

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			
First name(s)	Australian Industry Group		
Surname			
Postal address	51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	0418 461183	Fax number	02 9466 5599
Email address	stephen.smith@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	
ABN/ACN	76 369 958 788
Contact person	Stephen Smith, Head of National Workplace Relations 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 (e.g. a hearing loop)?

Yes— Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or business who is representing the Applicant. This might be a lawyer, or a representative from a union or employer association. 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 business who is representing the Applicant.

Name of person			
Organisation			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

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

Black Coal Mining Industry Award 2010 [MA000001]

1.2 What industry is the employer in?

N/A

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?

Amend clause 4 – Coverage, as follows:

4. Coverage

4.1 This award covers employers in the **black coal mining industry** and their employees covered by the classifications in this award.

~~(a) employers of coal mining employees as defined in clause 4.1(b); and~~

~~(b) coal mining employees.~~

Coal mining employees are:

~~(i) employees who are employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day to day operation of a black coal mine and who are employed in a classification or class of work in Schedule A—Production and Engineering Employees or Schedule B—Staff Employees of this award;~~

~~(ii) employees who are employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day to day operation of a black coal mine and who are employed in a classification or class of work in Schedule A—Production and Engineering Employees or Schedule B—Staff Employees of this award; and~~

~~(iii) employees employed by a mines rescue service.~~

4.2 For the purposes of this award, **Black coal mining industry** has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. Subject to the foregoing, the black coal mining industry includes means:

(a) the following activities carried out by an employer whose principle function is:

~~(a) (i) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;~~

~~(b) (ii) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;~~

~~(c) (iii) the transportation of black coal on a coal mining lease; and~~

~~(d) (iv) other work on a coal mining lease directly connected with the extraction, mining and processing of black coal.~~

(v) the operation of a mines rescue service.

(b) An employer which supplies labour on an on-hire basis in the parts of the industry set out in clause 4.2(a) in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work in the parts of the industry set out in clause 4.2(a) This subclause operates subject to the exclusions from coverage in this award.

(c) An employer which provides group training services for apprentices and/or trainees engaged in the parts of the industry set out at clause 4.2(a) and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities in clause 4.2(a) are being performed. This subclause operates subject to the exclusions from coverage in this award.

4.3 The black coal mining industry does not include:

- (a) the mining of brown coal in conjunction with the operation of a power station;
- (b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;
- (c) the operation of a coal export terminal;
- (d) construction work on or adjacent to a coal mine site;
- (e) catering and other domestic services;
- (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); ~~or~~
- (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry; ~~or~~
- (h) employers covered by the following awards:
 - (i) Manufacturing and Associated Industries and Occupations Award 2010;
 - (ii) Vehicle Manufacturing, Repair, Services and Retail Award 2010.

~~NOTE: The coverage clause is intended to reflect the status quo which existed under key pre-modern awards in relation to the kinds of employers and employees to whom those awards applied and the extent to which the awards applied to such employers and employees.~~

~~An example of the types of issues and some of the case law to be considered when addressing coverage matters can be found in *Australian Collieries Staff Association and Queensland Coal Owners Association*—No. 20 of 1980, 22 February 1982 (Print [CR2297](#)) and in the Court decisions cited in this decision.~~

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

~~**4.7** This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.~~

~~**4.8**~~ **4.7** Subject to clauses 4.1 and 4.2, where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

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. This application is made as part of the Commission's 4 Yearly Review of Modern Awards. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) repealed the provision for 4 Yearly Reviews of Modern Awards in the *Fair Work Act 2009* (Cth) (**FW Act**) with effect from 1 January 2018. Under the application and transitional provisions of the Amending Act, a review of an award that commenced but was not completed before 1 January 2018 can continue under the terms of the repealed provisions. The review of the *Black Coal Mining Industry Award 2010* falls within this transitional provision. (See paragraph 1 and footnote 1 in *4 Yearly Review of Modern Awards – Sugar Industry Award 2010* [2019] FWCFB 1980).
2. If the Commission is not satisfied that this application should be dealt with under the 4 Yearly Review of Modern Awards, this application is pursued under s.157 of the FW Act.
3. This application is also pursued under s.160 of the FW Act, on the basis that the existing coverage provisions of the Award are ambiguous and uncertain.
4. The ambiguity and uncertainty in the coverage clause is causing disputation, business uncertainty and business cost risks. The ambiguity and uncertainty is also impeding bargaining for many employers in the manufacturing and vehicle industries which provide services to clients in the black coal mining industry.
5. In its *Decision Re. the Making of Priority Modern Awards* [2008] AIRCFB 1000 in which the *Black Coal Mining Industry Award 2010* was made, a seven Member Full Bench of the AIRC said (emphasis added):

[156] We have, at this stage, acceded to the main submissions of the CFMEU and the CMIEG in relation to the coverage clause in the exposure draft and have generally reverted to the form of words in the draft clause agreed by the main coal industry parties. We note that the stated goal of the CFMEU and the CMIEG was to achieve a coverage clause that as closely as possible reflects the status quo in terms of the existing application of the key federal pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. We agree with that goal and intend that the award we have made should neither expand nor contract the reach of the key pre-reform awards both in relation to the kinds of employers to whom those awards apply and the extent to which the awards apply to such employers. It follows that we reject submissions that sought to have mechanical and electrical contractors invariably covered by awards other than the modern award for the black coal mining industry.

[157] However, we are concerned that the clause as drafted is not simple to understand nor easy to apply. In particular, contractors who perform some work at or about coal mines may have difficulty in determining whether the award covers them. We acknowledge that significant attempts were made by the parties to agree on a form of words that described the industry in a clear and direct way. We intend to vary cl.4 before the award commences so that it contains a clearer description of the black coal mining industry albeit a description that reflects as closely as possible the status quo. We recognise that the difficulties in developing such a description are substantial and that this should not be done without further consultation with interested parties."

6. The above comments by the Full Bench were made in the context of:
- An agreement reached between a group of coal mining companies (called the Coal Mining Industry Employer Group - CMIEG) and the CFMEU (Mining and Energy Division) on wording for the coverage clause of the Black Coal Mining Award;
 - Strong submissions made by Ai Group and the AMWU that work covered by the *Manufacturing and Associated Industries and Occupations Award 2010* should not be covered by the *Black Coal Mining Industry Award 2010*;
 - Five witness statements tendered by Ai Group in the Full Bench proceedings, of representatives of companies which provided maintenance services to coal mining companies in the Hunter Valley and which were bound by, and applying, the terms of the *Metal, Engineering and Associated Industries Award 1998*; and
 - Submissions by the National Electrical and Communications Association (NECA) and the CEPU that work covered by the *Electrical, Electronic and Communications Contracting Award 2010* should not be covered by the Black Coal Mining Award.
7. Despite the view expressed by the Award Modernisation Full Bench in the above extract, that the coverage clause of the *Black Coal Mining Industry Award 2010* should be varied before 1 January 2010 to express the coverage more clearly, this did not occur.
8. A minor variation to the Explanatory Note in the coverage clause was made by Justice Boulton during the Modern Awards Review 2012 ([2012] FWA 9606) by agreement between Ai Group, the CMIEG, the CFMEU, the AMWU and the CEPU. The variation inserted the following additional underlined wording in the Note, and operated retrospectively to 1 January 2010:
- “NOTE: The coverage clause is intended to reflect the status quo which existed under key premodern awards in relation to the kinds of employers and employees to whom those awards applied and the extent to which the awards applied to such employers and employees.
- An example of the types of issues and some of the case law to be considered when addressing coverage matters can be found in *Australian Collieries Staff Association and Queensland Coal Owners Association* – No. 20 of 1980, 22 February 1982 {[Print CR2297](#)} and in the Court decisions cited in this decision.”
9. Unfortunately, after seven years it has become apparent that the above minor variation has not proved to be effective in:
- Resolving the ambiguity and uncertainty in the coverage clause of the Award;
 - Avoiding disputation about the coverage of the Award;
 - Avoiding business uncertainty;
 - Avoiding business cost risks; or
 - Preventing bargaining being impeded for employers in the manufacturing and vehicle industries which provide services to clients in the black coal mining industry.
10. The proposed variations are consistent with the modern awards objective and are necessary for the coverage provisions of the Award to meet the objective.

11. The current coverage clause, which requires employers and employees to have a detailed understanding of a large number of potentially relevant, unidentified court and tribunal decisions relating to the meaning of the expression “*employed in the black coal mining industry*”, is obviously not consistent with the modern awards objective.
12. The proposed variations are necessary to ensure a simple, easy to understand and sustainable modern award system that avoids unnecessary overlap of modern awards.
13. The proposed variation is also consistent with the following elements of the modern awards objective:
 - the need to encourage collective bargaining;
 - the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.
14. A retrospective operative date of 1 January 2010 is sought.
15. Ai Group seeks that this matter be dealt with by a Full Bench of the Commission.
16. Ai Group intends to file detailed evidence and submissions in support of this application.

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	29 March 2019
Capacity/Position	Head of National Workplace Relations Policy



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