



**MASTER BUILDERS**  
AUSTRALIA

**Supplementary submission in support of the application to  
vary the *Building and Construction General On-Site Award*  
2010**

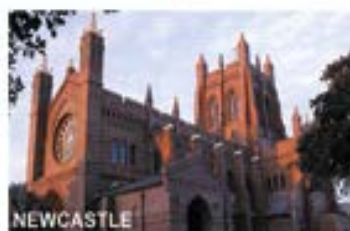
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Master Builders Australia Ltd

ABN 68 137 130 182

building australia



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## **1 INTRODUCTION**

- 1.1 This submission is made by Master Builders Australia Ltd (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 30,000 businesses nationwide. Master Builders is the only industry body that represents all three building and construction sectors: residential, commercial and engineering.

## **2 BACKGROUND AND PURPOSE OF THIS SUBMISSION**

- 2.1 This submission supplements Master Builders' submission dated 26 October 2011 (the Main Submission).
- 2.2 This submission is provided in order to assist the tribunal in the context of the Consultations set down for 16 November 2011.
- 2.3 This submission deals with four matters:
  - Updating and expanding Attachment D to the Main Submission (Attachment A to this submission);
  - Providing material on standing, given the terms of Clause 2.1 of the CFMEU's submission dated 9 November 2011;
  - Seeking a direction from the tribunal about a further date for calling witness evidence; and
  - Providing further examples of the manner in which Clause 19.8(c) cannot operate in practice as a satisfactory comparative exercise. Attached as Attachment B are the examples. They are provided as part of this submission to reduce the handling of paper at the Consultations.

### 3 ADULT APPRENTICES – PRE MODERN AWARD COVERAGE

- 3.1 Attachment A to this submission updates and expands Attachment D to the Main Submission.
- 3.2 Attachment A clearly shows that the preponderance of pre-modern award coverage did not prescribe adult apprentice wage rates.

### 4 STANDING

- 4.1 In paragraph 2.1 of the CFMEU's 9 November 2011 submission, the following is said:

*The application before the Tribunal has been made by the MBA as the agent of the various Master Builders associations that are either registered or transitionally registered under the Fair Work (Registered Organisations) Act 2009. Subject to the MBA satisfying FWA that it has the authority to act as the agent, the CFMEU raises no further issue as to standing.*

- 4.2 Master Builders has been recognised as legitimately operating as the agent of its members in other tribunal proceedings e.g. Matter D5010/5022 before SDP Richards.
- 4.3 Similarly with that matter Master Builders has not lodged a Form F53 in this matter as set out in rule 17.1 of the tribunal's rules. Master Builders will lodge a form F53 if required by the tribunal. However, we submit that Master Builders does not require permission to represent its members as agent, having regard to the provisions of s596 of the *Fair Work Act*.
- 4.4 Master Builders' de facto status is as an entity that is a peak body or peak council. However, the definition of "peak council" at s12 of the *Fair Work Act*, 2009 is as follows:

***"Peak Council"** means a national or State council or federation that is effectively representative of a significant number of organisations (within the ordinary meaning of the term) representing employers or employees in a range of industries.*

- 4.5 The notion of "a range of industries" set out in the definition extracted in paragraph 4.4 would not permit Master Builders to be treated as a peak council for the purposes of the Act. However, s596(4) does recognise that in representing its member associations, those associations are not taken to be represented by a lawyer or paid agent if the lawyer (in the case of Master

Builders' representation at the Consultations) is per s596(4)(b)(ii) "an employee or officer of an association of employers that is not registered under the *Fair Work (Registered Organisations Act) 2009*." This exclusion appears to nullify the requirement to seek the tribunal's permission. We note that rule 17.2 is to be read subject to s596 and, in that regard, it should be construed as not requiring the permission otherwise specified.

- 4.6 The policy behind this provision is indicated in the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) where it is indicated that:

*FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner... in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, Clause 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission.*

(at paras 2291-2292).

- 4.7 However, as the Explanatory Memorandum continues at (para 2298) s596(4) of the *Fair Work Act* "provides that a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent is a bargaining representative, or an employee or officer of the person, organisation, peak council or bargaining representative. The effect of this subclause is that in these circumstances FWA's permission is not required"<sup>1</sup> (emphasis added). This is a most categorical expression of Master Builders' argument.

- 4.8 We submit the effect of s596(4) therefore is to not require the tribunal's permission to act in the context of representation as currently constituted. However, to avoid doubt we seek permission to represent our members under rule 17.2 of the tribunal's rules. We do this without prejudice to our rights to argue that the provisions of s596 envisage that permission is not required but we, in any event now, seek permission to facilitate the smooth conduct of the hearing.

- 4.9 We note that Master Builders in any event holds written authorities from its member associations. It is also very unusual for legal representatives to prove the validity of their agency with their client. It is well understood that Master

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<sup>1</sup>(See: [www.comlaw.gov.au/Details/C2008B00262/Explanatory%20Memorandum/Text](http://www.comlaw.gov.au/Details/C2008B00262/Explanatory%20Memorandum/Text), at paras 2291-2298 for the full extract).

Builders represents its member associations. The CFMEU's request that we prove our agency is unnecessary.

## **5 WITNESS STATEMENTS OF GEOFFREY CHARLES THOMAS, DAVID MILTON CALLAN AND PHIL REID**

- 5.1 The CFMEU has, amongst other things in its 9 November 2011 submission, alleged that Master Builders has "concocted" an argument to support the one about calculation of adult apprentice rates. In part the witness evidence of Geoffrey Charles Thomas illustrates that an employee of one of Master Builders' autonomous associations has reached a position about the calculation of adult apprentice wage rates that is based on the wording of Clause 19.8(c) and which is not in any way capricious or a "concoction".
- 5.2 Unfortunately, Mr Thomas is not now available on 16 November 2011. In our understanding Mr Reid, to be called by the AMWU, is also not available on 16 November 2011.
- 5.3 Master Builders will be calling Mr Callan on 16 November 2011 and making him available for cross-examination.
- 5.4 We will also respectfully seek from the tribunal a further date when we are able to call Mr Thomas and cross-examine Mr Reid.
- 5.5 As stated in paragraph 5.1, the witness statement of Mr Thomas, senior industrial relations officer at the Master Builders Association of New South Wales (Attachment A to our Main Submission) demonstrates how adult apprentice rates are being calculated in practice by one of Master Builders' member associations, which directly advise builders. Mr Thomas' statement indicates that while clause 19.8(c) is ambiguous, his interpretation is that the reference to 'the rate prescribed for the lowest paid classification in clause 19.1' is a reference to clause 19.1(a) rates for a CW/ECW1 worker, exclusive of allowances.
- 5.6 The witness statement of Mr Callan, Chairman of the Board of Directors of the Master Builders Group Training Scheme Inc (Attachment B to our Main Submission) also demonstrates how adult apprentice wages are being calculated in practice, by a group training scheme associated with the Master Builders Association of South Australia. Mr Callan's statement indicates that clause 19.8(c) is confusing and complex, but that the Group Training Scheme has taken

the view that clause 19.8(c) references clause 19.1(a) rates, exclusive of allowances, for a CW/ECW1 worker.

- 5.7 Mr Callan's statement also attests to the reality that high adult apprentice wages damage employment. The Group Training Scheme has a policy of hiring first and second year adult apprentices to host employers at junior apprentice rates, with the Group Training Scheme making up the difference to the adult apprentices. This policy has been adopted to encourage employers to take on adult apprentices, who would otherwise be unwilling to take them on due to their high labour cost. This is compelling evidence of the real financial pressures that employers face when taking on apprentices in their early years, when they are less productive.

## 6 CLAUSE 19.8(c)

- 6.1 As indicated in paragraph 2.3 of this submission, in order to reduce the "paper burden" at the Consultations, examples that will be relied on are set out in Attachment B to this supplementary submission.
- 6.2 The only difference between the rates in the examples is the tool allowance. If this is removed, 19.3 rates will be lower than 19.7 rates for junior apprentices in their final year. Clause 19.3 rates for a CW/ECW1 (level a) worker without the tool allowance would always be **\$17.17** per hour, which is lower than a junior apprentice rate in their fourth year, (e.g. for a signwriter apprentice) **\$17.28** per hour.
- 6.3 Relatedly, we submit that it is not a solution to the identified problem to say that the tool, special and industry allowances are payable on their own terms under Clauses 20.1, 21.1 and 21.2. This is because Clause 19.8(c) will still produce results that are either perverse or that do not work. This can be demonstrated as follows:
- If the reference to the 'rate prescribed for the lowest paid classification in Clause 19.1' at Clause 19.8(c) is taken to reference Clause 19.3 rates, then (as discussed in the Main submission and demonstrated at Attachment B to this submission) they will always be higher than Clause 19.7 junior apprentice rates, meaning that the comparative exercise has no work to do. This implies that Clause 19.1(a) base rates should be used.

- If the reference to the 'rate prescribed for the lowest paid classification in Clause 19.1' at Clause 19.8(c) is taken to reference Clause 19.1(a) rates, with the payment of the tool, special and industry allowances nevertheless then added on their own terms under Clauses 20.1, 21.1 and 21.2, this will mean that a fourth year adult apprentice will be paid less than a third year adult apprentice.
  - This perverse outcome arises due to the fact that the Clause 19.7 rates for a final year apprentice are higher than Clause 19.1(a) base rates for a CW/ECW1 worker. Accordingly, in a final year, the interpretation that clause 19.8(c) simply references base rates (with allowances then added separately) would mean that Clause 19.7 rates would be triggered, rather than clause 19.1(a) rates (with the tool, special and industry allowances then added on their own terms per Clauses 20.1, 21.1 and 21.2 – i.e. effectively clause 19.3 rates). In effect this interpretation means that (lower) clause 19.7 rates would be payable in a final year, but that (higher) clause 19.3 rates would be payable in previous years.
  - As demonstrated in the examples at Attachment B to this submission and discussed in our Main Submission, Clause 19.7 rates are always lower than Clause 19.1(a) rates with the tool, special and industry allowances included (i.e. effectively 19.3 rates). Obviously the allowances would not be added to clause 19.7 rates, as these are already allowance-inclusive.
  - This is the perversity of considering Clause 19.8(c) as referencing base rates of pay under Clause 19.1(a), with the addition of allowances then payable on their own terms: it means that a final year adult apprentice would receive a reduction in pay.

6.4 The only way to make Clause 19.8(c) work is to limit the application of allowances to apprentices. We say they should not be payable at all. Under the *National Metal and Engineering On-Site Construction Industry Award 2002*, allowances were payable under Clauses 12.4.9 and 12.4.10 on a proportional basis. This presumably meant that final year junior apprentice rates were higher than minimum classification base rates plus proportional allowances, meaning that there was no reduction in pay between the third and fourth years, the



perverse result alluded to above. This matter will be able to be substantiated as part of the evidence of Mr Reid, referred to in section 5 of this submission.

## **7 CONCLUSION**

- 7.1 Master Builders lodges this supplementary submission to save time and the paper work burden at the Consultations on 16 November 2011.
- 7.2 As there have been difficulties with the Fair Work Australia website on 14 November 2011, we will bring to the tribunal copies of this supplementary submission.

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## COMPARATIVE TABLE OF APPRENTICESHIP AND ADULT APPRENTICESHIP PROVISION CLAUSES IN PRE-MODERN AWARDS<sup>2</sup>

	AWARD	CODE	APPRENTICESHIP CLAUSE	ADULT APPRENTICESHIP CLAUSE	RELATIVITY TO ADULT RATE
1	<i>A.W.U. Miscellaneous Workers' (ACT) Award 1998</i>	<a href="#">AP765606</a>	10.6	NA	NA
2	<i>Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979</i>	<a href="#">AN160008</a>	9	29A(9)	Base rates less than lowest adult base rates (in cl 29), allowances payable as junior apprentice proportions

<sup>2</sup> List of pre-modern awards taken from Fair Work Australia modern award research page, *Draft Awards Audit by Modern Awards*: see <http://www.fwa.gov.au/index.cfm?pagename=awardsmodernresearch> (accessed 9 December 2010).

3	<i>Asphalt and Bitumen Industry (NSW and ACT) Award 1999</i>	<a href="#">AP766022</a>	NA	NA	NA
4	<i>Asphalt and Bitumen Industry (Queensland) Award 2000</i>	<a href="#">AP765981</a>	NA	NA	NA
5	<i>Asphalt and Bitumen Industry (Southern States) Award, 1999</i>	<a href="#">AP766012</a>	NA	NA	NA
6	<i>Asphalt and Bitumen Industry (State) Consolidated Award</i>	<a href="#">AN120023</a>	NA	NA	NA
7	<i>Asphalt and Bitumen Industry (WA) Award 2000</i>	<a href="#">AP766093</a>	NA	NA	NA
8	<i>Australian Workers' Union Construction and Maintenance (Western Australia) Award 2003</i>	<a href="#">AP825520</a>	NA	NA	NA
9	<i>Australian Workers' Union Construction and Maintenance Award 2002</i>	<a href="#">AP815828</a>	NA	NA	NA
10	<i>Australian Workers' Union Construction-on-Site and Civil Engineering (A.C.T.) Award 1999</i>	<a href="#">AP765604</a>	18	NA	NA
11	<i>Australian Workers Union Road Maintenance, Marking and Traffic Management</i>	<a href="#">AN160016</a>	NA	4.1.10	Base rates less than lowest adult base rates (in cl 4.2), allowances payable as junior apprentice proportions

12	<i>AWU Geomembrane and Geotextile Installation Award 2003</i>	<a href="#">AP823562</a>	NA	NA	NA
13	<i>AWU/CFMEU Construction &amp; Maintenance Award (South Australia) 1989</i>	<a href="#">AN150011</a>	NA	NA	NA
14	<i>Bricklayers &amp; Tuckpointers (Mixed Industry) (SA) Award</i>	<a href="#">AN150018</a>	27	NA	NA
15	<i>Broken Hill Commerce and Industry Agreement Consent Award 2001</i>	<a href="#">AN120088</a>	1.6	Appendix E, clause 4, 6.5 (furnishing trades only)	Relativity of adult rate, 10% higher than junior rate.
16	<i>Building &amp; Construction Workers (State) (Mixed Industry) Award</i>	<a href="#">AN150021</a>	NA	NA	NA
17	<i>Building and Construction Industry (ACT) Award 2002</i>	<a href="#">AP817145</a>	17	NA	NA
18	<i>Building and Construction Industry (Northern Territory) Award 2002</i>	<a href="#">AP812941</a>	9	9.1.4	Rate applicable to lowest paid classification for adult employee (cl 5.1.1)
19	<i>Building and Construction Industry (State) Award</i>	<a href="#">AN120089</a>	18	18.1.3	Relativity of adult rate (cl 18.1(a)), only higher in final year for trainee and civil engineering construction carpenters
20	<i>Building and Construction Industry</i>	<a href="#">AN170010</a>	48	NA	NA

	<i>Award</i>				
21	<i>Building and Construction Workers (State) Award</i>	<a href="#">AN150022</a>	NA	NA	NA
22	<i>Building Construction Industry Award - State 2003</i>	<a href="#">AN140043</a>	NA	Definitions in clause 1.6 define those who are 21 years or older as a tradesperson	Adult rate (cl 5.1)
23	<i>Building Employees Mixed Industries (State) Award</i>	<a href="#">AN120091</a>	27	NA	NA
24	<i>Building Industry - Contract Floor Layer Minimum Rate Order Award</i>	<a href="#">AN120092</a>	NA	NA	NA
25	<i>Building Trades (Construction) Award 1987</i>	<a href="#">AN160034</a>	41	1B(9)	Base rates less than lowest adult base rates (in cl 8), allowances payable as junior apprentice proportions
26	<i>Building Trades (Government) Award 1968</i>	<a href="#">AN160036</a>	15	1B(9)	Base rates less than lowest adult base rates (in cl 9), allowances payable as junior apprentice proportions
27	<i>Building Trades (SA) Construction Award</i>	<a href="#">AN150023</a>	45	NA	NA

28	<i>Building Trades Award 1968</i>	<a href="#">AN160037</a>	16	10A(9)	Base rates less than lowest adult base rates (in cl 10), allowances payable as junior apprentice proportions
29	<i>Civil Construction, Operations and Maintenance General Award - State 2003</i>	<a href="#">AN140061</a>	NA	NA	NA
30	<i>Construction Industry Sector - Minimum Wage Order - Victoria 1997</i>	<a href="#">AP774313</a>	5.4	NA	NA
31	<i>Earth Moving and Construction Award</i>	<a href="#">AN160104</a>	NA	27, Part 3, (h)(i)	Base rates less than lowest adult base rates (in cl 27, Part 1), allowances payable as junior apprentice proportions
32	<i>Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973</i>	<a href="#">AN160114</a>	NA	1B(9)	Base rates less than lowest adult base rates (in cl 27(2)), allowances payable as junior apprentice proportions
33	<i>Engine Drivers' (General) Award</i>	<a href="#">AN160115</a>	NA	1B(9)	Base rates less than lowest adult base rates (in cl 19), allowances payable as junior apprentice proportions

34	<i>Engine Drivers' and Firemen's (ACT) Award 2000</i>	<a href="#">AP805250</a>	NA	NA	NA
35	<i>Engine Drivers General (State) Award</i>	<a href="#">AN120196</a>	NA	NA	NA
36	<i>Foremen (Building Trades) Award 1991</i>	<a href="#">AN160133</a>	NA	6(9)	Base rates less than lowest adult base rates (in cl 7), allowances payable as junior apprentice proportions
37	<i>Gangers (State) Award</i>	<a href="#">AN120225</a>	NA	NA	NA
38	<i>General Construction and Maintenance, Civil and Mechanical Engineering, &amp;c. (State) Award</i>	<a href="#">AN120228</a>	NA	NA	NA
39	<i>Industrial Spraypainting and Sandblasting Award 1991</i>	<a href="#">AN160180</a>	NA	1B(9)	Base rates less than lowest adult base rates (in cl 8), allowances payable as junior apprentice proportions
40	<i>Landscape Gardeners, &amp;c., on Building and General Construction and Maintenance, Civil and Mechanical Engineering (State) Award</i>	<a href="#">AN120309</a>	NA	NA	NA
41	<i>Metal and Engineering on-Site Construction Industry Award</i>	<a href="#">AN170063</a>	NA	NA	NA

42	<i>Metal Trades (General) Award 1966</i>	<a href="#">AN160206</a>	9, 31(3)	31(6)(i)	Base rates less than lowest adult base rates (in cl 31(1)), allowances payable as junior apprentice proportions
43	<i>National Building and Construction Industry Award 2000</i>	<a href="#">AP790741</a>	20	NA	NA
44	<i>National Metal and Engineering on-site Construction Industry Award 2002</i>	<a href="#">AP816828</a>	12.4	12.5	Comparative exercise, no less than base rates for adult employees (in cl 16.1) which did not specify allowances
45	<i>North Rankin Construction Award</i>	<a href="#">AN160228</a>	NA	NA	NA
46	<i>Plant, &amp;c., Operators on Construction (State) Award</i>	<a href="#">AN120419</a>	NA	NA	NA
47	<i>Risdon Prison Redevelopment Project Enterprise Award</i>	<a href="#">AN170089</a>	50 & 51	NA	NA
48	<i>Roof Slaters and Tilers (Victoria) Award 2002</i>	<a href="#">AP818507</a>	14.8	NA	NA
49	<i>Sinter Machine Emission Reduction Project Consent Award</i>	<a href="#">AN120707</a>	NA	NA	NA
50	<i>South Australian Civil Contracting Industry Award 1999</i>	<a href="#">AP798273</a>	NA	NA	NA



51	<i>UCIW Christmas Island Building and Construction Award 2004</i>	<a href="#">AP834773</a>	11.5	NA	NA
52	<i>Unions NSW Port Kembla Steelworks Construction Award 2006</i>	<a href="#">AN120701</a>	19	NA	NA
53	<i>WA Government Health Services Engineering and Building Services Award 2004</i>	<a href="#">AN160329</a>	21	1B(9)	Base rates less than lowest adult base rates (in Appendix A), allowances payable as junior apprentice proportions
54	<i>Western Australian Civil Contracting Award 1998</i>	<a href="#">AP803190</a>	NA	NA	NA

## Summary

The vast majority of relevant pre-modern awards did not provide for adult apprentice rates and of those which did, the majority did not provide for full adult rates:

- only 17 of the 54 pre-modern awards relevant to the making of the *Building and Construction General On-Site Award 2010* contained adult apprentice rates;
- of those 17 which provided for adult apprentice rates, 12 of those clearly provided for base rates which were less than those due to the lowest adult base rates, with allowances payable on a proportional basis;

**Examples of operation of clause 19.8(c)**

The base rate for a CW/ECW1 (level a) worker in clause 19.1(a) is **\$16.30** per hour.

**Example 1: Carpenter/joiner (highest possible junior apprentice rate)**

*Weekly hire rate under clause 19.3:*

- \$619.40 (base rate) + \$7.70 (special allowance) + \$25.39 (industry allowance) + \$27.69 tool allowance) = \$672.13 / 38 = **\$17.90** per hour.

*Rate for junior apprentice in final year:*

- \$617.58 (90% x \$686.20 standard rate) + \$6.93 (90% x \$7.70 special allowance) + \$25.39 (industry allowance) + \$27.69 (tool allowance) = \$669.54 / 38 = **\$17.83** per hour.

**Example 2: Plasterer apprentice (second highest junior apprentice rate)**

*Weekly hire rate under clause 19.3:*

- \$619.40 (base rate) + \$7.70 (special allowance) + \$25.39 (industry allowance) + \$22.87 tool allowance) = \$672.13 / 38 = **\$17.77** per hour.

*Rate for junior apprentice in final year:*

- \$617.58 (90% x \$686.20 standard rate) + \$6.93 (90% x \$7.70 special allowance) + \$25.39 (industry allowance) + \$22.87 (tool allowance) = \$669.54 / 38 = **\$17.70** per hour.

**Example 3: Bricklayer apprentice (third highest junior apprentice rate)**

*Weekly hire rate under clause 19.3:*

- \$619.40 (base rate) + \$7.70 (special allowance) + \$25.39 (industry allowance) + \$19.64 tool allowance) = \$672.13 / 38 = **\$17.69** per hour.

*Rate for junior apprentice in final year:*

- \$617.58 (90% x \$686.20 standard rate) + \$6.93 (90% x \$7.70 special allowance) + \$25.39 (industry allowance) + \$19.64 (tool allowance) = \$669.54 / 38 = **\$17.62** per hour.

**Example 4: Roof tiler apprentice (fourth highest junior apprentice rate)**

*Weekly hire rate under clause 19.3:*

- \$619.40 (base rate) + \$7.70 (special allowance) + \$25.39 (industry allowance) + \$14.49 tool allowance) = \$672.13 / 38 = **\$17.55** per hour.

*Rate for junior apprentice in final year:*

- $\$617.58$  (90% x  $\$686.20$  standard rate) +  $\$6.93$  (90% x  $\$7.70$  special allowance) +  $\$25.39$  (industry allowance) +  $\$14.49$  (tool allowance) =  $\$669.54 / 38 = \mathbf{\$17.48}$  per hour.

**Example 4: Signwriter apprentice (lowest junior apprentice rate)**

*Weekly hire rate under clause 19.3:*

- $\$619.40$  (base rate) +  $\$7.70$  (special allowance) +  $\$25.39$  (industry allowance) +  $\$6.65$  tool allowance) =  $\$672.13 / 38 = \mathbf{\$17.35}$  per hour.

*Rate for junior apprentice in final year:*

- $\$617.58$  (90% x  $\$686.20$  standard rate) +  $\$6.93$  (90% x  $\$7.70$  special allowance) +  $\$25.39$  (industry allowance) +  $\$6.65$  (tool allowance) =  $\$669.54 / 38 = \mathbf{\$17.28}$  per hour.