

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	0408 586 151	Fax number	
Email address	Tamsin.lawrence@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	Tamsin Lawrence, Deputy 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	17 December 2020
Capacity/Position	Head of National Workplace Relations Policy, The Australian Industry Group

Signature	
Name	Luis Izzo
Date	17 December 2020
Capacity/Position	Managing Director – Sydney Workplace

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 and
Australian Chamber of Commerce and Industry**
(AM2020/98)

CLERKS—PRIVATE SECTOR AWARD 2020
[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT

XX

XX

MELBOURNE, XX DECEMBER 2020

Variation to the Clerks—Private Sector Award 2020.

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

1. By deleting the words “until 29 March 2021” in clause I.1.1 in Schedule I – Award Flexibility During the COVID-19 Pandemic and replacing them with the words “until 30 June 2021”.
2. By deleting clause I.1.3 and inserting in lieu thereof:

I.1.3 An employer who issues a direction or makes a request under the provisions of Schedule I, or who makes an agreement pursuant to clause I.2.1, provides consent to a dispute about the direction, request or agreement being settled by the Fair Work Commission through arbitration in accordance with clause 40.5—Dispute resolution and section 739(4) of the Act.
3. By deleting clause I.2.1 and inserting in lieu thereof the following:

I.2.1 Remote Working Arrangements

(a) Application of this clause

The clause applies when an employee is undertaking Remote Work as defined in clause I.2.1(b).

(b) Definition of Remote Work

For the purposes of clause I.2.1, Remote Work means work undertaken by an employee from their home or any other location of their choosing that is not the premises of their employer.

(c) Extended spread of ordinary hours for day workers

- (i)** Instead of clause 13.3, if an employee engaged on day work is undertaking Remote Work by agreement with their employer and the employee requests and the employer agrees, the spread of ordinary hours of work for the day worker may be between 6.00 am and 10.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.
- (ii)** Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of Part 6—Shiftwork.
- (iii)** The facilitative provision in clause 13.4, which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.1(c)(i).

(d) Ability for employees to elect not to work ordinary hours continuously

An employee undertaking Remote Work is not required by this award to work their ordinary hours continuously as specified by clause 13.6, if this is agreed between the employer and employee.

(e) Flexible starting and finishing times for part-time employees

- (i)** Notwithstanding clause 10.2(c), an employer and part-time employee are not required to reach agreement as to the starting and finishing times of an employee for any day that the employee will be undertaking Remote Work, if:
 - (A)** they have instead agreed that the employee may choose their starting and finishing times on those days; or
 - (B)** they have instead agreed to start and finish within a specific range of times.
- (ii)** Clause 10.3 does not require an employer and employee to reach separate agreements regarding changes to the times at which an employee will start or finish work each day if clause I.2.1(e)(i) applies.

(f) Ability for part-time employees to work non-consecutive hours

(i) Notwithstanding clause 10.5, an employer is not required to roster a part-time employee so that their hours of work are consecutive, provided that:

(A) It has been agreed between the employer and employee that the work does not need to be undertaken continuously; and

(B) The employee is provided with at least 3 hours of work on that shift.

(g) Arrangements for taking meal and rest breaks while undertaking Remote Work

(i) An employee who is undertaking Remote Work may take any meal or rest break referred to in clause 15 at any time that suits their personal circumstances, instead of taking them at the times prescribed by clause 15, provided that this is agreed to by their employer.

Example: An employee who is working more than 5 hours may elect to take their break at a point in their shift after the first 5 hours of work.

(ii) An employee who is undertaking Remote Work may alter the configuration of the meal or rest breaks referred to in clause 15 in order to suit their personal circumstances instead of taking the breaks in the manner contemplated by clause 15, provided that this is agreed by their employer.

Example: An employee who is entitled to take a meal break of between 30 and 60 minutes under clause 15.3 may instead take 3 breaks of 20 minutes duration.

4. By deleting the words “29 March 2021” in clause I.2.3(e) and replacing them with the words “until 30 June 2021”.

B. This determination comes into effect on XX December 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 XX December 2020.

PRESIDENT

Grounds relied upon 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 the 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. In its current form, Schedule I to the Award would cease to operate from 1 April 2021. If the application is granted, the proposed variation would result in the continued operation of Schedule I to 30 June 2021. It would include certain existing flexibilities as well as introduce a small number of new provisions. In all instances, the proposed changes include appropriate safeguards. The various elements of the proposed Schedule I are canvassed below.
4. The application is made because of the ongoing challenges facing employers due to the COVID-19 pandemic (**Pandemic**). As a result, in order to ensure that the Award achieves the modern awards objective, it is *necessary* to include the proposed flexibilities.
5. The application is also made in recognition of the desire of some employees, in the context of the pandemic, to undertake their hours of work in a flexible manner while working from their home or other location away from their employer's premises, and that in many instances such desires will be acceptable to their employer.
6. The variation is necessary, in the relevant sense, for reasons which include the following overarching considerations:
 - i) Australia remains at risk from the health crisis resulting from the Pandemic.
 - 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 proposed Schedule I is necessary notwithstanding the extension of the Jobkeeper Scheme, subject to certain amendments, until 29 March 2021. This is because:

- A large group of employers and employees do not fall within the scope of the JobKeeper scheme despite experiencing economic distress.
- The proposed Schedule I would continue beyond the cessation of the Jobkeeper scheme.

iv) Schedule I would continue to expressly contemplate that the period of operation may be extended by the Commission:

1.1.1 ... The period of operation can be extended on application to the Fair Work Commission.

v) There continues to be an increased adoption of arrangements involving employees working from home, or other locations remote to the premises of their employer, relative to historical norms.

vi) Many of the present relevant circumstances justifying the operation of the Schedule appear likely to persist until at least 30 June 2021 and it is important and fair to provide both employers and employees with certainty as to the availability of the proposed 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 provides a powerful justification granting the application.

7. Having regard to all of the above, the proposed Schedule I is necessary to ensure that employers and employees are able to access important flexibilities that will enable the preservation of jobs and the facilitation of appropriate working arrangements in the context of the ongoing health crisis.

8. Ai Group and ACCI have engaged in detailed discussions with the Australian Council of Trade Unions (**ACTU**) and the Australian Services Union (**ASU**) about the application. It is our understanding that the ACTU and ASU do not oppose the application.

Arrangements for working remotely

9. Clause I.2.1 currently permits the spread of hours for day work otherwise applicable under the Award to be extended to 6am to 10pm, Monday to Friday, if this is requested by an employee and agreed to by the employer whilst they are working from home. The application seeks that the availability of this flexibility be extended until 30 June 2021. This will provide greater certainty to parties applying the Award. We have earlier dealt with the relevance of this matter to the modern awards objective.
10. The application also seeks the temporary implementation of new additional flexibilities which are intended to facilitate employees working remotely (i.e. at a location away from their employer's premises) in a way that also enables the accommodation of their personal circumstances (such as caring responsibilities), where this is agreed by the employer. Relevantly, the proposed changes include:
 - (a) A greater capacity for employees to elect to work their hours in a non-continuous manner while working from home/remotely, with agreement from their employer.
 - (b) An enhanced ability for part-time employees to select their own starting and finishing times when working from home/remotely, with agreement from their employer.
 - (c) Greater flexibility in relation to the taking of meal or rest breaks by employees working from home, subject to agreement with the employer.
11. The schedule also provides that the flexibilities are available when an employee is undertaking 'Remote Work' rather than merely 'working from home'. This reflects the capacity for many employees to now work either at their home or some other location of their choosing that is not the premises of their employer. The inclusion of a definition of 'Remote Work' will also assist to ensure the provision is simple and easy to understand, as contemplated by s.134(1)(g) of the Act.
12. The proposed new variations temporarily remove impediments to employees undertaking their ordinary hours in circumstances where such arrangements are desired by the employee and agreeable to their employer. They will also increase the utility of the extended spread of ordinary hours currently available under Schedule I.

Provisions dealing with the taking of annual leave

13. Clause I.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.
14. Clause I.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.
15. This clause is directed at the preservation of jobs and operates subject to significant safeguards.
16. 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.

Proposed variation to clause I.1.3

17. The application proposes to vary clause I.1.3 of the current schedule. The provision presently provides, in effect, that a direction or request given under Schedule I or an agreement under clause I.2.1 is not valid unless the employee is advised in writing that the employer consents to a dispute about the direction, request or agreement being settled by the Fair Work Commission, in accordance with clause 40.5 of the Award and s.739(4) of the Act.
18. The application proposes to relieve employers of the administrative burden of needing to prepare and provide such documentation to an employee, but nonetheless does not dilute the access to consent arbitration of relevant disputes by the Commission. The proposed amendments would provide that an employer consents to this if they issue the relevant direction or request under the Schedule or enter an agreement pursuant to the Schedule. This will improve the workability of the Schedule.