

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	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Employee organisation		
Name	The Australian Workers' Union		
Postal address	L1, 16 – 20 Good Street		
Suburb	Granville		
State or territory	NSW	Postcode	2142
Phone number	02 8863 8900	Fax number	
Email address	nat.office@nat.awu.net.au ; stephen.crawford@nat.awu.net.au		

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

Legal name of business	The Australian Workers' Union
Trading name of business	
ABN	28 853 022 982
Contact person	Stephen Crawford (Senior National Legal Officer)

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's representative



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

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

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

Funeral Industry Award 2020 MA000105

1.2 What industry is the employer in?

Funeral directing

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?

The application seeks to vary the *Funeral Industry Award 2020* pursuant to s 160 of the *Fair Work Act 2009* to remove ambiguities or uncertainties concerning casual overtime rates. A draft determination is attached.

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.

1. The application is to vary the *Funeral Industry Award 2020* (“**Funeral Award**”) pursuant to s 160 of the *Fair Work Act 2009* to remove ambiguities or uncertainties concerning casual overtime rates.
2. In the 4-yearly Review of Awards - Casual Overtime common issue proceedings, the relevant industrial parties for the Funeral Award agreed that casual employees are entitled to be paid their 25% casual loading when they perform overtime work in addition to the applicable overtime penalty rates: see [2020] FWCFB 4350 at [300].
3. The Overtime for Casuals Full Bench determined to adopt this agreed position (see [304]) and subsequently varied the Funeral Award on 30 October 2020.
4. However, in April 2021, the Fair Work Ombudsman (“**FWO**”) contacted the AWU (and indicated the same approach was made to other relevant industrial parties) to raise some concerns that the agreed outcome identified above has not been accurately reflected in the terms of the Funeral Award.
5. In particular, the interaction of the following provisions is ambiguous or uncertain and potentially inconsistent with the agreed position:

- (a) clause 11.2 of the Funeral Award prescribes that the 25% casual loading is paid “for each ordinary hour worked”. The reference to “each ordinary hour worked” is likely to prevent this general provision being applied to overtime hours;
- (b) clause 11.3 states a casual employee working overtime will be paid at the rates prescribed in clauses 19.1(b), 20.6(b) and 20.7(b). Those clauses correctly identify rates which include the 25% casual loading paid on a cumulative basis.

However, there are additional overtime rates that can apply to casual employees in clause 19 and 20 which have not been dealt with in the same manner as the entitlements in clause 19.1(b), 20.6(b) and 20.7(b). Specifically:


- (i) clause 19.2: work on a rostered day off;
 - (ii) clause 19.4(a) and (b): removals;
 - (iii) clause 20.6(c): unrelieved employee – afternoon shiftworker; and
 - (iv) clause 20.7(c): unrelieved employee – non-continuing afternoon shiftworker.
6. Given clause 11.2 appears limited to ordinary hours and separate overtime rates have been expressly included for casual employees in clause 19.1(b), 20.6(b) and 20.7(b), the FWO has indicated it is likely to provide advice to the public that casual employees receive the same rates as permanent employees when they perform overtime work covered by clause 19.2, 19.4(a) and (b), 20.6(c) and 20.7(c).
7. The current ambiguity or uncertainty concerning these provisions should be resolved to ensure the outcome agreed by the industrial parties and endorsed by the Commission is clearly reflected in the Funeral Award.

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	Misha Zelinsky
Date	5 May 2021
Position	Acting National 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

PRXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.160—FWC may vary modern awards to remove an ambiguity or uncertainty

Variation of the *Funeral Industry Award 2020*

(AM2021/XX)

FWC MEMBER/S

LOCATION, XX XXXX 2021

*Variation to the *Funeral Industry Award 2020**

A. Further to the decision [2021 FWCFB XXX] issued by the Full Bench on X March 2021, the above award is varied as follows:

1. By deleting the word “ordinary” in clause 11.2.
2. By deleting the current clause 11.3 and replacing it with the following words:

When a casual employee works overtime, they must be paid the overtime rates in clauses 19.1(b), 19.2, 19.4(a), 19.4(b), 20.6(b), 20.6(c), 20.7(b) and 20.7(c).
3. By adding the following words at the end of clause 19.2:

The rate will be 175% of the minimum hourly rate for a casual employee.
4. By adding the following words at the end of clause 19.4(a):

The rates will be 175% and 225% of the minimum hourly rate respectively for a casual employee.
5. By adding the following words at the end of clause 19.4(b):

The rate will be 225% of the minimum hourly rate for a casual employee.
6. By adding the following words at the end of clause 20.6(c):

The rate will be 245% of the minimum hourly rate for a casual employee.
8. By adding the following words at the end of clause 20.7(c):

The rate will be 275% of the minimum hourly rate for a casual employee.

B. This determination comes into operation on [INSERT DATE]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after [INSERT DATE].

FWC Member