

Form F46 – Application to vary a modern award Fair Work Act 2009, ss.157–160

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

The Applicant



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

Title	[] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)			
Surname			
Postal address	Unit 15 306 Albert Street (PO Box 214, Brunswick, VIC, 3056)		
Suburb	Brunswick		
State or territory	Victoria	Postcode	3056
Phone number	0425 790 722	Fax number	
Email address	phil.eberhard@plumber.com.au		

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

Legal name of business	Master Plumbers and Mechanical Services Association of Australia
Trading name of business	Master Plumbers
ABN/ACN	56 296 473 997
Contact person	Phil Eberhard

Does the Applicant need an interpreter?



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

[] Yes – Specify language

[X] No

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

[] Yes – Please specify the assistance required

[X] No

Does the Applicant have a representative?



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

Yes – Provide representative’s details below

No

Applicant’s representative



These are the details of the person or organisation who is representing the Applicant (if any).

Not applicable

Name of person			
Firm, organisation or company			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

Is the Applicant’s representative a lawyer or paid agent?

Yes

No

Not applicable

1. Coverage

1.1 **What is the name of the modern award to which the application relates? Include the Award ID/Code No. of the modern award**



Plumbing and Fire Sprinklers Award 2020
(MA000036)

1.2 **What industry is the employer in?**

Not applicable

2. Application

2.1 What are you seeking?

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

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

2.2 What are the details of your application?

See Attachment A – What are the details of the application?

2.3 What are the grounds being relied on?

See Attachment B – What are the grounds for the application?

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



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

Attach additional pages, if necessary.

Signature



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

Signature	
Name	Peter Daly
Date	3 August 2021
Capacity/Position	Chief Executive Officer / Secretary



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

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

Attachment A - What are the details of the application?

Schedule X—Additional Measures During the COVID - 19 Pandemic

X.1 Subject to clauses X.2.1(d) and X.2.2(c), Schedule X operates from 2 August 2021 until 31 December 2021. The period of operation can be extended on application.

X.2 During the operation of Schedule X, the following provisions apply:-

X.2.1 Unpaid pandemic leave

(a) Subject to clauses X.2.1(b), (c) and (d), any employee is entitled to take up to 2 weeks' unpaid leave if the employee is required by government or medical authorities or on the advice of a medical practitioner to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.

(b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).

(c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).

(d) A period of leave under clause X.2.1(a) must start before 31 December 2021, but may end after that date.

(e) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this award and the NES.

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

X.2.2 Annual leave at half pay

(a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.

(b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.

(c) A period of leave under clause X.2.2(a) must start before 31 December 2021, but may end after that date.

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

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

NOTE 1: An employee covered by this award who is entitled to the benefit of clause X.2.1 or X.2.2 has a workplace right under section 341(1)(a) of the Act.

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

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

See Attachment B – What are the grounds for the application?

1. The Master Plumbers and Mechanical Services Association of Australia (**Master Plumbers**) (an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (C'th) has made application to the Fair Work Commission (**Commission**) to vary the *Plumbing and Fire Sprinklers Award 2020 (PFS Award)* by including an additional Schedule - Schedule X – Additional Measures During the COVID – 19 Pandemic.

The Master Plumbers application is supported and endorsed by:-

- the Master Plumbers ACT;
- the Master Plumbers NSW;
- the Master Plumbers & Gasfitters Association of Western Australia;
- the Master Plumbers Association of Queensland;
- the Master Plumbers of South Australia; and
- the Master Plumbers Association of Tasmania.

(collectively referred to as the **Master Plumbers Group**).

2. On 1 April 2020, a Full Bench of the Commission (Justice Ross, President, Vice President Hatcher, Vice President Catanzariti, Deputy President Asbury, Deputy President Clancy and Commissioner Spencer) published a Statement ([2020] FWCFB 1760) (**Statement**).

3. In paragraph 1 of the Statement the Commission advised that:

“This Statement is made in the context of the unique circumstances pertaining to the COVID-19 pandemic and sets out our *provisional* views regarding the variation of 103 modern awards to provide an entitlement to unpaid ‘pandemic leave’ and the flexibility to take annual leave at half pay. The variations proposed would operate until 30 June 2020 and the awards we propose to vary are set out ... (in paragraph 108 of the Statement).”

4. The *Plumbing and Fire Sprinklers Award 2010* (now the *Plumbing and Fire Sprinklers Award 2020*) was one of the 103 modern awards that the Commission had listed for possible variation to include an “entitlement to unpaid ‘pandemic leave’ and the flexibility to take annual leave at half pay.”

5. In the Statement the Commission advised that:-

[4] This matter will also be expedited, given the exigencies of the impact of the COVID-19 pandemic. Any interested person wishing to respond to the *provisional* views in this Statement is to lodge a written submission by **4pm on Monday 6 April 2020**. Instructions for filing submissions are in ‘Next steps’ below.

[5] If no submissions are received opposing our *provisional* views, in respect of the proposed variation of a particular award or more generally, we will determine the matter and make the variations proposed without holding a hearing.

[6] If a submission is received opposing our *provisional* views in respect of the proposed variation of a particular award or more generally, a hearing will be held at **2pm on Wednesday 8 April 2020** by telephone.

6. The Commission received a large number of submissions.
7. On 8 April 2020, the Commission published a decision ([2020] FWCFB 1837) (**Decision**).
8. In that Decision the Commission determined to remove the PFS Award from the list of awards to be considered for variation. The Commission determined to

“adopt the suggestion advanced by ... (Master Builders Australia) ... and direct the parties to enter into discussions in relation to the matters raised in the submissions. The MBA is to provide a report on the outcome of those discussions by no later than **4pm on Friday 17 April 2020**. A conference of interested parties will be convened in the week commencing 20 April 2020.”

9. On 23 June 2020, the Commission in Decision [2020] FWCFB 3281 determined to vary 99 modern awards to provide for a Schedule X. Schedule X provides an entitlement to unpaid pandemic leave and the flexibility to take annual leave at half pay.
10. In correspondence dated 26 June 2020, the Master Builders advised the Commission that:-

Pursuant to this directive, Master Builders engaged with relevant employer groups who maintained an interest in the Construction Awards and settled a proposal for variations which subsequently formed the basis of discussions with relevant union parties. The proposal for variations included the standard clauses for unpaid pandemic leave and double leave, half-pay as provisionally proposed by the Commission.

Despite the efforts of all parties, agreement was not reached, and Master Builders therefore sought assistance from the Commission. Two conciliation conferences took place convened by Commissioner Lee during which the proposed variations were discussed in detail. The parties were regrettably unable to reach agreement in respect of any variation, including those standard clauses proposed by the Commission which the employers supported without amendment.

On 27 May 2020, Master Builders, the Housing Industry Association and Ai Group ('the Applicants') filed a joint application to temporarily vary the Construction Awards to provide additional measures during the COVID-19 pandemic.⁵

Annexed to the originating application was a Draft Determination, in the form of Schedule H, which contained a number of proposed variations including the Commission's unpaid pandemic leave and double leave at half pay provisions. The Applicants sought that Schedule H operate until 31 December 2020, with the potential for the period of operation to be extended on application.

The application is currently before the Full Bench in AM2020/28, with the Applicants having already filed submissions and evidence and a two-day hearing set down for 14th and 15th July 2020.

While the Construction Awards are not one of the 99 Awards listed at Attachment A of the 23 June 2020 Statement, we seek to bring to Your Honour's attention the matters on foot in AM2020/28 and the Applicant's claim for the Commission's unpaid 'pandemic' leave and double leave at half pay provisions to be in operation, with respect to the Construction Awards, until at least 31 December 2020. (Footnotes have been removed)

11. On 11 August 2020, the Commission varied the:-

- *Building and Construction General On-Site Award 2010 (now the Building and Construction General On – Site Award 2020) ,*
- *Joinery and Building Trades Award 2010 (now the Joinery and Building Trades Award 2020) and*
- *Mobile Crane Hiring Award 2010 (now the Mobile Crane Hiring Award 2020)*

to insert Schedule X.

12. At the time of making the application to vary the PFS Award, the COVID-19 position was deteriorating significantly, particularly in Victoria and New South Wales, but also in Queensland and South Australia.

13. The circumstances which caused the Full Bench to provide an entitlement to unpaid pandemic leave and the flexibility to take annual leave at half pay have re - emerged and should justify the insertion of Schedule X in the PFS Award.

14. The situation has really not changed.

15. The following table shows the number of COVID-19 cases by source of infection for each state and territory, since the first case was reported. The table also shows the total number of cases and deaths by state and territory.

Jurisdiction	Overseas	Locally Acquired (Contact of Confirmed Case)	Locally Acquired (Unknown Contact)	Locally Acquired (Interstate Travel)	Under Investigation	Total Cases	Deaths
ACT	95	25	1	3	0	124	3
NSW	3519	2932	815	91	0	7357	59
NT	177	12	0	2	0	191	0
QLD	1386	304	43	27	1	1761	7
SA	642	168	9	28	0	847	4
TAS	85	141	5	3	0	234	13
VIC	1211	15885	3768	0	1	20865	820
WA	934	92	14	8	0	1048	9
Australia (Total)	8049	19559	4655	162	2	32247	915

16. Restrictions currently exist in New South Wales, South Australia Victoria.
17. The Commission should be minded to insert Schedule X into the PFS Award, as there is a regulatory gap in the award safety net concerning employees who are required to self-isolate following potential exposure. Access to unpaid pandemic leave will enable people to remain in employment and support the important public policy objective of isolation. Additionally, offering an employee the opportunity of accessing annual leave at half pay has the same impact.
18. The Master Plumbers Group asks that the Commission vary the PFS Award and allow the Schedule to operate until 31 December 2021 (or other time determined by the Commission following an application)