

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](#).

Applicant 1



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

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	The Australian Industry Group		
Surname			
Postal address	51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	0405 448 119	Fax number	
Email address	brent.ferguson@aigroup.com.au		

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

Legal name of business	The Australian Industry Group
Trading name of business	The Australian Industry Group
ABN/ACN	76 369 958 788
Contact person	Brent Ferguson, National Manager – Workplace Relations Advocacy and Policy

Does the Applicant need an interpreter?



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

Yes – Specify language

No

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

Yes – Please specify the assistance required

No

Does 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 2



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

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Australian Chamber of Commerce and Industry		
Surname			
Postal address	Level 2, 150 Collins Street		
Suburb	Melbourne		
State or territory	VIC	Postcode	3000
Phone number	0488 400 496	Fax number	
Email address	scott.barklamb@australianchamber.com.au		

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

Legal name of business	Australian Chamber of Commerce and Industry
Trading name of business	Australian Chamber of Commerce and Industry
ABN/ACN	85 068 391 795
Contact person	Scott Barklamb, Director - Workplace Relations

Does the Applicant need an interpreter?



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

Yes – Specify language

No

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

Yes – Please specify the assistance required

No

Does either Applicant have a representative?



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

Yes – ACCI's representative's details are below.

No – Ai Group does not have a representative.

ACCI's representative



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

Name of person	Luis Izzo, Managing Director – Sydney Workplace		
Firm, organisation or company	Australian Business Lawyers & Advisors		
Postal address	Level 15, 140 Arthur Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	(02) 9458 7005		
Email address	Luis.izzo@ablalawyers.com.au		

Is ACCI's representative a lawyer or paid agent?

Yes

No

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

Clerks - Private Sector Award 2020 [MA000002]

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 the draft determination in Attachment A.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

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



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


See Attachment B.

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	Stephen Smith
Date	24 September 2020
Capacity/Position	Head of National Workplace Relations Policy, The Australian Industry Group

Signature	
Name	Scott Barklamb
Date	24 September 2020
Capacity/Position	Director – Workplace Relations, Australian Chamber of Commerce and Industry

DRAFT DETERMINATION

Fair Work Act 2009

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



The Australian Industry Group

Australian Chamber of Commerce and Industry;

(AM2020/XX)

CLERKS—PRIVATE SECTOR AWARD 2020

[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT

XX

XX

MELBOURNE, XX JUNE 2020

Application to vary the Clerks—Private Sector Award 2020.

A. Further to decision [[2020] FWCFB XX] issued by the Full Bench on XX June 2020, the above award is varied as follows:

1. By deleting the words “until 30 June 2020” in clause I.1.1 in Schedule I – Award Flexibility During the COVID-19 Pandemic, and replacing them with the words “until 29 March 2021”.
2. By deleting the words “30 September 2020” in clause I.2.3(d) and replacing them with the words “until 29 March 2021”.

B. This determination comes into effect on 28 September 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after 30 June 2020.

PRESIDENT

Attachment B

Grounds relied upon and submission in support of the Application

1. The Australian Industry Group (**Ai Group**) and the Australian Chamber of Commerce and Industry (**ACCI**) seek a variation to the *Clerks – Private Sector Award 2020* (**Award**) in the terms set out at Attachment A to our application.
2. The application is made pursuant to s.157 of the *Fair Work Act 2009* (**Act**). The section empowers the Commission to vary modern awards if necessary to achieve the modern awards objective.
3. If granted, the proposed variation would result in the extension of the period of operation of Schedule I—Award Flexibility During the COVID-19 Pandemic, to 28 March 2021. This would provide, subject to various safeguards, for the continuation of essential flexibilities relating to:
 - The implementation of working from home arrangements¹
 - Reductions in ordinary hours of work²
 - Annual leave³
4. The application is made because of the ongoing challenges facing employers due to the COVID-19 pandemic (**Pandemic**). Such circumstances mean that it is *necessary* for the Award to retain the provisions of Schedule I in order to ensure the achievement of the modern awards objective.
5. The variation is necessary, in the relevant sense, for reasons which include the following seven overarching considerations:
 - i) Australia remains at risk from the health crisis resulting from the Pandemic, and the circumstances of Victoria demonstrates the capacity for a resurgence in transmission rates even where progress is made in slowing or reducing such rates.

¹ Clause I.2.1

² Clause I.2.2

³ Clause I.2.3

- ii) The threat to health posed by the Pandemic, developments in the international trading environment and Government initiatives to stop the spread of the virus have resulted in an exceptional decline in current economic conditions and cast a long shadow over conditions in the foreseeable future.
- iii) The Australian Government has extended the Jobkeeper Scheme, subject to certain amendments, until 29 March 2021. Similarly, the Full Bench expressed a provisional view that *Schedule X-Additional measures during the COVID-19 pandemic, which is currently contained in some 80 awards, should be extended until the same date.*⁴ This represents an acknowledgement or reinforcement of the matters identified at (i) and (ii) above but separately demonstrates that the proposed variation provides for the adoption of a comparable approach to other regulatory changes in relation to Schedule I.
- iv) The Schedule remains important to employers despite the operation of JobKeeper arrangements. A large group of employers and employees do not fall within the scope of the JobKeeper scheme and are experiencing economic distress and circumstances which mean that the flexibilities are necessary to protect employment opportunities.
- v) Key findings and reasoning underpinning the Commission's decision in March 2020 pertaining to the introduction of Schedule I and in its subsequent July 2020 decision⁵ providing for the extension of the Schedule are apposite, as the applicable circumstances and relevant considerations have not materially changed so as to justify a different conclusion as to the necessity for the Schedule.
- vi) The terms of the Schedule expressly contemplate that the period of operation may be extended by the Commission:

1.1.1 Schedule I operates from 28 March 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

- vii) The present relevant circumstances justifying the operation of the Schedule appear likely to persist until at least 29 March 2020 and it is both important and fair to provide both employers and employees certainty as to the availability of the current

⁴ [2020] FWCFB 1690

⁵ [2020] FWCFB 3443

flexibilities until this date. The requirement under s 131(1)(g) that the Commission take into account the need for a stable modern awards system provide a powerful justification for extending the Schedule until this date, rather than for a shorter period on the basis that it can be further extended on application.

6. Ai Group and ACCI have endeavoured to have discussions and reach agreement with the Australian Council of Trade Unions (**ACTU**) and the Australian Services Union (**ASU**) on the extension of the Schedule, but the union parties have advised that they are not prepared to extend the operation of any of the provisions in the Schedule. Notwithstanding the ACTU and ASU's position, an extension is necessary, including being necessary to ensure that the Award continues to achieve the modern awards objective.

Working from home arrangements

7. Clause I.1.1 provides for the extension of the spread of ordinary hours where the employer and employee have agreed to implement working from home arrangements at the request of the employee.
8. A substantial proportion of businesses covered by the Award have modified their operations as a result of the Pandemic and a significant proportion of clerical employees are working from home. Working from home remains at substantially increased levels compared to circumstances prior to the onset of the Pandemic.
9. In both NSW and Victoria the State Governments have imposed restrictions that essentially require the implementation of working from home arrangements.
10. In NSW, public health orders require an employer to allow an employee to work from home if it is reasonably practicable⁶. Similar rules apply in all parts of Victoria. In Metropolitan Melbourne, unless a workplace is a *Permitted Work Premises*, no on-site work can be undertaken (other than for a limited number of exceptions).⁷ This means that for a very large number of employers, the only work that can be undertaken by their workforce is work that can be undertaken at home.

⁶ Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020, Clause 6

⁷ Stay at Home Directions (Restricted Areas) No 15, clauses 5 and 8

11. In a very large number of cases, employers are allowing their clerical employees to work from home at the current time, even where it not a Government requirement to do so. The reasons why employers are doing this include: protecting the health of employees, accommodating the concerns of employees about travelling to workplaces on public transport, accommodating the concerns of employees about being exposed to the virus in workplaces, and accommodating employees' need to care for children.
12. Clause I.2.1 provide essential flexibility to employees who are working from home, and to their employers.

Reduced hours

13. Clause I.2.2 provides a capacity for employers to continue to reduce the ordinary hours of their clerical workforce where this has been agreed by 75% of such employees, subject to various safeguards.
14. Crucially, the provisions only apply where such arrangements were implemented prior to 30 June 2020.
15. The provisions also require an employer to conduct a vote of relevant employees upon the request of an affected employee in order to confirm the continuing support of the workforce for such arrangements. If 75% of such employees do not support the arrangements the provision requires that they cease.
16. The provision is directed at facilitating the retention of employment of as many clerical employees of the employers utilising the arrangement as possible during the crisis. It is directed at saving jobs.
17. The statutory requirement arising from s 134(1)(c) that the Commission take into account “...*the need to promote social inclusion through increased workforce participation*”, weighs heavily in favour of the retention of the provision.
18. The provision contains various measures to mitigate the adverse impact of a reduction in ordinary hours upon employees.⁸

⁸ 1.2.2(f) and 1.2.2(g)

Provisions dealing with the taking of annual leave

19. Clause 1.2.3 provides a capacity for employers to request that employees access a portion of their accrued annual leave if the request is made for reasons attributable to the Pandemic or Government initiatives to slow the transmission of the Pandemic and to assist the employer to avoid or minimise the loss of employment.
20. Clause 1.2.3 also provides a capacity for employers and employees to agree to the employee taking twice as much annual leave at a proportionately reduced rate during a period of absence from work.
21. This clause is directed at the preservation of jobs and operates subject to significant safeguards. This clause makes cost reduction measures available to employers that are more desirable than some of the alternatives - which may include standing employees down without pay, attempting to reduce employment hours by consent or involuntary redundancies. The interests of both employers and employees are served by ensuring that moderate cost management measures such as this remain available to prevent further loss of employment hours.
22. It is a crucial measure that goes to the heart of the statutory requirement arising from s 134(1)(c), namely, that the Commission take into account “...*the need to promote social inclusion through increased workforce participation*”, weighs heavily in favour of the retention of the provision.