CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2020/28

Fair Work Act 2009

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

Application by Master Builders Australia, Housing Industry Association and Another to vary the Building and Construction General On-Site Award 2010, Joinery and Building Trades Award 2010, Mobile Crane Hiring Award 2010
(AM2020/28)

REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)

10th July 2020

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Introduction

1. On 1 April 2020, at a time when the nature and effect of the COVID-19 pandemic was not capable of being known, a Full Bench of the Commission in *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760 (**Variation Decision**) determined not to vary or otherwise consider at that point variations to the *Building and Construction General On-Site Award 2010, Joinery and Building Trades Award 2010* and *Mobile Crane Hiring Award 2010* (**the Awards**). It did so on the basis that business in the sectors of the economy covered by the Awards had not been as adversely impacted by the pandemic as others; that the construction sector was not likely to be affected in the short term; and that there was a high incidence of enterprise agreement coverage, entailing a lower level of award-reliance.[1] The variations to the modern awards the subject of the Variation Decision were made, necessarily and appropriately, in some haste and in circumstances where the health and economic impacts of the pandemic could only be guessed at. It was feared that tens of thousands of deaths could occur in Australia. It was not certain how long parts of the economy would be shut down for.

2. Following the Variation Decision, the construction industry has remained open. Fortuitously, it has not suffered the as negatively as other sectors of the economy, such as retail and hospitality, which were the subject of government shutdowns. To the contrary, it was and remains classed as 'essential' by governments. A pipeline of government funded work and stimluatory initatives aimed at the industry have been announced and will be available to be performed in the industry in the short to medium term.

3. Some three and a half months later, the Commission is asked by Master Builders Australia (**MBA**), Housing Industry Association (**HIA**) and the Australian Industry Group (**AIG**) to vary the Awards to insert a new schedule in each award containing proposed temporary measures affecting employment conditions within the awards. The evidence filed in support of this claim consists of generalised assertions and opinions which lack an identifiable foundation. The claim is, in short, bereft of probative value.

4. In summary, the proposed temporary measures sought in the application, that would apply until 31December 2020, include:

    - creating a new unpaid pandemic leave entitlement;
    - allowing annual leave to be taken at half pay;
    - allowing employers to direct employees to take annual leave at one weeks' notice;[2]

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1 At [110].

2 Cf *Application to vary the Clerks—Private Sector Award 2020* [2020] FWCFB 3443 at [70].

- allowing employers to direct full-time and part-time employees to take accrued RDO's;
- requiring employees to perform all duties that are within their skill and competency regardless of their classification;
- allowing employers to give a direction to employees to work less hours (including nil hours) or less days than the employee would usually work;
- extending the spread of ordinary hours of work to include 6.00am to 2.00pm on Saturdays;
- changing the definition of redundancy under the award industry-specific redundancy scheme;
- allowing employers to apply to the Fair Work Commission (**the Commission**) to reduce the amount of redundancy pay payable under the industry-specific redundancy scheme; and
- reducing the minimum engagement of casual employees to 2 hours work per engagement.

5. The CFMMEU (Construction and General Division) (the CFMMEU C&G) has members employed under all three of the awards that are sought to be varied and therefore has an interest in these proceedings. The CFMMEU C&G opposes the variations sought. The application is a cynical and opportunistic attack on the safety net of building and construction workers.

6. The application fails at the threshold, as there is no valid application before the Commission. Further, the proposed variations to the industry-specific redundancy schemes are contrary to the requirements of the *Fair Work Act 2009* (Cth) (**the FW Act**) and the balance of the variations sought are without evidentiary merit, and the applicants have failed to provide sufficient probative evidence to justify the variations sought.

No Valid Application

7. The submission of the HIA filed on 15th June 2020 [3] states in paragraph 2.1.2 that the application is made pursuant to s. 157 of the FW Act. A similar claim is made by the MBA at paragraph 3 of its submission filed on 23rd June 2020[4]. There are two problems with the MBA and HIA applications. *First*, s.157 only confers the power on the Commission to vary awards and any application for the Commission to exercise its powers under s.157 must be made under s.158 of the FW Act. *Second* s.158(1), delineates the persons who may make applications to vary awards. Relevantly for present purposes, Item 1 of s 158(1) does not confer standing on unregistered organisations to apply to vary awards.

8. The Commission's power to vary awards (outside of the 4 yearly review) is set out in s.157 of the FW Act. It is as follows:

[3] https://www.fwc.gov.au/documents/awardmod/variations/2020/am202028-sub-ws-hia-150620.pdf
[4] https://www.fwc.gov.au/documents/awardmod/variations/2020/am202028-sub-mba-230620.pdf

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

(1) The FWC may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

(2A) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

(3) The FWC may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

9. The Commission is not acting pursuant to s.157(3)(a). Consequently, the trigger point for the exercise by it of its jurisdiction under s.157(1) is that there is an application under s 158: s.157(3)(b).

10. As alluded to above, s.158(1) prescribes who may apply for the making of a determination to vary a modern award. As these proceedings seek to vary terms of the modern awards only, Item 1 of the table is relevant. It provides as follows:

158 Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

Who may make an application?		
Item	**Column 1** **This kind of application …**	**Column 2** **may be made by …**
1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

11. "Organisation" is defined in s.12 of the FW Act to mean an organisation registered under the *Fair Work (Registered Organisations) Act* 2009 (Cth) (**FWRO Act**). Registration is effected under the provisions of Chapter 2 to the FWRO Act. Neither the MBA nor HIA are organisations registered under the FWRO Act. Consequently, they are incapable of applying to vary an award.

12. The third applicant is the AIG. The AIG is, it is accepted, an organisation registered under the FWRO Act. There is, however, no evidence that the application was made in accordance with the AIG's rules.

13. The AIG is a registered organisation and, as a registered organisation, the AIG have rules that must be followed. The AIG rule 32 – Powers of the National Executive, says in 32(2) that the powers include:

> "(b) to take or procure any actions it sees fit to comply with the Act or the FWA and any other industrial instrument affecting the Organisation or its membership including referring any industrial dispute to the FWC or to another appropriate industrial court or tribunal;
>
> (c) to act on behalf of the Organization's membership concerned in any industrial dispute or to initiate or defend or become a party to any legal proceedings of any kind whether for itself or on behalf of the Organization's membership or part thereof without any authority in General Meeting being obtained; and <u>unless otherwise directed under the FWA or the Act, the proper officer of the Organisation to appear for the Organisation before the FWC or any other competent Court or tribunal or before any Commissioner or other Delegate shall be the National Secretary-Treasurer (who may authorise or appoint in writing</u>

any other Officer or a salaried staff member of the Organization to sign any documents and act as the proxy, representative or agent of the National Secretary-Treasurer and otherwise do all such acts matters and things on behalf of the National Secretary-Treasurer in respect thereof, as the National Secretary-Treasurer shall see fit); "

14. The AIG application is signed by "Vasuki Paul: National Manager – Construction Utilities and Workplace Relations Advocacy". Ms Paul is not AIG's National Secretary-Treasurer. In order for a valid application to be made in accordance with the AIG rules Ms Paul must, at the time the application was made, have been authorised by the National Executive or authorised in writing by the National Secretary-Treasurer to sign such documents. There is no evidence of such authority being conferred on Ms Paul. Consequently, the Commission cannot be satisfied that there is an application of the kind required by s.157(3)(a) of the FW Act before it. The Commission, therefore, has no jurisdiction to exercise its power under s 157(1). The application must, therefore, be dismissed.

Redundancy Variations Contrary to the Fair Work Act

15. The proposed variations set out in the draft Determination at H.9, seek to change the industry specific redundancy scheme in the *Building and Construction General On-site Award 2010* in two ways:

    (1) by replacing the definition of redundancy in clause 17.2 with the definition of redundancy in s.389 of the FW Act.

    (2) by conferring power on the Commission to vary the redundancy pay entitlement if the employer obtains other acceptable employment for an employee or the employer cannot pay the amount.

16. The power of the Commission to vary industry-specific redundancy schemes in awards is limited by s.141(3) and s.141(4) of the FW Act, which provide as follows:

> *Varying industry-specific redundancy schemes*
>
> (3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 5:
>
> (a) by varying the amount of any redundancy payment in the scheme; or
>
> (b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).
>
> (4) In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:
>
> (a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and
>
> (b) must retain the industry-specific character of the scheme.

17. Section 141(5) allows the FWC to vary an award by omitting an industry-specific redundancy scheme. That, however, is not is being sought in the application. This is perhaps not surprising as the HIA tried to delete the industry-specific redundancy scheme during the 4-yearly review of modern awards. This was rejected (resoundingly) by a Full Bench in a decision issued 26 September 2018 in [2018] FWCFC 6019 (**Construction Awards Full Bench**), where it was said:

> "[81] We do not consider therefore that there is any basis to conclude that the removal of clause 17 of the Building Award is necessary to meet the modern awards objective, having regard to the considerations identified in s 134(a)-(h) of the Act. Indeed there is one matter which causes us to conclude that the removal of the scheme would not achieve the objective, having regard in particular to the consideration of "employment costs" in s 134(1)(f). Although it was not the subject of any significant evidence, we understand it not to be in dispute that a significant number of employers in the industry make payments into an industry redundancy scheme. Clause 17.4 provides that redundancy pay entitlements under the clause may be offset by contributions to any such scheme. No such provision is made in Pt 2-2 Div 11 of the Act in respect of the redundancy payments required by s.119, leading to the result that absent clause 17 employers contributing to redundancy schemes will effectively be required to make a double payment for any redundancy which occurs."

18. The applicants do not seek to vary the award under s.141(3)(b) in accordance with a provision of Subdivision B of Division 5 of Part 2-3, viz., by varying the award to:
    - update or omit name of employer, organisation or outworker entity (s.159)
    - vary the default fund term of a modern award in relation to a superannuation fund specified in the term in relation to a standard MySuper product (s.159A)
    - remove ambiguity or uncertainty or correct error (s.160)

19. The only avenue left for the applicants would be s.141(3)(a). The CFMMEU C&G recognises that the Construction Awards Full Bench decision gave a glimmer of hope to the applicants as in discussing industry-specific redundancy schemes in awards they noted that:

> [61] Any variation which has the necessary effect of reducing the amount of any redundancy payment payable under the industry-specific scheme would therefore be authorised by s 141(3)(a). That would encompass the proposed variations before us to change the definition of redundancy in clause 17.2, and to introduce a small-business exemption, because if granted they would have the necessary effect of reducing, to zero, the redundancy payment entitlements of those categories of employees affected by the variations.

20. But the application falls foul of s.141(4)(b) as the proposed variations would mean that the proposed clause would not retain the industry-specific character of the scheme.

21. The Construction Awards Full Bench, in dismissing identical proposed variations to clause 17 of the Building and Construction General On-site Award 2010, addressed this in the following terms:

> "[82] In respect of the claim to alter the definition of redundancy, it may be accepted that the definition adopted in the form of the 1990 variation did not apparently match the intention of Commissioner Palmer that the scheme only apply to employer-initiated terminations of employment. However that may be, the definition is a foundational element of the industry-scheme which itself, as the Award Modernisation Full Bench found in 2009, has become an established feature of the building and construction industry. Moreover it is part of the broader application of the scheme which the Full Bench found it necessary to take into account in order to reach the conclusion that the scheme was not less beneficial than the NES provisions. That is a matter relevant to the requirement for fairness in the modern awards objective. Changing the definition would, we consider, alter the industrial balance of the scheme and its historic industry-specific character. The same conclusion may be reached in respect of the proposed exemption of small employers, as proposed in different forms by the HIA and the MBA. Further, as already stated, it has not been demonstrated that the rationale for not excluding small employers does not remain as valid in today's circumstances as it was found to be in 1990." (emphasis added)

22. For these reasons, the changes sought to the ISRS under the On-Site Award are not permitted by s 141(3)-(5) and must be dismissed.

23. The other limb of the applicants' proposed variation to the industry-specific redundancy scheme seeks to give the Commission the same power to vary the amount of redundancy to be paid by an employer as provided for in s.120 of the FW Act, which applies to redundancy entitlements conferred under s 119. In support of this proposed variation the applicants say:

- this option is currently not available to employers covered by the Onsite Award due the operation of the ISRS which excludes the operation of the provisions of Subdivision B-Redundancy Pay of Division 11 of the NES.[5]
- the ISRS applies to small business – contrary to the prima facie view that redundancy obligations should not apply to small businesses as reflected in s. 121 of the Act which

[5] HIA Amended Submission at 5.4.9

provides an exemption from redundancy payments for employers with less than 15 employees.[6]

- adopting clause H.9 of the Schedule would ensure that employers covered by the On-site Award are on a level playing field with other businesses across the country, are afforded the same safety net and relieved of a potentially crippling cost burden businesses are facing.[7]
- s.120 of the FW Act has application to the On-Site and Mobile Crane Awards, and that a recent decision of Spencer C. [2020] FWC 2546 supports this view. The proposed schedule item H.9.2 will arrest any remaining uncertainty on the question of s.120 and its interaction with s.123(4)(b) when considered in context of clause 17.1 of the On-Site Award and clause 12 of the Mobile Cranes Award.[8]

24. Seeking such changes, even on a temporary basis, which have the purpose of allowing employers to whom the On-Site Award covers and applies to avoid their existing redundancy pay obligations, exposes the blatant bare-faced opportunism of the applicants to try and reduce conditions under the guise of Covid-19. The industry-specific redundancy scheme has been a component of the award safety net in the building and construction industry since 1990. The former AIRC and this Commission have repeatedly rejected employer attempts to remove it or change it. It is an award entitlement and responsible employers to whom the On-Site Award applies should have made provision for this liability. What the applicants now seek to is reward employers who have failed to meet their award obligations at the expense of the employees they say they want to maintain. The hypocrisy and unfairness of this proposed variation is plain.

25. The HIA at least recognise that s.120 of the Fair Work Act has no application where an award contains an industry-specific redundancy scheme, although they appear confused as to why. It is s.123(4) of the FW Act which excludes the operation of s.120 and s.121 of the FW Act.

26. The MBA on the other hand has abandoned its previous recognition that s.123(4) of the FW Act excludes the operation of s.120 and embrace the decision of Spencer C. in [2020] FWC 2546. It should be noted that this decision is under appeal. It is, with respect, plainly wrong.

27. Before the decision of Spencer C., it was well settled that s.123(4) excluded the operation on s.120, and there have been many other decisions of the Commission which recognised the exclusion in s.123(4) including:

    - Coolabah Landscapes v C Cooper [2015] FWC 1337;
    - Highland Land Company Pty Ltd T/A Duraseal [2020] FWC 844;

[6] Ibid, at 5.4.10
[7] Ibid at 5.4.11
[8] MBA Submission at paragraphs 83 and 84.

- Coastal Formwork Pty Ltd [2016] FWC 2705;
- Lewis Plumbing (QLD) Pty Ltd [2015] FWC 3117

28. The Commission's jurisdiction under s.120 to vary redundancy pay is clearly stated in s.120(1)(a) to applies if "an employee is entitled to be paid an amount of redundancy pay by the employer because of s.119". The redundancy pay under the On-Site Award is not derived from s.119, which is part of the NES, but from the On-Site Award. Consequently, Commissioner Spencer had no jurisdiction to vary the entitlement to redundancy conferred by the On-Site Award.

29. Further and in addition, s 123(4) determines that Subdivision B of Division 11 of Part 2-3 does not apply to employees to whom an ISRS applies to. Subdivision B includes s.120. For this further reason, s.120 was not available to permit Commissioner Spencer to reduce redundancy entitlements conferred on the respondent by the On-Site Award.

30. Further, clause 17.2 of the On-Site Award provides:

> 17.1 The following redundancy clause for the on-site building, engineering and civil construction industry (as defined) is an industry specific redundancy scheme as defined in s.12 of the Act. In accordance with s.123(4)(b) of the Act the provisions of Subdivision B – Redundancy pay of Division 11 of the NES do not apply to employers and employees covered by this award.

31. The Explanatory Memorandum to the *Fair Work Bill 2008* puts the matter beyond doubt (to the extent there can be any doubt):[9]

> "490. Subclause 123(4) lists further categories of employees not covered by the redundancy pay provisions in this Division. The employees not covered are:
>
> . an apprentice;
>
> . an employee to whom an industry-specific redundancy scheme in a modern award applies (see clause 141);
>
> . an employee to whom a redundancy scheme in an enterprise agreement applies (if the scheme is an industry-specific redundancy scheme and is incorporated by reference into the enterprise agreement from a modern award); and
>
> . an employee prescribed by the regulations as an employee to whom the redundancy pay entitlement does not apply.

[9] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill_em/fwb2008124/memo_0.html

491. An employee excluded from the entitlement to redundancy pay because they are covered by an industry-specific redundancy scheme would derive their entitlement to redundancy pay from the industry-specific redundancy scheme. Such a scheme is enforceable as a term of the award or agreement; it does not become a term of the NES."

32. The only argument advanced by the MBA as to why its proposed variation at H.9.2 is needed is to "arrest any remaining uncertainty on the question of s.120 and its interaction with s.123(4)(b) when considered in context of clause 17.1 of the On-Site Award and clause 12 of the Mobile Cranes Award."[10] There is no uncertainty about the application of s.120. It does not apply to an award industry-specific redundancy scheme because of s.123(4)(b).

Merits of the Application

33. The application and supporting submissions are scant on detail as to the merits of each of the items contained in the proposed temporary schedule, particularly in regard to the impact on employees.

34. While the application seeks to vary the *Mobile Crane Hiring Award 2010* and the *Joinery and Building Trades Award 2010,* the applicants have failed to provide draft determinations for these awards, and the applicants submissions and evidence do not specifically address why the changes are necessary for these awards. On this basis the proposed variations to these awards should be dismissed.

35. The applicants make a number of general submissions as to why the application should be granted. They suggest that the changes will assist employers to maintain or keep employees, but fail to demonstrate how the individual items in the proposed temporary schedule will achieve this.

36. The applicants appear to think that removing award conditions, or at least significantly reducing them, will somehow magically keep employees tied to their employer, that employees will welcome their employer deciding to reduce their working hours to nil without any payment, and employees will readily accept that employers would not have retained sufficient funds to pay the employees redundancy entitlements. Employees are not that naive.

37. The applicants say that they want the schedule to apply to only those employers and their employees that do not qualify for the JobKeeper[11], i.e. businesses that have not been immediately severely affected economically by the Covid-19 pandemic. They say that the proposed variations

[10] MBA Submission at paragraph 84
[11] See paragraph 27 in Schedule C to the application.

will fill the regulatory gap left by the JobKeeper scheme and provide employers with the flexibilities now contained in Part 6-4C of the FW Act.

38. *First,* there is no evidence about how many employers in the industry covered by the Awards are in receipt of the JobKeeper scheme. There is also no evidence about how many employers in the industry have missed out on the JobKeeper scheme and require 'flexibilities' to address issues arising from the pandemic.

39. *Second*, there is not a regulatory gap left by JobKeeper. It was a specific policy decision taken by the Federal Government. As the Commission observed in the Fast Food Industry decision ([2020] FWCFB 2316),

> "[92] We agree with RAFFWU's submission that there is 'no regulatory gap'. Rather the scope of the JobKeeper scheme is a deliberate policy choice by the Commonwealth."

40. *Third,* and more importantly, there is a substantial difference between the JobKeeper scheme and what is being proposed by the applicants and that is the minimum payment to employees.

41. Under JobKeeper there is a minimum payment of $1500 per fortnight, which at $750 per week is equivalent to:

- 77% of the award minimum weekly pay of a daily hire CW3 carpenter under the *Building and Construction General On-site Award 2010,*
- 80% of the award minimum weekly pay of a MCE2 non-slew (Franna) crane operator under the *Mobile Crane Hiring Award 2010,* and
- 81% of the award minimum weekly pay of level 5 Joiner under the *Joinery and Building Trades Award 2010*.

42. The purpose of JobKeeper is a wage subsidy, as explained in the Explanatory Memorandum (see Appendix A):

> "On 30 March 2020, the Australian Government announced a wage subsidy called the JobKeeper payment for entities that have been significantly affected by the economic impacts of the Coronavirus
>
> ……
>
> A business that is entitled to the JobKeeper payment will receive a fixed payment of $1,500 per fortnight per eligible employee. The payment must have already been passed on to the eligible employee in full. The payment provides the equivalent of approximately 70 per cent of the national median wage. In addition a business may be entitled to the JobKeeper payment for the business owner or a nominated owner regardless of whether the business has eligible employees.

By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during this period of downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over."[12]

43. **Under the applicants proposed variation, there is no minimum payment to employees**. **There is no wage subsidy**. An employee could be told not to work for an unlimited period during the life of the proposed schedule and not be paid anything and then when they are made redundant face the prospect of an application by their employer to pay a reduced amount or no amount of redundancy pay.

44. The further general argument advanced by the applicants is that they seek the same provisions as inserted into other awards by recent decisions of the Commission.[13] This contention is flawed.

45. *First*, many of the changes are not the same as the provisions inserted into other awards.

46. *Second*, and more importantly, a Full Bench in its decision on the Fast Food Industry Award ([2020] FWCFB 2316) recognised the points of distinction between applications, and that each of the COVID-19 related award variations made by the Commission turns on its own facts,

> "[82] We note here that Ai Group's reliance on the Commission's earlier decisions in relation to the Hospitality, Restaurants and Private Sector Clerical Awards is misconceived. Contrary to Ai Group's contention that there are parallels between those decisions and the circumstances of the present matter, we think there are clear points of distinction. In particular:
>
> - the variations in respect of each of these awards only operate until 30 June 2020 – Ai Group is proposing that the variations to the Fast food Award operate until mid-August 2020;
> - at the time the earlier variations were made there was a high degree of uncertainty regarding the timeframe associated with the easing of COVID-19 related restrictions – there is now a road map for the easing of restrictions and some restrictions have already been eased;
> - the variation in respect of these awards were determined before the implementation of the JobKeeper Scheme and the flexibilities made available through Part 6-4C of the Fair Work Act 2009 (Cth) the Act; and

[12] Explanatory Memorandum at pp.1-2

[13] See paragraph 29 of Schedule C to the Application, MBA Submission at paragraph 43, HIA submission at 5.1.1 and 6.1.7

- each of the previous matters were supported by all of the industrial parties – that is not the case in respect of the matter before us.

[83] Each of the COVID-19 related award variations made by the Commission turns on its own facts. While the general context may be the same; the impact of the pandemic has not been uniform in its severity, as is evident from Mr Newlands' evidence regarding the impact on McDonalds' operations."

47. The applicants case, in truth, devolves to nothing more than an assertion that because a provision was inserted into another industry award, that similar provisions should therefore be inserted into the Awards.

48. The applicants say that they propose that the temporary schedule only apply until 31st December 2020[14], but their clear intention is to uss this application as a stalking horse for a much longer operation as betrayed by the submissions of the applicants.

49. The HIA say,

> "6.5.3 The Application looks to operate hand in glove with other support measures to ensure that the Awards can, on a temporary basis, and only while the Pandemic continues to adversely affect the residential building industry…..
>
> 6.5.7 Secondly, it is clear that the impacts of the Pandemic will not change simply because of an easing of restrictions.
>
> ……
>
> 6.5.11 Clearly the impact of the Pandemic is long term and not completely known."

50. The HIA's own National Outlook, Autumn edition 2020 states that:

> "Even if population growth returns early in 2021, and the government and the RBA have bridged the gap through fiscal and monetary stimulus, **new home construction and associated employment will not recover within the next two years**."[15]

51. The MBA are perhaps are, perhaps, more forthright with their intentions, stating:

> "23. Further, a full return to pre-COVID-19 business conditions for building and construction is forecast to be longer than other industry sectors as demand/activity is linked to general market confidence and consumer activity. The inherent lag between the commission and commencement of new works ……..is expected to delay any positive trend in building activity until 2021/22. Industry activity levels are not predicted to revert

[14] HIA submission at 3.1.5
[15] HIA submission at page 23

to the long-term home building trajectory February (last data prior to COVID-19) until 2024/25.

….

26. The variations proposed …. Would take the form of a schedule that:

a) is temporary and proposed to expire on 31 December 2020, unless otherwise extended;

….

44. Schedule H.1 deals with the operation of Schedule H generally. Item H.1.1 sets the period for which the Schedule is proposed to operate, being from a date as determined by the Commission and expires on 31 December 2020, subject to any extension."

….

52. As the real intention is to have the Schedule apply long term and not on a very short term temporary basis, it can only be seen as an attack on the award safety net of building and construction workers and an attempt to overturn the recent Decision of the Construction Awards Full Bench in the 4 yearly review of modern awards.

Unpaid Pandemic Leave and Double Annual Leave at Half Pay

53. Turning to the specific variations to be included in the proposed schedule, the applicants seek the unpaid pandemic leave and annual leave provisions that were inserted in 99 awards by a Full Bench on 8th April 2020. In the decision ([2020] FWCFB 1837) approving the variations, the construction awards were excluded on the basis that,

"[4] These awards were not included because:

- the businesses in these sectors have not been as adversely impacted (to date) by the COVID-19 pandemic as some other sectors. For example the ABS survey reported that 37% of businesses in mining had been adversely affected, compared to 78% of businesses within the accommodation and food services industry. Further, on the basis of Professor Borland's report, the Construction sector is not likely to be affected in the short term; and
- these sectors do not have a high level of award-reliance and enterprise agreements are relatively common."

54. It is submitted that the observations made by the Full Bench are still relevant today as they were in April 2020. The applicants have not demonstrated otherwise. Enterprise agreements remain

common (and indeed prevalent) in the building and construction industry; there has been no surge in applications to terminate agreements; and new agreements are still being made and approved by the Commission. There has been no change in the level of award-reliance in the industry[16] and the short-term effect of covid-19 has not substantially changed in the industry.

55. The applicants have provided no evidence of the number of building and construction workers who have been diagnosed as positive for Covid-19, or evidence of building and construction workers who have been required to quarantine because they have come into contact with people with Covid-19. This is not surprising because to date there have been very few, in large part thanks to the successful measures implemented to avoid the spread of Covid-19 in the industry. Attached at Appendix B is a witness statement of Nigel Davies, the Assistant National Secretary of the CFMMEU C&G which identifies the number of cases that the CFMMEU C&G are aware of and the steps taken to deal with the situation.

56. There is no evidence before the Commission of employees applying for annual leave and being denied leave, or employees being denied taking a weeks' leave followed by a week of unpaid leave (which is effectively the same arrangement of annual leave at half pay).

57. The CFMMEU C&G therefore submits that these provisions are not needed and not necessary to meet the modern awards objective.

Directions to Take Annual Leave

58. The proposed clause H.5.3 seeks to give the employer the right to direct an employee to take any accrued annual leave. Any such direction would not have effect if it resulted in an employee having less than 2 weeks remaining.

59. The MBA claim that the proposed variation would give workplaces greater capacity to respond quickly to relevant circumstances as they arise when compared to conventional provisions which are narrow and restricted in application, and use the existing clauses 38.6 and 38.7 of the Building and Construction General On-site Award 2010 which deal with excessive leave as an example.[17]

60. The HIA attempt to justify the proposed variation on the basis that it was inserted into the Clerks Private Sector Award 2010[18], and that it offers another option to employees and employers to maintain a connection with employment and to ensure businesses can be responsive to levels of demand.[19]

[16] The 2013 Research Report 2013/6 at table 4.7 found that 7% of construction workers were award reliant by pay setting, see https://www.fwc.gov.au/documents/sites/wagereview2014/research/report6.pdf
[17] MBA Submission at paragraph 54
[18] HIA Submission at 5.2.3
[19] HIA Submission at 5.2.5

61. The MBA provide no specific evidence to support their assertion that the variation would "give workplaces greater capacity to respond quickly to relevant circumstances as they arise" or otherwise demonstrate why the variations are necessary. The excessive leave provisions deal with a specific issue and contain protections for workers, whereas there are no protections for employees in the proposed variation. Further, clause H5.3 is contrary to s. 93(3) of the FW Act as the power of an employer to direct an employee to take annual leave is not conditioned by a requirement of 'reasonableness'. It follows that this provision contravenes s 55 of the FW Act as it would, in its operation, result in an outcome whereby employees do not receive in full the benefit provided by s 93(3).[20] H5.3 is a term that cannot, by s 136(1)(c) be included in the a modern award.

62. The HIA reliance on the Clerks Decision is misconceived for the reasons set out in paragraphs 40 and 41 above. In the March 2020 Decision, the Full Bench had a consent arrangement before them which is not the case now. The evidence in those proceedings was of a totally different set of circumstances:

> "[14] Annexure B to the Joint Application sets out the following impacts of the COVID-19 pandemic ***on office work***:
>
> '50. Office work is currently materially impacted by CoV.
> 51. Most offices in CBD's and major towns are now empty with employees encouraged to work from home as far as practicable.
> 52. Those still attending work are adopting new work patterns to reduce the level of exposure to colleagues.
> 53. This includes rostering a limited number of employees into work at any one time and spacing employees out in the physical office environment.'" (emphasis added)

63. Further in the recent application to extend the operation of the Schedule in the Clerks Award (AM2020/30), the employers agreed to remove the provision now sought by the HIA.[21]

64. There is no basis for the inclusion of provisions permitting employers to direct employees to take accrued annual leave. The provision, as proposed, is contrary to s 93(3) in any event.

Directions to take accrued RDO's

65. Proposed clauses H.5.4-5.5 seeks to give an employer the right to direct an employee to take any Rostered Days Off (RDO's) that are accrued by the giving of one week's notice, or any shorter period of notice that may be agreed.

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[20] *Canavan Building Pty Ltd* [2014] FWCFB 3202 at [36].
[21] Transcript of 30th June 2020 at PN16

66. The HIA say that the award requires that ordinary hours of work incorporate a system for the accruing and taking of RDO's and rely on the same reasoning and methodology applicable to the proposed direction to take annual leave.

67. The MBA also say that the On-site Award does not provide any capacity for an employer to direct the taking of RDO's.[22]

68. The problem with the HIA argument is that the hours of work clause in the On-Site Award does not do what they say. Prior to the variations made on 1st July 2020, the award permitted employers and a majority of employees to reach agreement on working other than the rostered day off cycle (clause 33.1(a)(vii)). This provision remains and, following the variations applying from 1 July 2020[23], is now found in clause 33.2 of the award.

69. The hours of work clause has also been significantly varied from 1 July 2020, mainly in line with what the HIA and MBA wanted, to now allow employers to set what days are taken as RDO's by the issuing of a roster prior to the commencement of a 4 week cycle. Clause 33.1(c) now provides as follows:

> "(c) **Taking the accrued RDO**
>
> (i) 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.
>
> (ii) The means by which a written roster under clause 33.1(c) 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

[22] MBA Submission at paragraph 57
[23] https://www.fwc.gov.au/documents/awardsandorders/html/pr715725.htm

• 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.

(iii) A roster issued in accordance with clause 33.1(c)(i) must not require an employee to take an RDO on a day that is a public holiday."

70. The MBA and HIA have failed to provide any evidence of employers and employees not being able to reach agreement on the taking of accrued RDO's or explain why the additional temporary provision to apply to accrued RDO's is required.

Employee Duties

71. Proposed clause H.6.1 seeks to require employees to perform all duties within their skill and competency regardless of their classification. It would also provide that no employee shall have their pay reduced as a result of being directed to perform duties in accordance with the clause.

72. The MBA claim that the provisions of the existing Awards are narrow in this regard and are generally limited to conventional 'higher duties' provisions. The HIA make no submission on this issue.

73. The MBA are wrong in their interpretation of the On-Site Award and they fail to give the proper recognition to the classification structure under the award. Each of the classification levels in Schedule B of the award have a skills and duties provision, for example:

B.2.2 Construction worker level 2/Engineering construction worker level 2 (CW/ECW 2)

(a) A CW/ECW 2 works under limited supervision in one or more skill streams contained within this award. A CW/ECW 2 will:

(i) have completed in accordance with RPL principles a Construction Skills Test equivalent to the required competency standards; or

(ii) have completed relevant structured training equivalent to the required competency standards; or

(iii) successfully completed an Engineering Construction Industry Certificate Level 2 consisting of a total of 20 appropriate modules, or formally recognised equivalent accredited training so as to enable the employee to perform work within the scope of this level; or

(iv) obtained skills equivalent to the above gained through work experience subject to competency testing to the prescribed standard.

(b) Skills and duties

(i) An employee at this level performs work to the extent of their skills, competence and training. Employees will acquire skills both formal and informal over time and with experience, and will undertake indicative tasks and duties within the scope of skills they possess.

(ii) An employee at this level may be part of a self-directed WAT and may be responsible for the supervision of one or more employees working at CW/ECW 1 level.

(iii) An employee at this level:

- can interpret plans and drawings relevant to their functions;
- assists with the provision of on-the-job training;
- assumes responsibility for allocating tasks within a WAT within the area of the employee's skill, competence and training;
- has some responsibility for the order and purchase of materials within defined parameters;
- is able to sequence functions relevant to the employee's WAT;
- applies quality control techniques to the employee's own work and other employees within the WAT;
- works from complex instructions and procedures;
- co-ordinates work in a team environment or works individually under general supervision;
- is responsible for assuring the quality of their work;
- works in a safe manner;
- exercises discretion within their level of training;
- understands the construction process in their sector and has a basic level of understanding of processes in other sectors;
- implements basic fault-finding and problem solving skills within the employee's sphere of work;
- interacts harmoniously with employees of other companies on-site;
- anticipates and plans for changes to the work environment.

(c) Indicative tasks which an employee at this level may perform include the following:

- calculates safe loads and stress factors;
- measures accurately using specialised equipment;
- non-trades maintenance of relevant plant and equipment;
- anticipates and plans for constant changes to the work environment.
- materials handling;
- operates machinery and equipment requiring the exercise of skill and knowledge beyond that of an employee at CW/ECW 1 (level d);
- uses measuring and levelling instruments;
- performs basic quality checks on the work of others;
- oxy acetylene cutting.

74. It is also not clear why such a provision is necessary given that such a direction would be a lawful and reasonable one.
75. The MBA have not identified any particular work that employees cannot perform at each of the classification levels. There is no evidence that such a provision is necessary.

<u>Hours of Work</u>

76. The proposed clause H.7.1 seeks to give the employer the right to give a direction to an employee during a period to:
    - Not work on a day or days on which an employee would usually work; or
    - Work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
    - Work a reduced number of hours (compared with the employee's ordinary hours of work) which may be nil (H.7.1g))
77. The MBA do not even attempt to say why this provision is necessary. They simply observed that there is no such provision in the Award. [24]
78. The HIA say that the clause is needed "to keep employees connected with their workplaces by allowing greater flexibility regarding working hours including enabling employees (sic) to engaging workers for less hours or be stood down without pay".[25] Why the circumstances of the construction industry require such a clause are not identified in the submissions or, more importantly, the evidence.
79. This blatant attempt to further casualise the industry and introduce what is essentially a zero hours contract is not based on any evidence. The provision has nothing whatsoever to do with maintaining employment. It is a disguised attack on the minimum working hours of building and construction workers and has no place in modern awards.
80. As for the MBA reference to the Joinery Award, this ignore the variation to that award which removed the 60% requirement.[26]
81. The proposed Schedule H.7.2 seeks to replace clause 33.1 of the award with a provision that allows an employer and an employee to agree to 38 ordinary hours being worked between 6.00am and 7.00pm Monday to Friday and 6.00am and 2.00pm Saturdays.
82. The MBA claim that the clause retains the broader parameters as to when ordinary hours of work can be performed and uses the example of not more than 5 days per week. This is incorrect as there is no mention of not more than 5 days per week.
83. The MBA say that intention of this variation is to broaden the options as to when ordinary hours of work can be performed to accommodate disruptions to work arising from COVID-19 impacts, stagger ordinary hours of work to better accommodate WHS obligations such as social distancing and hygiene, and accommodate other changes to workflow and future work programmes.[27] They also say that the variation would give more capacity to workplaces to

[24] MBA Submission at paragraph 67
[25] HIA Submission at 5.3.7
[26] https://www.fwc.gov.au/documents/awardsandorders/html/pr715726.htm
[27] MBA Submission at paragraph 70

embrace alterations to the times during which construction activity can take place and refer to changes in the City of Melbourne and in NSW.[28]

84. Other than the general statement of Tony Grippi, the MBA provide **no evidence** to support the changes to ordinary hours. Nor do they address why the penalty for working on Saturday should be removed. The evidence of Jade Ingham and Nigel Davies show that the staggering of ordinary hours is already occurring. The ready inference is that it can be accommodated within existing award provisions. The evidence of Nigel Davies also shows the importance of penalty rates on Saturdays for casual workers in particular.
85. The changes to hours in which construction work can occur are not a new phenomenon as a permit system to allow work to be performed in certain areas at unusual times is common in the building and construction industry. As the press release from the City of Melbourne notes,

> "The city's Local Law currently allows for construction activity to occur between the hours of 7am and 7pm on weekdays and between 8am and 3pm on Saturdays. Approval is required from Council to work outside these standard hours.
>
> The temporary measures will not applied as a 'blanket approval'. They will be administered on a case by case basis under the existing local law via 'out of hours' permits."[29]

86. Moreover, the changes have nothing to do with extending the period in which ordinary hours can be worked but are concerned with increasing the hours of work on construction projects to "fast track construction projects" on a case by case basis.
87. In essence, what the applicants seek is an averaging provision similar to that proposed by the HIA in the 4-yearly review[30] which was rejected by the Construction Awards Full Bench.
88. The HIA advance an argument that the clause is necessary to comply with covid-19 health and hygiene requirements and that additional flexibility is necessary in order to ensure that work is carried out in a timely way without imposing an unreasonable cost burden.[31] The HIA refers to its own Industry Guidelines for managing COVID-19 on sites.[32]
89. The HIA provide no evidence of their guidelines being followed in practice, nor do they explain why the 'no more than 6 rule' which the guidelines refer to does not apply to renovation and repair sites. The HIA suggestion that a housing site can have up to 25-30 trades coming and going at any one time[33] defies belief. How a dwelling house could have 30 tradespersons

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[28] Ibid at 71 and 72
[29] https://www.melbourne.vic.gov.au/news-and-media/Pages/Construction-hours-extended-in-response-to-COVID-19.aspx
[30] [2018] FWCFB 6019 at [372] -[373]
[31] HIA Submission at 5.3.2 and 5.3.3
[32] Ibid at 5.3.4 and 5.3.5
[33] Ibid at 5.3.6

working in it at once seems somewhat far-fetched. It is difficult to comprehend how concreters, framing carpenters, roof tilers, kitchen installers and floor sanders would all be working at the same time. More importantly its relevance to the Awards is highly questionable given that the overwhelming majority of the workers engaged in residential construction would not be employees, but subcontractors on ABN's.

90. There is no evidentiary basis justifying the inclusion of this provision in any of the Awards.

Location of work

91. Proposed clause H.8 seeks to allow an employer to direct an employee to perform duties at a place different from the employee's normal place of work. The HIA submission does not address this issue at all.
92. The MBA claim that the proposed variation is necessary as apart from clause 23 –Inclement Weather of the On-Site Award, there is no clear, positive right to alter the location of work and that clarity and certainty are necessary.[34]
93. The MBA fail to recognise that clause 24 – Living Away From Home - Distant Work, and clause 25 – Travelling Time Entitlements both implicitly recognise that employees under the On-site Award can be required to work at different locations (see clauses 24.6 - Travelling expenses, clause 25.1 - Fares and travel pattern allowance, and 25.2 - Travelling between construction sites). The variation is totally unnecessary. There is, in any event, a vacuum of evidence that would justify it.

Redundancy

94. The proposed Schedule H.9 seeks to change the definition of redundancy under clause 17.2 of the Building and Construction General On-site Award 2010 and allow an employer to apply for a variation to reduce the amount of redundancy pay.
95. The issue of redundancy is dealt with above.
96. No evidentiary foundation for this variation is established.

Casual Employment

97. The proposed Schedule H.10 seeks to reduce the minimum engagement of casuals to 2 hours per engagement. There is no evidence that minimum casual engagement is an issue in the industry generally or as a result of matters arising as a consequence of the pandemic. Nor is there any evidence that the current minimum engagement provisions are not satisfying the modern award objective.
98. The MBA say that the temporary alteration to the minimum engagement provisions "*is a clear example that will promote greater opportunities to work, particularly in relation to the Joinery*

[34] MBA Submission at paragraphs 76 and 77.

award which requires casuals to be engaged for a minimum of 7.6 hours".[35] The HIA argue that the "*current minimum engagement periods may represent a significant barrier to their continued engagement*".[36]

99. Neither the MBA or HIA provide any evidence to support these loose and general assertions. Such a substantial reduction in the minimum engagement for casual employees will have a significant impact on the earnings of the most insecure workers in the industry. There is no merit whatsoever in this proposed variation.

Evidence

100. The applicants' main argument in support of the application is the negative impact of Covid-19 on the building and construction industry. But the applicants' main argument is not based on the government restrictions impacting on sites and businesses in the industry, although they do try and tie in the social distancing on sites as having an impact.

101. Unlike other applications to vary awards because of short term changes brought about by businesses forced to close down because of government requirements banning large gatherings, or requirements that people not travel or work from home where possible, this application is made because of the flow on effects that the Covid-19 pandemic will have on the demand for work performed by the industry. In other words, the argument advanced is an economic one based on the looming recession.

102. The main evidence provided by the applicants such as the witness statements of Warwick Temby and Shane Garrett, and the HIA National Outlook are all directed to the potential downturn in the industry caused by a reduction in consumer confidence, reduced permanent migration and the reduction in overseas students. But these are all macro issues, not matters affected by the redundancy provisions of awards or the hours worked by an employee on a particular day.

103. Reducing the award conditions of construction workers will not affect these macro issues one iota. Attached at Appendix C is an Economic Report prepared for the CFMMEU C&G by Dr Phillip Toner and Dr Rafferty. This expert report identifies that:

- Employment in the industry is cyclical and based on periods of boom activity and recession.
- Sections of the industry were not travelling as well as others prior to the Covid-19 pandemic and imposition of government restrictions.

[35] Ibid at paragraph 105
[36] HIA submission at 5.3.8

- To date, the institution of restrictions by Commonwealth and State governments have had minimal impact on construction activity.
- That government responses that seek to stimulate construction work will have a positive effect on employment in the industry.
- That industrial relations arrangements, including the terms of industry awards, will have little effect, if any, on employment levels and employment growth in the industry, or on the efficient and productive work performance or productivity.
- That economic forecasts are inherently unreliable as a measure of future activity.
- That the proposed variations contained in the application will have little, if any, impact on productivity, employment growth and the maintenance of employment or business viability.

104. Seen in the context of the Economic Report the possible recessionary impacts of Covid-19 are no different to those experienced in previous recession cycles such as the 1990-91 recession.

105. The other evidence provided by the applicants are the witness statements of Laura Reagan, Tony Grippi and Grant Galvin.

106. The evidence of Laura Reagan is nothing more than an additional submission of the HIA that tries to introduce third party conversations as evidence. It is nothing more that hearsay evidence which should be rejected or, in the alternate given little or no weight.[37]

107. The evidence of Grant Galvin as to the impact on the Queensland commercial construction industry is based on discussions with unnamed and unknown MBA members. This evidence is impermissible and untestable hearsay. It should be rejected.

108. The evidence of Tony Grippi, Operations Manager Sydney for Richard Crookes Constructions, is the only direct employer evidence provided by the applicants. The CFMMEU C&G applied for and was granted an order to produce documents for Richard Crookes Constructions related to the statement made by Tony Grippi. Mr Grippi's bald assertions are without substance.

109. The witness evidence of Nigel Davies and Jade Ingham contradict the evidence of Mr Grippi that measures to address social distancing on sites are slowing down work and causing disruptions to sites.

110. Apart from the inconvenience on the coordination of work on-site the applicants provide no evidence of any substance as to the immediate negative effect of Government restrictions. This is not surprising as building and construction sites have been deemed an essential service and

[37] Cf *Robinson v Sydney Trains* [2017] FWC 5097 at [51]-[55].

excluded from the harsher measures introduced affecting industries such as Hospitality and Fast Food. As the Full Bench observed in the Hospitality Decision ([2020] FWCFB 1574,

"*Government responses to the COVID-19 pandemic*

[16] The outbreak of the coronavirus (COVID-19) and the responses from governments, both federal and state, initially put restrictions on some businesses and then forced many to close, which has consequences for employees.

(i) Measures taken to restrict gatherings and non-essential business

[17] The Commonwealth Government has initiated the following guidelines for social distancing in order to stop or slow the spread of the disease:

- avoid handshaking and kissing;
- visit shops sparingly;
- consider whether outings and travel are necessary;
- reconsider non-essential business travel; and
- the suspension of non-essential gatherings for an initial period of 4 weeks.

[18] On 13 March 2020, the Commonwealth and State Governments agreed to advise against all non-essential organised public gatherings of more than 500 persons, effective from 16 March 2020. This did not impact schools, workplaces, hospitals, public transportation, domestic travel and universities as well as public transient places such as shopping centres.

[19] In addition, on 18 March 2020, non-essential indoor gatherings of more than 100 people (including staff) and outdoor activities of more than 500 people were not to be permitted. Essential gatherings include:

- Public transport;
- Medical and health care facilities, pharmacies, emergency service facilities;
- Correctional facilities, youth justice centres or other places of custody, courts and tribunals;
- Parliaments;
- Food markets, supermarkets and grocery stores, shopping centres; and
- Office buildings, factories, construction sites and mining sites.

111. The evidence taken as a whole in these proceedings demonstrates that work in the construction industry has continued during the Covid-19 pandemic and that government restrictions have had minimal impact.

Modern Awards Objective

112. The modern awards objective, encapsulated in s 134(1), is a composite expression requiring that modern awards, together with the NES provide a fair and minimum safety net of terms and conditions.[38] In undertaking the function reposed by s 134(1), the Commission is required to take into account the matters in s 134(1)(a)-(h).[39] The matters under s 134(1)(a)-(h) are not accorded any particular primacy and their relevance will depend on the particular case.[40] It is not necessary to make a finding that an award fail to satisfy one or more of the considerations under s 134(1)(a)-(h) before a variation may be made.[41]
113. Section 138 determines, relevantly, that a modern award *may* include terms that are permissible to be included and *must* include terms that are required to be included *only to the extent necessary to the achieve the modern awards objective*. What is 'necessary' to achieve the modern awards objective in the circumstances of the particular case and context of the particular award involves the exercise of an evaluative judgment having regard to s 134(1)(a)-(h) matters and assessed by reference to the proposed variations as well submissions and evidence. That being so, unless the Commission determines that a proposed variation will result in achievement of the modern awards objective, the variation should not be made.
114. Relevant matters under s 134(1) will be considered *seriatim*

Section 134(1)(a)

115. The proposed variations are apt to decrease the pay of award reliant employees, by reducing entitlements to overtime (by permitting the expansion of ordinary hours) and reducing minimum casual engagement. Moreover, award reliant employees covered by the On-Site Award will lose redundancy entitlements provided by the ISRS.
116. There is not a scintilla of evidence for the assertion that the variations are, as HIA contends, likely to cause employers to maintain employees if there is a downturn in work.
117. The variations undercut this objective.

Section 134(1)(b)

118. The proposed variations will do nothing to encourage collective bargaining. To the contrary, they will encourage employers to resist collective bargaining by incentivising them to rely upon varied Awards which pare back basic employment entitlements.

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[38] *Application to vary the Clerks – Private Sector Award 2020* [2020] FWCFB 3443 at [48] (***Clerks Award***).
[39] *SDA v AIG* at [48].
[40] *NRA v FWC* (2014) 225 FCR 154 at [105]-[106].
[41] *Clerks Award*

119. It is notable that the applicants do not suggest (nor could it be sensibly suggested) that any of the variations will encourage collective bargaining in the industry.

Section 134(1)(c)

120. There is no evidentiary warrant for the notion that the proposed variations will promote social inclusion via increased workforce participation. The applicants' contentions in this respect are premised on the variations facilitating the maintenance of employment. There is no evidentiary foundation for this conjectural contention

Section 134(1)(d)

121. There is no evidence that the variations will promote flexible work practices.
122. It appears from the evidence of Mr Davies and Mr Ingham that work practices in the construction industry are already sufficiently flexible to accommodate matters arising from the pandemic.
123. How the proposed variations could possibly impact the efficient or productive performance of work is unclear. The variations are a means to cut wages and conditions and have nought to do with enhancing efficiencies and productivity in the performance of work.

Section 134(1)(da)

124. The proposed variations *remove* additional remuneration that award-reliant employees would otherwise receive for working overtime and on weekends by permitting ordinary hours to be worked between 6:00AM and 7:00PM on weekdays and 6:00AM and 2:00PM on Saturdays.

Section 134(1)(f)

125. There is no evidence that the current provisions of the Awards are impeding business productivity, employment costs or otherwise imposing an undue or unwarranted regulatory burden in the context of the pandemic.
126. Contrary to the MBA submissions, there is no evidence that there has been a *decline* in productivity in the industry. Moreover, there is no evidence that the changes will increase *productivity,* as that noun is properly understood. To the contrary, as the Economic Report demonstrates, award matters have little if any impact on productivity in the industry.
127. It is useful in this regard to pay attention to what 'productivity' actually means, given the misguided nature of the assertions about it in the applicants' submissions. A Full Bench of Fair Work Australia explained in *Fair Work Australia v Schweppes Australia Pty Ltd* [2012] FWAFB 7858:[42]

[42] At [42]-[43] and [45].

We accept that the conventional economic meaning of the word 'productivity' is the number of units of output per units of inputs. Productivity is a measure of the volume or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Schweppes incorrectly equates productivity with the average cost of labour per unit, which, properly understood, is a measure of nominal labour costs.

In our view productivity, as used in the Act, refers to the conventional economic meaning of the quantity of output relative to the quantity of inputs. It is quite different in concept to the price of output and price of inputs, including the price of labour.

…

… we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed to the conventional economic concept of the quantity of output relative to the quantity of inputs…

128. The application seeks to reduce labour costs for employers. It has nothing whatsoever to do with increasing productivity.
129. Further, there is no evidence that the application will impact on or decrease the regulatory burden on employers in any tangible sense.

Section 134(1)(h)

130. The proposed variations will not impact (in a positive manner) employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
131. Rather, they are a cynical attempt to reduce basic conditions under the guise of the pandemic and in circumstances where the construction industry has not been impacted to the drastic extent other industries have by Covid-19 and government restrictions.
132. In all the circumstances, the proposed variations do not meet the modern awards objective.

Conclusion

133. The application should be dismissed.
134. There is no valid application before the Commission. Further, the proposed variations to the industry-specific redundancy schemes are contrary to the requirements of FW Act, the variations sought are without merit, and the applicants have failed to provide probative evidence to support the proposed variations.

Appendix A – Explanatory Statement – JobKeeper Rules

Appendix B – Witness Statement of Nigel Davies

Appendix C – Economic Report

Appendix D – Witness Statement of Jade Ingham