



HOUSING INDUSTRY ASSOCIATION



Submissions to the Fair Work Commission

Plain Language – Shutdown Provisions (AM 2016/15)

21 November 2022

contents



ABOUT THE HOUSING INDUSTRY ASSOCIATION2

1. INTRODUCTION2

2. EMPLOYER EVIDENCE3

3. SUBSTANTIAL CHANGE3

4. INDUSTRY PRACTICE.....4

5. NEGATIVE IMPACT ON EMPLOYMENT OPPORTUNITY4

6. INCREASED COSTS AND IMPACT ON EMPLOYEE LEAVE5

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into the manufacturing, supply and retail sectors.

Contributing over \$100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

- 1.1. This submission is filed by the Housing Industry Association (HIA) in response to the Fair Work Commission (FWC) decision issued on 25 August 2022 in AM 2016/15¹ (Decision) in relation to the annual shutdown provisions in the modern awards.
- 1.2. In its Decision, the Full Bench set out a provisional view regarding the current modern award annual shutdown provisions (Provisional View).
- 1.3. A key element of the Provisional View was that a modern award term that allows an employer to direct an employee to take unpaid leave during an annual shut down period is not permitted to be included in modern awards. For this reason, amongst a number, the Provisional View also proposed that current annual shutdown provisions be replaced with a model term, to be adopted across all applicable modern awards (subject to necessary award specific modifications) that deals with an annual shutdown (Model Shutdown Term).
- 1.4. In summary, under the Model Shutdown Term, HIA understands that:
 - Employers retain the right to impose a temporary annual shutdown.
 - An employer must provide a period of notice of the temporary annual shutdown.
 - An employer may direct an employee to take paid annual leave for the temporary annual shutdown period.
 - An employee may take annual leave in advance during the temporary annual shutdown period.
- 1.5. Under the Model Shutdown Term an employer would not be permitted to direct an employee to take unpaid leave during the temporary annual shutdown.
- 1.6. It is proposed that the Model Shutdown Term be included in the *Building and Construction General Onsite Award 2020* (On-Site Award), the *Joinery and Building Trades Award 2020* (Joinery Award) the *Manufacturing and Associated Industries and Occupations Award 2020* and the *Timber Industry Award 2020*. HIA has an interest in these awards.
- 1.7. HIA opposes the Provisional View and the insertion of the Model Shutdown Term into the modern awards that HIA expresses an interest in. Adoption of the Model Shutdown Term stands at odds with the modern awards objectives, specifically section 134 (1)(c)(f) and (h) of the *Fair Work Act 2009* on the basis that:
 - Survey evidence shows the widespread adoption and acceptance of annual industry shutdowns including the acceptance of the possibility of employers directing employees to take unpaid leave during this period.
 - The change represents a substantial change to the modern awards not envisaged as a part of the FWC's plain language redrafting process and not agitated by any interested party.
 - The Model Shutdown Term would:
 - Jeopardise well accepted and long-standing industry practice adversely impacting productivity, employment costs and imposing an additional regulatory burden.
 - Adversely impact employment opportunities and workforce participation, including opportunities for apprentices.
 - Lead to increased costs from employers and the economy more broadly.

¹ [2022] FWCFB 161



- Raise questions regarding the taking of annual leave at other times during the year.
- 1.8. HIA relies on the submission filed on behalf of Australian Chamber of Commerce and Industry (ACCI) dated 21 November 2022.

2. EMPLOYER EVIDENCE

ACCI SURVEY

- 2.1. During October and November 2022, ACCI and the Australian Industry Group conducted a survey (the Survey) in relation to the extent that employers use annual shutdown provisions to direct employees who have insufficient annual leave to take leave without pay during the period of such a shutdown.
- 2.2. On 27 October 2022, HIA communicated to members alerting them to the proposed changes including the proposal to adopt the Model Shutdown Term and directing HIA members to the ACCI Survey.
- 2.3. HIA refers to paragraphs 5.26 to 5.28 and Schedule 2 of the submissions filed on behalf of ACCI in relation to the survey results.

HIA WITNESS STATEMENT

- 2.4. HIA refers to the witness statement of Russell Holtham, General Manager Operations of HIA Apprentices filed 21 November 2022 and set out at Attachment A (the Statement).
- 2.5. The Statement evidences the impact the Model Shutdown Term will have on:
- The employment opportunities for apprentices who may not be recruited during the final quarter of the year.
 - A businesses financial position which will be impacted by the potential requirement to pay for additional annual leave.
 - The taking of accrued annual leave at other times of the year.

3. SUBSTANTIAL CHANGE

- 3.1. The reconsideration of the modern award annual shutdown provisions arose out of the plain language redrafting common matter, a matter directed at redrafting modern awards, so they were easy to understand and apply.
- 3.2. HIA understood that the plain language redrafting common matter was not directed at making changes that would substantially alter the meaning or operation of modern awards provisions.
- 3.3. HIA submits that the Model Shutdown Term represents a substantial change to the modern awards that was not envisaged as a part of the plain language redrafting common matter.
- 3.4. For example, the Modern Shutdown Term is significantly different to the current provisions at clause 31.3 of the On-Site Award and clause 27.9 of the Joinery Award. In particular, and as highlighted in the Decision, the Model Shutdown Term removes the ability of an employer, to direct employees to take a period of unpaid leave, where they do not have sufficient accrued annual leave, during the annual shutdown period.



- 3.5. Finally, and while not determinative of the approach by the FWC the fact that no party has sought a change to the shutdown provisions should weigh against the insertion of the Model Shutdown Term.

4. INDUSTRY PRACTICE

- 4.1. The insertion of the Model Shutdown Term would have a significant and undesirable impact on the residential building industry.
- 4.2. Shutdowns are a common and widespread practice utilised by employers in the residential building industry. The 'annual' nature of the shutdowns (as reflected in the titles of the current clauses) are a long standing and well understood feature of not only the residential building industry, but the building and construction industry more broadly.
- 4.3. The shutdown over the Christmas/new year period is industry practice.
- 4.4. The Survey reports that 89.5% of employers shut down all or part of their operations during this time². Industry shutdowns in the residential building industry are implemented for reasons including:
- To coincide with an annual or seasonal slow down or cessation of trade.
 - To coincide with shutdowns implemented by other related organisations such as clients and suppliers.
 - To reduce or avoid the disruption that would be caused by multiple public holidays if a shutdown was not implemented.
- 4.5. The industry practice is confirmed by residential building contracts which include a term in relation to the industry shutdown, to give notice to homeowners regarding the shutdown and any necessary extension of time to the building period as a result of the shutdown period.
- 4.6. Considering the industry practice, and the proposed operation of the Model Shutdown Term, if an employee refuses to take unpaid leave during the temporary annual shutdown and, as a consequence, the employer does not shutdown, the impracticalities of operating in the residential building industry during this period are almost insurmountable for example:
- The industry wide nature of the shutdown affects all interrelated supply chains meaning that for example materials become unavailable hamstringing the progress of residential building projects during this period.
 - Allowing a limited number of employees on site may raise safety issues.
 - In the renovation, alterations and additions segment residential homeowners may not want trades working on their properties during this time, leaving builders with no choice but to shutdown.
 - There are no other forms of work available.

5. NEGATIVE IMPACT ON EMPLOYMENT OPPORTUNITY

- 5.1. The Statement sets out a number of negative impacts on employment opportunities should the Model Shutdown Term be adopted.
- 5.2. The final quarter of the year is generally the busiest time for businesses, resulting in a higher level of recruitment. For the residential building industry, school leavers often commence an

² 5.27(c) of the ACCI Submission



apprenticeship during this time³.

- 5.3. Any employee hired during this time would not have sufficient annual leave accrued to cover the industry shutdown period. Accordingly, it is accepted practice for employers to direct employees to take unpaid leave⁴.
- 5.4. If employers are not permitted to direct employees to take unpaid leave and are instead required to offer leave in advance, businesses will likely face issues in relation to the ability to recovery entitlements paid in advance due to challenges arising from staff retention.
- 5.5. For example, apprentices often resign from their apprenticeship within the first 3 to 6 months⁵. Businesses often deal with issues arising from an employee either not returning to work after the shutdown period or terminating their employment a short time later. In these scenarios, it is often difficult for employers to recover the cost of the annual leave in advance from the employee due to:
 - The employee not returning to work immediately after the shutdown.
 - The employee returning to work but resigning either without notice or insufficient notice for the employer to recover the leave paid in advance (as a result of the employee having been paid in advance).
- 5.6. To resolve these issues, employers will be faced with the option of either:
 - Continuing to recruit as per normal and paying all staff leave in advance with the potential risk that the employee will resign, leaving the employer out of pocket; or
 - Not recruiting in the final quarter of each year, to avoid having staff at Christmas not having sufficient leave accrued to cover the shutdown period; or
 - Increase the cost of their business services to cover any potential leave entitlement requirements.

6. INCREASED COSTS AND IMPACT ON EMPLOYEE LEAVE

- 6.1. The Statement evidences the potential cost impacts on employers should the Model Shutdown Term be adopted.
- 6.2. The Statement also raises concerns regarding the taking of accrued annual leave at other times of the year should the Model Shutdown Term be adopted.
- 6.3. A business seeking to shut down during the Christmas/New Year period could face increased employment costs due to employees without a sufficient annual leave balance or no accrued annual leave and who refuse to take annual leave in advance (as per the Model Shutdown Term).
- 6.4. In these circumstances, all employees, including both those with accrued annual leave and those without, would be required to be paid. This not only introduces a new cost burden on employers but also creates an undesirable outcome regarding the use of annual leave more generally. For example, it would seem inherently unfair that those employees with accrued annual leave are required to use that entitlement during a shutdown period while those without will, nevertheless, get paid without using up their accrued entitlement.

³ [21] Statement of Russell Holtham

⁴ [22] – [23] Statement of Russell Holtham

⁵ [31] Statement of Russell Holtham



- 6.3 Questions also arise regarding what an employer's rights are in relation to the taking of annual leave by an employee at other times during the year.
- 6.4 An employee may choose to take their four weeks of paid annual leave throughout the year, which would leave them either with the option of reaching an agreement to take annual leave in advance during the shutdown period or, unpaid leave. For example, the Statement includes evidence of HIA Apprentices recruited on or after 2018 who have taken unpaid leave during the shutdown period⁶. In those circumstances, HIA provided those employees with unpaid leave in accordance with the On-Site Award.
- 6.5 Section 88(2) of the *Fair Work Act 2009* states that an employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave. It is unclear whether it would be considered reasonable for an employer to refuse an employee's annual leave request during the year to ensure the employee has a sufficient accrued annual leave balance to cover the shutdown period.
- 6.6 The Model Shutdown Term may have the unintended consequence of providing employees with the right to, or expectation of, more than 4 weeks paid annual leave.

⁶ [28] Statement of Russell Holtham



Attachment A

IN FAIR WORK COMMISSION

FWA Matter No: AM2016/15

Applicant: Housing Industry Association

PLAIN LANGUAGE – SHUTDOWN PROVISIONS

STATEMENT OF RUSSELL HOLTHAM

I, Russell Holtham of Corner Station Place and Port Road Hindmarsh South Australia, General Manager Operations HIA Apprentices state as follows:

- 1 I have been employed with the Housing Industry Association Limited (HIA) for 21 years.
- 2 I am currently employed as the General Manager Operations HIA Apprentices.
- 3 I have the authority to swear this statement on behalf of HIA.
- 4 In my role, I am responsible for the National Operations of HIA Apprentices, HIA's Group Training Scheme. My key responsibilities include managing the operation and development of HIA Apprentices to ensure growth, profitability and the maintenance of high quality service levels for all customers.
- 5 Prior to this I was HIA's Commercial Manager for South Australia (SA) which included being Manager of HIA Apprentices SA.
- 6 Prior to HIA I spent 17 years with a company called Amdel Laboratories, where I was the Manager of their Analytical Laboratory in Kalgoorlie, Meekatharra and Darwin.

Proposed change to the Modern Awards

- 7 I am aware of the Fair Work Commission Decision dated 25 August 2022 in relation to annual leave shutdown provisions in the modern awards.
- 8 I make this statement in support of the submissions made by HIA in relation to the *Building and Construction General On-Site Award 2010 (On-Site Award)* and the *Joinery and Building Trades Award 2010*.
- 9 I understand that the Fair Work Commission has proposed to amend the On-Site Award by deleting the current clause 31.3 and insert a new 31.3 'Direction to take annual leave during shutdown'. The new clause 31.3 relates to the Christmas/New Year holiday period and permits employers to direct employees to take paid leave during the shutdown period. The On-Site Award will no longer afford employers the ability to direct employees to take unpaid leave. Employees and employers can agree to take annual leave in advance where they have not accrued sufficient paid annual leave to cover the period.

HIA's Group Training Scheme

- 10 More than 30 years ago, HIA established "HIA Apprentices", a group training scheme.
- 11 HIA Apprentices employs apprentices and trainees in the residential building industry.
- 12 The main purpose of HIA Apprentices is to ensure that the residential building industry has trades for the future. It aims to do this by helping young people into apprenticeships, providing them with support, assistance, advice and guidance throughout their apprenticeship and to make it easier for builders and contractors to take them on.
- 13 The establishment and operation of a group apprenticeship scheme is also expressly recognised in HIA's Constitution as a means of pursuing the Association's corporate objectives which relevantly include ensuring an adequate supply of industry skills.
- 14 HIA Apprentices is a nationally registered Group Training Organisation (GTO). Being a nationally registered GTO, HIA has been deemed as compliant with the Australian Apprenticeships National Standards for Group Training Organisations.

HIA Apprentice operations

- 15 The majority of HIA Apprentices are employed under the On-Site Award.
- 16 The apprentices and trainees are placed with host trainers, usually within small to medium sized enterprises. HIA Apprentices remains the legal employer to the trainee or apprentice, and is responsible for wages, conditions, training, and signing of the Training Contract.
- 17 HIA currently employs 820 apprentices. The majority of these apprentices are pursuing qualifications in the Carpentry, Bricklaying, and Cabinetmaking trades. Apprentices are employed across all states and territories with the exception of the Northern Territory.
- 18 In the year ending 31 December 2021, 500 apprentices commenced their apprenticeship with HIA Apprentices, this equates to an average of just over 41 new commencements a month
- 19 To date, in 2022 we have had 478 apprentices commence their apprenticeship with HIA Apprentices, this equates to an average of 43 commencements per month.

Apprentice Recruitment

- 20 HIA undertakes recruitment activities throughout the entire year.
- 21 However, a particularly important time for apprentice recruitment is during the final quarter of the year (October, November and December) as school leavers finish their final year and look to commence a trade.

- 22 In the fourth quarter of 2021, HIA Apprentices had 119 new apprentices commence their apprenticeship. During the fourth quarter of 2022 up to 15 November 2022, HIA Apprentices has had 56 new apprentices commence their apprenticeship.
- 23 An apprentice engaged during this period will not have sufficient leave accrued to cover the industry shutdown period.

Annual Shutdown Periods

- 24 Since I have had this role, HIA Apprentices has shutdown for the period of on or about 22 December through to the first Monday in January every year, depending on when public holidays fall (**Annual Shutdown Period**). Many, if not all, businesses that host a HIA apprentice also shutdown during the Christmas/New Year holidays, with the dates generally covering the same or similar period.
- 25 New HIA apprentices are made aware of the Annual Shutdown Period via their contract of employment and apprentice handbook both which include provisions relating to the annual shutdown. HIA also communicate the shutdown period during the year.
- 26 On 5 October 2022, HIA's Apprentices were notified of the forthcoming Annual Shutdown Period of 22 December 2022 to 5 January 2023 as required by the On-Site Award.

Impact on HIA Apprentices

- 27 In 2021, 122 of the 683 apprentices then employed by HIA, did not have sufficient leave to cover the shut down period. These 122 apprentices were directed to take unpaid leave.
- 28 Out of those 122 apprentices directed to take unpaid leave, 50 commenced between 1 October and 13 December 2021, 38 commenced between 1 January and 1 October 2021 and 34 commenced between 2018 and 2020.
- 29 HIA has calculated that it would have cost approximately \$61,000 inclusive of leave loading, if it had been required to provide these apprentices with paid leave in advance, instead.
- 30 It is not feasible for HIA Apprentices to provide work for apprentices during the shutdown period as:
- a. both HIA and the host trainers shutdown during the Annual Shutdown Period;
 - b. the supply chain that supports the residential building industry also shuts down during this period, making the supply of materials to support the carrying out of residential building work difficult and resulting in closure of most building sites; and
 - c. there is no other forms of work available to an apprentices to undertake safely.
- 31 In my experience, apprentices are most likely to resign within the first three to six months of their apprenticeship. Whilst the leave in advance provisions under the

modern awards (such as clause 31.4 of the On-Site Award) provide a potential avenue for HIA to recover leave paid in advance from monies due at termination, many apprentices resign with little or no notice, and may have otherwise accrued insufficient other entitlements to cover for the leave paid in advance.

- 32 If the On-Site Award is amended to remove an employer's ability to direct an employee to take unpaid leave during the Annual Shutdown Period, HIA would likely need to provision for its new monetary liability to pay leave in advance to those employees who have not accrued sufficient leave for this period. To manage this new obligation and the risk of not being able to recover these payments, HIA Apprentices may be required to reconsider and reduce or cease recruitment during the final quarter of the year.
- 33 On this basis, the change proposed by the Commission would have a detrimental effect on the residential building industry and such change should be reconsidered.

Signature of person making declaration: _____
Declared at South Australia
on 21 November 2022

Before me:

Signature of Witness: _____
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