

Form F46 – Joint Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

Applicant



These are the details of the person who is making the application.

Title	<input checked="" type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Shaun		
Surname	Schmitke		
Postal address	Level 3, 44 Sydney Avenue		
Suburb	FORREST		
State or territory	ACT	Postcode	2603
Phone number	(02) 6202 8888	Fax number	
Email address	shaun.schmitke@masterbuilders.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Master Builders Australia Ltd.
Trading name of business	Master Builders Australia
ABN/ACN	137 130 182
Contact person	Shaun Schmitke – Deputy CEO & National Director Safety, Contracts & Workplace Relations

Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input checked="" type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:
First name(s)	Melissa
Surname	Adler

Postal address	79 Constitution Ave		
Suburb	CAMPBELL		
State or territory	ACT	Postcode	2612
Phone number	(02) 6245 1305	Fax number	
Email address	m.adler@hia.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	HIA
Trading name of business	Housing Industry Association Limited
ABN/ACN	004 631 752
Contact person	Melissa Adler – Executive Director – Industrial Relations and Legal Services

Applicant

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input checked="" type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Vasuki		
Surname	Paul		
Postal address	2/441 St Kilda Road		
Suburb	Melbourne		
State or territory	Vic	Postcode	3004
Phone number	0407654090	Fax number	
Email address	vasuki.paul@aigroup.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	The Australian Industry Group
Trading name of business	Ai Group
ABN/ACN	76 369 958 788

Contact person	Vasuki Paul: National Manager – Construction Utilities and Workplace Relations Advocacy
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Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Does either Applicant have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

No – MBA, HIA, Ai Group do not have a representative

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Building and Construction General On-Site Award 2010 (MA000020)
Joinery and Building Trades Award 2010 (MA000029) and
Mobile Crane Hiring Award 2010 (MA000032)

1.2 What industry is the employer in?

Building, metal and civil construction industries.

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

2.2 What are the details of your application?

For the *Building and Construction General On-Site Award 2010*, see Annexure A - noting that mirror temporary Schedules are also sought (where applicable) for the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010*.

For proposed variations specific to the *Joinery and Building Trades Award 2010*, see Annexure B.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

See Annexure C.


Attach additional pages, if necessary.


Signatures



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Shaun Schmitke
Date	27 May 2020
Capacity/Position	Deputy CEO, National Director – Safety, Contracts & Workplace Relations Master Builders Australia

Signature	
Name	Melissa Adler
Date	27 May 2020
Capacity/Position	Executive Director – Industrial Relations and Legal Services Housing Industry Association

Signature	
Name	Vasuki Paul
Date	27 May 2020
Capacity/Position	National Manager – Construction Utilities and Workplace Relations Advocacy Ai Group



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

Annexure A

MA000020 PRXXXXXX



DETERMINATION

Fair Work Act 2009

s.157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Building and Construction General On-Site Award 2010

(AMXXXX/XX) [[MA000020](#)]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT

XXXX

XXXX

MELBOURNE, XX XX 2020

Application to vary the Building and Construction General On-Site Award 2010 – COVID-19 Pandemic

A. Further to the decision [[2020 FWCFB XXXX]] issued by the Fair Work Commission on XX XX 2020, the above award is varied as follows:

1. By inserting Schedule H as follows:

H.1 - Award flexibility during the COVID-19 Pandemic

H.1.1 - Subject to clauses H.5.1(d), H.5.2(d), H.5.5(d) and H.11.1(a), Schedule H operates from XX XXX 2020 until 31 December 2020. The period of operation can be extended on application.

H.1.2 – Schedule H does not apply to any employee employed by an employer who qualifies for the ‘JobKeeper’ Scheme if the employee is eligible to receive ‘JobKeeper’ payments pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

H.1.3 The provisions of this Schedule are to:

- a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:
 - i) the COVID-19 pandemic; and
 - ii) government initiatives to slow the transmission of COVID-19; and
- b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and
- c) continue the employment of employees; and
- d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and
- e) help ensure that, where reasonably possible, employees:
 - i) remain productively employed during the COVID-19 pandemic; and
 - ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

H.2 – General conditions applicable to this Schedule

H.2.1 Directions/Requests to Employees

- a) All directions or requests issued by an employer to an employee pursuant to this Schedule must:
 - i) be in writing with a copy retained as an employee record; and
 - ii) must not be unreasonable in all of the circumstances;

NOTE: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

- b) A direction or request from an employer to an employee made pursuant to this Schedule has no effect unless done so for reasons that the employer reasonably believes are consistent with the overall intent of this Schedule outlined at clause H.1.
- c) A direction or request made pursuant to this Schedule has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.
- d) In determining whether a direction or request given by an employer to an employee of the employer (the relevant employee) under this Schedule is necessary to continue the employment of one or more employees of the employer, it is immaterial that a similar direction could have been given by the employer to an employee of the employer other than the relevant employee.
- e) A direction or request given by an employer to an employee of the employer under this Schedule continues in effect until:
 - i) it is withdrawn or revoked by the employer; or

- ii) it is replaced by a new direction or request given by the employer to the employee under the relevant clause within this Schedule; or
 - iii) it is revoked or varied by an order made by the FWC; or
 - iv) it ceases to have effect due to the expiration of this Schedule.
- f) If a direction given by an employer applies to an employee of the employer, the employee must comply with the direction.
 - g) If an employee is subject to a direction issued pursuant to this Schedule during a period, that period counts as service.
 - h) If a direction to reduce hours applies to an employee, the employee accrues leave entitlements as if the direction had not been given.
 - i) If a direction to reduce hours applies to an employee, the following are to be calculated as if the direction had not been given:
 - i) redundancy pay;
 - ii) payment in lieu of notice of termination.
 - j) If an employee takes paid annual leave in accordance with an agreement or direction under this Schedule, the employee accrues leave entitlements as if the agreement had not been made.
 - k) If an employee takes paid annual leave in accordance with an agreement or direction under this Schedule, the following are to be calculated as if the agreement had not been made:
 - i) redundancy pay;
 - ii) payment in lieu of notice of termination.

H.2.2 Consultation

- a) A direction given by an employer to an employee of the employer pursuant to this Schedule does not apply to the employee unless:
 - i) the employer gave the employee written notice of the employer's intention to give the direction; and
 - ii) the employer did so:
 - at least 3 days before the direction was given; or
 - if the employee genuinely agreed to a lesser notice period—during that lesser notice period; and
 - iii) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.
- b) Subsection a) does not apply to a direction (the relevant direction) given by an employer to an employee of the employer under a particular section of this Schedule if:
 - i) the employer previously complied with paragraphs a) (i), (ii) and (iii) in relation to a proposal to give the employee another direction under that clause; and
 - ii) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and
 - iii) the employer considered those views in deciding to give the relevant direction.

- c) An employer must keep a written record of a consultation under paragraph a) (iii) with:
 - i) an employee of the employer; or
 - ii) with a representative of an employee of the employer.

H.3 - Consultation and Dispute Resolution

H.3.1 Consultation about major workplace change

Amend clause 8.5 to insert new subclause (h) as follows:

- h) temporary arrangements given effect by Schedule H.

H.3.2 Disputes

- a) Any disputes which arise under this Schedule shall be dealt with pursuant to the procedure established within this Award.

H.4 - Protections

H.4.1 Misuse of directions or requests

- a) An employer must not purport to give a direction or request if:
 - i) the direction or request is not authorised by this Schedule; and
 - ii) the employer knows that the direction or request is not authorised by this Schedule.

H.4.2 Protection of workplace rights

- a) For the avoidance of doubt, each of the following is a workplace right within the meaning of Part 3-1 of the Fair Work Act 2009:
 - i) the benefit that an employee of an employer has or derives because of an obligation of the employer to satisfy the conditions of this Schedule;
 - ii) agreeing, or not agreeing, to perform duties in accordance with this Schedule:
 - on different days; or
 - at different times;
 - iii) agreeing, or not agreeing, to take paid annual leave in compliance with a request or direction made in accordance with this Schedule; or
 - iv) making a request for secondary employment, training etc.

H.4.3 Relationship with other laws etc.

- a) This Schedule will at all times operate subject to the following provisions of the Fair Work Act 2009:
 - i) Division 2 of Part 2-9 (payment of wages etc.);

- ii) Part 3-1 (general protections);
 - iii) Part 3-2 (unfair dismissal);
 - iv) section 772 (employment not to be terminated on certain grounds);
 - v) an anti-discrimination law;
 - vi) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees;
 - vii) a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.
- b) This Schedule has effect subject to a person's right to be represented, or collectively represented, by an employee organisation or employer organisation.

H.5 – Leave and accrued RDOs

H.5.1 Unpaid Pandemic Leave

- a) Subject to clauses H.5.1(b), (c) and (d), any employee is entitled to take up to 2 weeks' unpaid leave if the employee is required by government or medical authorities or on the advice of a medical practitioner to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- b) The employee must give their employer notice of the taking of leave under clause H.5.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).
- c) An employee who has given their employer notice of taking leave under clause H.5.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause H.5.1(a).
- d) A period of leave under clause H.5.1(a) must start before 31 December 2020, but may end after that date.
- e) Leave taken under clause H.5.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this award and the NES.

NOTE: The employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

H.5.2 Annual leave at half pay

- a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.
- b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.
- c) A period of leave under clause H.5.2(a) must start before 31 December 2020, but may end after that date.

EXAMPLE: Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- the employee's pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for one week's leave on full pay (where one week's full pay includes leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual.

NOTE 1: A employee covered by this award who is entitled to the benefit of clause H.5.1 or H.5.2 has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

H.5.3 Direction to take Annual Leave

- a) Instead of clauses 38.XX - An employer may direct an employee to take any annual leave that has accrued, by giving at least one weeks' notice, or any shorter period of notice that may be agreed.
- b) A direction to take annual leave shall not result in an employee having less than two weeks of accrued annual leave remaining.

H.5.4 Direction to take Accrued RDOs

- a) Instead of clauses 33.XX - An employer may direct full-time and part-time employees in a workplace or section of a workplace to take any accrued Rostered Days Off that are accrued, by giving at least one weeks' notice, or any shorter period of notice that may be agreed.

H.5.5 Taking an accrued RDO

- a) Instead of clauses 33.XX - An accrued RDO will be taken in one of the following ways:

- on one day during a 20 day four week cycle on which all employees will take a RDO in accordance with a written roster fixed by the employer and issued 7 days before the commencement of that cycle; or
 - on a day during a 20 day four week cycle during which particular employees will take their RDOs on different days in accordance with a written roster fixed by the employer and issued 7 days before the commencement of that cycle; or
 - by any other method that is agreed by the employer and a majority of that employer's employees and recorded in writing.
- b) The means by which a written roster under clause 33.XX may be issued include but are not limited to the following:
- by giving an employee a copy of the written roster; or
 - by placing a copy of the written roster on the notice board(s) at the workplace; or
 - by sending the written roster to the employee by post in a prepaid envelope to an employee's usual residential or postal address, by facsimile transmission, or by email or other electronic means; or
 - by any other means agreed to by the employer and employee.
- c) A roster issued in accordance with clause 33.XX must not require an employee to take an RDO on a day that is a public holiday.
- d) Clause H.5.5 operates from XX XXX 2020 until 30 June 2020.

H.6 – Employee duties

H.6.1 Duties of Employees

- a) An employee will perform all duties that are within their skill and competency regardless of their classification under clause 18 and Schedule B, provided that the duties are safe, and the employee is licensed and qualified to perform them, where necessary.
- b) No employee shall have their pay reduced as a result of being directed to perform duties in accordance with this clause.

H.7 – Hours of work

H.7.1 Directions to reduce hours of work

- a) After the commencement of this Schedule, an employer may give an employee a direction during a period to:
 - i) not work on a day or days on which the employee would usually work; or
 - ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or

- iii) work a reduced number of hours (compared with the employee's ordinary hours of work);
- b) A direction made pursuant to clause H.7.1 a) will only be valid if;
 - i) the employee cannot be usefully employed for the employee's normal days or hours during the period of reduced hours because of changes to business attributable to:
 - the COVID-19 pandemic; or
 - government initiatives to slow the transmission of COVID-19; and
 - ii) the implementation of the direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - iii) the direction is given for a period that consists of or includes the operation of this Schedule.
- c) If a direction made pursuant to clause H.7.1 a) is given to an employee, the employer must, during the period to which the direction relates:
 - i) pay the employee the ordinarily applicable hourly rate of pay for all hours worked; and
 - ii) apply all conditions as specified in this Award as may be relevant and otherwise applicable to the hours worked;
 - iii) but is not otherwise required to make payments to the employee in respect of the period of reduced hours.
- e) A direction under this Schedule does not apply to an employee during a period when the employee:
 - i) is taking paid or unpaid leave that is authorised by the employer; or
 - ii) is otherwise authorised to be absent from the employee's employment.
- f) An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the direction to reduce hours of work would otherwise apply to the employee.
- g) For the purposes of clause H.7.1 a) the reduced number of hours may be nil.

H.7.2 Ordinary hours of work

- a) Instead of clause 33.1 – If the employer and employee agree, except as provided in clause 34 – Shiftwork, the ordinary working hours will be 38 per week, worked between 6.00 am and 7.00 pm Monday to Friday, and 6:00am and 2:00pm Saturdays in accordance with the following procedure.

H.8 – Location of work

H.8.1 Location of work

- a) An employer may direct an employee directed to perform duties during a period (the relevant period) at a place that is different from the employee's normal place of work.
- b) If a direction made pursuant to clause H.8.1 a) is given to an employee, the employer must, during the period to which the direction relates ensure that:
 - i) the location of work is suitable for the employee's duties; and
 - ii) the location does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic; and
 - iii) the performance of the employee's duties at the place is:
 - safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - reasonably within the scope of the employer's business operations.

H.9 – Redundancy

H.9.1 Redundancy

- a) The definition at clause 17.2 of the Award will have no effect during the operation of this Schedule shall be replaced by the definition at s.389 of the Fair Work Act 2009.
- b) The giving of a direction or request pursuant to this Schedule does not amount to a redundancy.

H.9.2 Variation of redundancy pay for other employment or incapacity to pay

This section applies if:

- a) an employee is entitled to be paid an amount of redundancy pay by the employer because of clause 17; and
- b) the employer:
 - i) obtains other acceptable employment for the employee; or
 - ii) cannot pay the amount.
- c) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
- d) The amount of redundancy pay to which the employee is entitled under clause 17.3 is the reduced amount specified in the determination.

H.10 - Casual Employment

H.10.1 Casual Employment

Instead of clause 14.4 - A casual employee is entitled to payment for a minimum of two 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.

H.11 - Time off instead of payment for overtime

H.11.1 Time off instead of payment for overtime

- a) Clause H.11.1 and corresponding Schedule I operate from XX XXX 2020 until 30 June 2020.
- b) Clause H.11.1 does not apply to daily hire employees or casual employees.
- c) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- d) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause H.11.1.
- e) An agreement must state each of the following:
 - iii) the number of overtime hours to which it applies and when those hours were worked;
 - iv) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - v) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
 - vi) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

NOTE: An example of the type of agreement required by this clause is set out at Schedule I. There is no requirement to use the form of agreement set out at Schedule I. An agreement under clause H.11.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

- f) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause H.11.1 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

- g) Time off must be taken:
 - i) within the period of 6 months after the overtime is worked; and
 - ii) at a time or times within that period of 6 months agreed by the employee and employer.

- h) If the employee requests at any time, to be paid for overtime covered by an agreement under clause H.11.1 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- i) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (f), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- j) The employer must keep a copy of any agreement under clause H.11.1 as an employee record.
- k) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- l) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause H.11.1 will apply, including the requirement for separate written agreements under paragraph (c) for overtime that has been worked.

NOTE: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- m) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause H.11.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

NOTE: Under section 345(1) of the Act a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause H.11.1.

2. By inserting Schedule I as follows:

Schedule I — Agreement for time off instead of payment for overtime

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:

Date and time overtime started: ___/___/20___ ____ am/pm

Date and time overtime ended: ___/___/20___ am/pm

Amount of overtime worked: _____ hours and _____ minutes

The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period following the request.

Signature of employee: _____

Date signed: ___/___/20___

Name of employer

representative: _____

Signature of employer

representative: _____

Date signed: ___/___/20___

3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on XX XX 2020. In accordance with s. 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XX 2020.

PRESIDENT

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Annexure B

MA000020 PRXXXXX



DETERMINATION

Fair Work Act 2009

s.157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Joinery and Building Trades Award 2010

(AMXXXX/XX) [[MA000029](#)]

Building, metal and civil construction industries

JUSTICE ROSS, PRESIDENT

XXXX

XXXX

MELBOURNE, XX XX 2020

Application to vary the Joinery and Building Trades Award 2010 – COVID-19 Pandemic

- A. Further to the decision [[2020 FWCFB XXXX]] issued by the Fair Work Commission on XX XX 2020, the above award is varied in accordance with item 1. The variations within this determination operate until 31 December 2020. The period of operation can be extended on application.
- B. This Determination does not apply to any employee employed by an employer who qualifies for the ‘JobKeeper’ Scheme if the employee is eligible to receive ‘JobKeeper’ payments pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.
1. By deleting clause 12.3 and inserting the following:
12.3 A casual employee is engaged by the hour with a minimum daily engagement of 2 hours.
 2. By updating the table of contents and cross-references accordingly.

C. This determination comes into operation on XX XX 2020. In accordance with s. 165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XX 2020.

PRESIDENT

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Annexure C

Introduction

1. Master Builders Australia (**MBA**), the Housing Industry Association (**HIA**) and the Australian Industry Group (**Ai Group**), together (**the Joint Applicants**), seek a determination to vary the *Building and Construction General On-Site Award 2010* (MA000020), *Joinery and Building Trades Award 2010* (MA000029) and the *Mobile Crane Hiring Award 2010* (MA000032) (**the Awards**), to mitigate against the current impacts COVID-19 is having on employees and employers covered by the Awards.
2. If granted, the proposed variation would result in the insertion of a new schedule to each Award (**the Schedule**), and an additional amendment to clause 12.3 of the *Joinery and Building Trades Award 2010*, which would apply until 31 December 2020. The application is made, and the variation is sought in light of the unprecedented challenges facing employers and employees in the context of the COVID-19 pandemic (**Pandemic**).
3. The variations to the Awards are necessary to achieve the Modern Awards Objective (**MAO**) in light of circumstances arising from the Pandemic.
4. The MBA, HIA and Ai Group have been involved in negotiations with the CFMMEU, AWU, ETU/CEPU and AMWU (**Joint Unions**) regarding the issues raised in the Draft Determination.
5. The Joint Unions have not consented to the application.

COVID-19 Impact

6. An Information Note published by the Commission contains extensive detail about various measures that have been taken by State and Federal Governments for the purposes of endeavoring to slow the spread of the Pandemic. We refer to and rely upon that Information Note. It was most recently updated on 21 May 2020¹.
7. Relevantly the announcement of the Pandemic resulted in:
 - a) Limiting non-essential gatherings indoors and outdoors.
 - b) Restrictions on a number of facilities opening.
 - c) The introduction of social distancing measures and other health and hygiene requirements to stop and prevent the spread of the Pandemic.
 - d) Those travelling from overseas and within certain state borders were subject to quarantine.
 - e) Those suspected of being infected with the disease or being in close contact of someone infected with the disease similarly were required to quarantine.

Impacts on the Construction sector

8. The construction sector, whilst operating during the period of the Pandemic, has been impacted by social distancing measures and other health and hygiene requirements to stop and prevent the spread of the Pandemic as well as the adverse economic consequences of the various restrictions.
9. New patterns of work to ensure compliance with social distancing, other health and hygiene requirements and managing health and safety have had to be implemented. These include:

¹ [Fair Work Commission Information note - Government responses to COVID-19 pandemic - 21 May 2020](#)

- a) Limiting the number of people on site;
 - b) Changing rosters to ensure a limited number of employees undertake particular works at particular times;
 - c) Changing the scheduling of work to ensure compliance with the requirement to social distance at least 1.5 metres wherever practicable;
 - d) Providing additional time for tasks to be undertaken;
 - e) Providing additional time for workers to maintain personal hygiene and to clean and disinfect commonly used tools and plant;
 - f) Adjusting the scheduling of the delivery of materials to sites to ensure these are contactless with both trades and other suppliers as far as practicable;
 - g) Providing additional time for site inductions to cover the latest COVID-19 government requirements; and
 - h) Ensuring that work can continue, taking into account the requirement that any employees showing COVID-19 related symptoms, or any employees diagnosed with COVID-19, are placed in self isolation.
10. The new pattern of working will likely be an ongoing necessity and has resulted in reduced productivity and additional costs.
11. The economic downturn resulting from the Pandemic and health actions by the government, has seen approximately 77,000 employees (as of 2 May 2020²) that have either lost their jobs or been stood down. Further, a recent survey of over 400 building firms across Australia has shown that the Pandemic has had a huge impact on the building and construction industry with as many as one-third of Australia's construction businesses being forced to close over the next twelve months if business conditions do not improve.³
12. The construction industry is quite unique with respect to the lagged nature in which it responds to economic shocks. In particular, the residential industry's work extends over such a long time between sale and completion that a major economic shock may not translate into reduced activity on the ground for a number of months.
13. Specifically, and notwithstanding that home building work in the pipeline has been permitted to continue, the residential building industry is equally vulnerable, along with so many Australian businesses, to the decline in economic activity. While there has been no official 'lock down', restrictions remain regarding requirements to avoid public spaces and situations where they come into close contact with other people. This included open houses for established homes and display villages for the new home market. With fewer people shopping around there were fewer sales leads and fewer sales.
14. Given the lag between when a client signs to purchase a new house and land package, and its completion, the industry is required to make employment decisions at least six months in advance. The industry is making decisions right now regarding its employment arrangements for the rest of the year and into 2021. Without any form of mitigation, this could result in extensive layoffs instead of a 'bridge' across the Pandemic, and a prolonged slump instead of a V-shaped recovery.
15. Decisions need to be made today for when this fallout reaches on-the-ground activity. The risk of inaction is that another one of Australia's key industries ends up in freefall, well after the health crisis is over.

² Based on ABS data - [Weekly Payroll - Jobs & Wages in Australia - 6160.0 week ending 2 May 2020 \(released 29 May\)](#)

³ <https://sourceable.net/one-third-of-australias-construction-businesses-could-close/> 11 May 2020.

16. In 2018/19 the residential building industry engaged over 1 million people to commence building almost 200,000 new homes. Next year HIA, for example, expects the industry to start 111,000 new homes leaving up to 500,000 jobs at risk and employment in the sector is not expected to recover within the next two years.
17. Small businesses in the residential building industry and apprentices in the sector are particularly vulnerable at this time and a failure to introduce any greater flexibility not only places those small businesses and apprentices in greater jeopardy but also creates inconsistencies between staff within businesses which may, for example, be covered by multiple awards.
18. To keep all building and construction sector employees in work, action needs to be taken now in order to assist in the retention of several thousands of jobs, ready for work when the industry is called upon to re-activate construction productivity.
19. This necessitates a level of trade off:
 - (a) Additional operational flexibility can allow some businesses to hold off taking other steps;
 - (b) Employees may be willing during the Pandemic to trade off some employment benefits to stay in work and receive some income; and
 - (c) Accessing paid leave (annual leave and long service leave) that is already provisioned for on the balance sheet will allow businesses to reduce cash flow burdens and reduce operational activity while still maintaining employment with employees continuing to be paid.

The Relevant Legislative Requirements

20. This application is made pursuant to s.157 of the *Fair Work Act 2009 (Act)*.
21. Section 157 of the Act empowers the Commission to vary modern awards if necessary, to achieve the MAO.
22. The MAO requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, having regard to the matters set out in s.134(1) of the Act.
23. In its recent decision about variations the *Clerks Private Sector Award 2010 (Clerks Award)* in the context of the Pandemic, the Commission characterised the contextual considerations surrounding the application there made as follows:

[41] The context in which the Joint Application is being advanced and the character of the variations proposed are important contextual considerations. In particular, the variations are:

 - (a) are temporary in nature;*
 - (b) are advanced by consent;*
 - (c) are seen as necessary, based on the party's experience of the COVID-19 Pandemic, the Governments response and the impact these are cumulatively having on employment, employment relationships and working arrangements; and*
 - (d) are aimed at providing employers and employees with the various flexibilities in working arrangements that are now seen as necessary options to preserve, as best as can be, on-going employment, paid hours of work and alternatives to standing down employees without pay or making employees redundant.*
24. Notwithstanding the application is not advanced with the Joint Unions' consent, it is our submission those contextual considerations are also relevant to this application and lend support to the grant of the variation sought.

25. The circumstances warrant a variation to the minimum safety net that reflects a 'trade off' between additional operational flexibilities against some employment benefits, with a view to maintaining the viability of employers and the ongoing employment of their employees.

Section 134 Considerations

26. The variation to the Awards is necessary to achieve the MAO in the circumstances of the Pandemic, having regard to the matters listed at s.134(1) of the Act. In particular:

- a) Schedule H strikes an appropriate balance between what is "fair" for employers and employees in the context of the Pandemic. The proposed variations must be considered in light of the acute need for additional flexibilities that are faced by employers in the current context. It is important to note in this regard that the variations proposed are temporary. Subject to an application being made to extend the operation of Schedule H, they would cease to operate on 31 December 2020.
- b) The Awards, in their current form, are not "relevant". They do not reflect the operational realities in which employers and employees are endeavouring to currently operate. The insertion of the proposed schedule would address this deficiency.
- c) To the extent that the Commission considers that employees covered by the Awards are 'low paid' in the sense contemplated by s.134(1)(a), we refer to and rely upon the Commission's observations in its recent decision concerning the Clerks Award:

[53] ... employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority. It is also relevant that the clause seeks to mitigate the potential impact of the proposed variations in various ways, as outlined in this submission.

- d) The proposed variations may encourage enterprise bargaining (s.134(1)(b)).
- e) The measures proposed in Schedule H will likely increase workforce participation (s.134(1)(c)). To the extent that the proposed variations do not increase workforce participation relative to the level of workforce participation prior to the Pandemic, it will in our submission enable the retention of "as many employees in employment as practicable in the current crisis". This is, in our submission, a consideration weighing in favour of the grant of the proposed variation.
- f) The proposed schedule will clearly promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).
- g) Section 134(1) (da) and (e) is a neutral consideration.
- h) The proposed variation will have a positive impact on business (s.134(1)(f)) provide employers with essential flexibilities that are necessary to enable them to better 'weather the storm'. Ensuring the ongoing viability of employers beyond the Pandemic is vital to ensuring that employees retain employment opportunities.
- i) Section 134(1)(g) is a neutral consideration.
- j) Though difficult to quantify in precise terms, we submit that the variation proposed will

ultimately have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

The Proposed Variations

27. We note that the proposed variations would apply to an employer and their employees only where they do not qualify for the recently introduced JobKeeper scheme. That is, flexibilities afforded by Part 6-4C of the Act and the flexibilities afforded by the proposed new Schedule H (together with clause 12.3 of the *Joinery and Building Trades Award 2010*) are mutually exclusive.
28. Accordingly, the proposed variations are designed to fill the regulatory gap left by the JobKeeper scheme and provide employers who cannot access the flexibilities now contained in the Act with a combination of measures that may be implemented to moderate the impacts of the Pandemic.
29. We note that the Joint Applicants are mostly seeking no more than the Commission has already provided in similar schedules for the Clerks' and other awards and the bringing forward of provisions that the Commission has already determined as part of the 4 Yearly Review Award-Stage Proceedings.
30. The additional amendments sought are to provide much needed flexibility around provisions that are particularly restrictive within the Awards.