the noted changes within the Gardening Award- Exposure Draft.

#### **Clause 11- Casual employment**

1. Clause 11.2 of the Gardening Award- Exposure Draft has been redrafted as follows:

*11.2 A casual employee **must be engaged for a minimum of 3 consecutive hours**. ~~is entitled to a minimum period of engagement of three hours.~~*

2. HIA is concerned that the removal of the words 'minimum period of engagement', and simple replacement with the word 'consecutive' through the light touch process may have unintended consequences given the different meaning of the words, and the general common understanding of 'minimum period of engagement'.
3. Clause 14.4 of the Onsite Award refers to 'a minimum of four hours' work per engagement':  
*14.4 A casual employee is entitled to payment for a minimum of four hours' work per engagement, plus the relevant fares and travel allowance and expenses prescribed by clauses 24—Living away from home—distant work and 25—Fares and travel patterns allowance on each occasion they are required to attend work*
4. Clause 12.3 of the Joinery Award refers to 'minimum daily engagement of 7.6 hours':  
*12.3 A casual employee is engaged by the hour with a minimum daily engagement of 7.6 hours.*
5. HIA recommends that Clause 11.2 of the Gardening Award- Exposure Draft is redrafted to read as follows:  
*11.2 A casual employee is entitled to a minimum period of engagement of three hours.*

## Clause 12- Apprentices

### **Reimbursement of fees and textbooks**

6. Clause 12.6(c) of the Gardening Award- Exposure Draft contemplates the employer reimbursement of textbook costs and course fees which are required for the purposes of the employee's apprenticeship.
7. HIA notes that the redrafting of this clause has removed the use of the words 'prescribed' before the use of the word 'course' and 'textbook', potentially widening the scope of reimbursement of course and textbook fees beyond those which are prescribed for the Apprentices training.
8. The Onsite Award (Clause 15.6) and Joinery Award (Clause 13.12), include the use of the word 'prescribed' as a preface to reimbursement of textbook costs.
9. The 2013 Full Bench Decision relating to the Modern Awards Review 2012—Apprentices, Trainees and Juniors<sup>1</sup> (**2013 Apprentice Decision**) noted in paragraph 362 the decision 'to vary the awards to provide for reimbursement for the cost of prescribed textbooks.'
10. HIA submits that Clause 12.6(c) of the Gardening Award- Exposure Draft is redrafted to reflect the current drafting of the Gardening Award as follows:  
*(c) An employer must reimburse an apprentice for all fees paid by the apprentice themselves to a registered training organisation (RTO) for **prescribed** courses that the apprentice is required to attend, and all costs incurred by the apprentice in purchasing **prescribed** textbooks (not provided or otherwise made available by the employer) that the apprentice is required to study, for the purposes of the apprenticeship.*

### **Payment directly to RTO**

11. Clause 12.6(c) of the Gardening Award- Exposure Draft removes the capacity of employers meeting their reimbursement obligations by making payment of fees and textbook costs directly to the RTO (current Clause 14.5(f) of the Gardening Award).
12. Similarly, the Onsite Award (Clause 15.6) and Joinery Award (Clause 13.12), include the capacity for the employer to reimburse the payment of fees and textbook costs directly to the RTO.

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<sup>1</sup> [2013] FWCFB 5411

13. The 2013 Apprentices Decision made clear that the payment of fees directly to a training provider satisfies an award reimbursement requirement, and should accordingly been made clear within an Award:

*[357] We consider that to meet the modern awards objective it is appropriate to clarify the award requirement for the reimbursement of training fees. There should be an addition to current award provisions to require reimbursement of training fees to occur within six months of commencement of the apprenticeship or the relevant stage of the apprenticeship unless there is unsatisfactory progress. It should also be clear that payment of fees directly to the training provider by an employer within six months of commencement of the apprenticeship or stage of the apprenticeship will satisfy the award requirement.*

14. Accordingly HIA recommends the continued inclusion of this term through the insertion of a Clause 12.6(f) into the Gardening Award- Exposure Draft, as follows:

*(f) An employer may meet its obligations under clause 14.5(e) by paying any fees and/or cost of textbooks directly to the RTO.*

### **Satisfactory progress**

15. Clause 12.6(e) of the Gardening Award- Exposure Draft has been redrafted as follows:

*(e) Reimbursement under clause 12.6(c) is subject to the employer being satisfied that the apprentice is making satisfactory progress in the apprenticeship.*

16. The new drafting of this clause has separately identified 'satisfactory progress' as the trigger for reimbursement of course fees and textbook costs. The current reading of the Gardening Award (Clause 14.5(e)) maintains that the training fees and textbook costs are payable, 'unless there is unsatisfactory progress'.

17. Clause 15.6 of the Onsite Award, and Clause 13.12(a) of the Joinery Award, also refer to the reimbursement of training fees and textbook costs being payable, 'unless there is unsatisfactory progress'.

18. HIA is concerned the change in the drafting of the words could result in unintended consequences.

19. The 2013 Apprentice Decision provided the following commentary around 'satisfactory progress' in relation to reimbursement of training fees and textbook costs' and noted the possible impacts on the use of 'satisfactory progress' as the trigger for reimbursement:

*[355] We are satisfied that in this changed environment the requirement for reimbursement subject to satisfactory progress should be clarified. It would be unreasonable to interpret satisfactory progress as meaning 'following the satisfactory completion of all competency units for the particular apprenticeship stage'. This could mean apprentices are out of pocket for a year or more and would not be consistent with the modern awards objective due to the impact on low paid workers (s.134(1)(a) of the Act). It may also act to discourage apprenticeship completion and early apprenticeship completion (s.134(h)). On the other hand, there is no reason that an employer should be required to pay fees up front in the case of a first year apprentice who never attends the required off-the-job training. The evidence shows that there is a significant drop out rate from apprenticeships during the probation period, which is generally three months from commencement.'*

20. Further the 2013 Apprentice Decision at paragraph 357 confirmed the appropriate use of the words 'unsatisfactory progress'

*'There should be an addition to current award provisions to require reimbursement of training fees to occur within six months of commencement of the apprenticeship or the relevant stage of the apprenticeship unless there is unsatisfactory progress'.*

21. HIA submits that Clause 12.6(e) is removed from the Gardening Award- Exposure Draft, and Clause 12.6(c) is amended as follows:

*(c) An employer must reimburse an apprentice for all fees paid by the apprentice themselves to a registered training organisation (RTO) for courses that the apprentice is required to attend, and all costs incurred by the apprentice in purchasing textbooks (not provided or otherwise made available*

*by the employer) that the apprentice is required to study, for the purposes of the apprenticeship,  
unless there is unsatisfactory progress.*

Yours sincerely  
HOUSING INDUSTRY ASSOCIATION LIMITED

A handwritten signature in black ink, appearing to read "M. Adler". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Melissa Adler  
Executive Director- Industrial Relations and Legal Services