

## Form F46 – Application to make, vary or revoke a modern award

Fair Work Act 2009, ss.157–161

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 type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	1 Watertank Way		
Suburb	Midland		
State or territory	WA	Postcode	6056
Phone number	08 3235 7000	Fax number	
Email address	<a href="mailto:Kim.Brooklyn@parkerville.org.au">Kim.Brooklyn@parkerville.org.au</a>		

### If the Applicant is not an individual, please also provide the following details

Applicant's legal name	Parkerville Children and Youth Care Inc.
Applicant's trading name	
Applicant's ABN/ACN	86 437 092 401
Contact person	Kim Brooklyn, Chief Executive Officer

**Does the Applicant need an interpreter?**



If the Applicant has trouble accessing this information, please contact us. We can arrange to provide it in another format. You can find information about [help for non-English speakers](#) on our website.

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	Simon Billing		
Firm, organisation or company	HFW Australia		
Postal address	Level 15, Brookfield Place – Tower 2, 123 St Georges Terrace		
Suburb	Perth		
State or territory	WA	Postcode	6000

Phone number	0419 859 314	Fax number	
Email address	simon.billing@hfw.com		

**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.

Social, Community, Home Care and Disability Services Industry Award 2010 (**Award**) (MA000100)

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

N/A

**1.3 Does the application relate to the Care and Community Sector?**



The Care and Community Sector includes, but is not limited to, the aged care, early childhood education and care and disability care sectors. Applications to make, vary or revoke awards that relate to the Care and Community Sector are decided by Care and Community Sector Expert Panels. See sections 617(8) and (9) of the FW Act.

Yes

No

Unsure

## 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 Does the application seek to vary modern award minimum wages?

Yes

No

### 2.3 Does the application relate to gender pay equity?



Variations to awards relating to substantive gender pay equity matters are decided by pay equity Expert Panels. See sections 617(6) and (9) of the FW Act. See also work value reasons in s.157(2A) and (2B).

Yes

No

Unsure

### 2.4 What are the details of your application?

Outline the changes you are asking the Commission to make. For example - if you are asking the Commission to vary an existing award, you should set out which parts of the award you are asking the Commission to change and how you think these parts should be changed.

Parkerville seeks variations that:

- (a) would clarify Award coverage in respect of persons providing therapeutic care duties (**Therapeutic Carers**) in the social and community services sector;
- (b) would clarify that the performance of work on shifts before and after (and that are each contiguous with one end of) a sleepover, are permitted as separate shifts each constituting ordinary hours;
- (c) in the alternative to (b), would extend application of the “24 hour care” terms in the Award to Therapeutic Carers.

The variation in paragraph (a) is sought pursuant to s 160(1) of the *Fair Work Act 2009 (FW Act)*. In the alternative, that variation is sought pursuant to s 157(1) of the FW Act.

The variation in paragraph (b) is sought pursuant to s 160(1) of the FW Act with retrospective effect from 1 January 2010 pursuant to s 165(2) of the FW Act. In the alternative, that variation is sought pursuant to s 157(1) of the FW Act.

The variation in paragraph (c) is sought pursuant to s 160(1) of the FW Act. If the Commission makes the variation in paragraph (a) with retrospective effect, Parkerville seeks that the variation in paragraph (c) commence on the same date pursuant to s 165(2) of the FW Act. In the alternative, that variation is sought pursuant to s 157(1) of the FW Act.

This Application is made pursuant to s 160(2)(b) and s 158(1) of the FW Act.

Attach additional pages, if necessary.

## 2.5 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, and the minimum wages objective if it applies, as well as any additional requirements set out in the FW Act.

### Award coverage of Therapeutic Carers

1. For 120 years, Parkerville (a not-for-profit association) has advocated, supported and provided specialist care and services to vulnerable children, young people, adults and their families in Western Australia.
2. Those services include provision of residential care arrangements outside of the family home to children who need protection and care. This is primarily facilitated through Parkerville's Group Foster Care Program (**Program**). As part of that Program, Parkerville operates Group Foster Care Homes (**Homes**). Each Home can accommodate up to four child or youth residents. As of 30 June 2022, Parkerville provided out of home care (through its Homes, foster care and youth accommodation programs) to 163 children and young people.
3. Parkerville employs Therapeutic Carers to care for children and young people living in its Homes (**residents**).
4. The principal duty of a Therapeutic Carer is to provide direct care to residents. This includes assisting residents dress, cooking / preparing meals, performance of domestic duties (cleaning rooms, washing, purchasing school supplies), assisting with schoolwork and arranging / supervising recreational activities. Therapeutic Carers also perform clerical and administrative work allied to provision of these services.

5. The care provided to the residents is trauma informed, attachment based therapeutic care. This specialised care aims to enable residents who have been the victim of family violence or sexual abuse to form appropriate attachment to an adult. To achieve the objective of such care a Therapeutic Carer is required to live in such an out of home care residence and provide care, or be available to provide care, to residents for the duration of a rostered-on period, typically of seven days, followed by seven days rostered off work.
6. The Award relevantly covers employers throughout Australia in the social and community services sector (which Parkerville operates in), and their employees in the classifications listed in Schedule B, to the exclusion of any other modern award (see clause 4.1).
7. However, whether Therapeutic Carers fall within the classifications listed in Schedule B is ambiguous and / or uncertain.
8. Several of the key responsibilities of Therapeutic Carers are described in Schedule B but are expressed to apply only in relation to the delivery of disability services.
9. These include:
  - (a) resident contact and interaction including attending to their personal care or undertaking generic domestic duties under direct or routine supervision and either individually or as part of a team as part of the delivery of disability services (B.1.2(g));
  - (b) preparation of the full range of domestic duties including cleaning and food service, assistance to residents in carrying out personal care tasks under general supervision either individually or as part of a team as part of the delivery of disability services (B.1.2(h));
  - (c) supervising or providing a wide range of personal care services to residents under limited supervision either individually or as part of a team as part of the delivery of disability services (B.2.2(l)); and
  - (d) assisting in the development or implementation of resident care plans or the planning, cooking or preparation of the full range of meals under limited supervision either individually or as part of a team as part of the delivery of disability services (B.2.2(m)).
10. The identification of those duties in relation to the delivery of disability services, but not in relation to the provision of social and community services work more broadly, gives rise to an ambiguity and / or uncertainty as to whether the Award covers Therapeutic Carers.
11. That ambiguity and / or uncertainty is compounded by award coverage of Therapeutic Carers historically, which occurred in limited circumstances and by express reference to the duties performed.

Variation to remove ambiguity or uncertainty or to achieve modern awards objective

12. The Award should be varied pursuant to s 160(1) of the FW Act to remove the ambiguity and / or uncertainty by making clear that the coverage of the Award extends to Therapeutic Carers.

13. That variation is appropriate to ensure that employers have clarity regarding the coverage of persons providing out of home care to children and youth in the social and community services sector.
14. Alternatively, if the Commission does not consider the coverage of Therapeutic Carers to be ambiguous or uncertain, the proposed variation should be made pursuant to s 157(1)(a) of the FW Act on the basis that it is necessary to do so in order to achieve the modern awards objective, specifically the need to ensure a simple, easy to understand, stable and sustainable modern award system (see s 134(1)(g) of the FW Act).

#### **Sleepover arrangements in the Award**

15. Sleepover arrangements are set out at clause 25.7 of the Award.
16. Clause 25.7(f) states:  
  
*An employer may roster an employee to perform work immediately before and / or immediately after the sleepover period, but must roster the employee or pay the employee for at least four hours' work for at least one of these periods of work. The payment prescribed by 25.7(d) will be in addition to the minimum payment prescribed by this subclause.*
17. The Award is ambiguous and / or uncertain as to whether the sleepover constitutes a break between shifts, such that hours worked prior to and following a sleepover can each constitute the performance of ordinary hours.
18. The Australian Industry Group has made an application to this Commission to vary the Award pursuant to s 160(1) (or, in the alternative, s 157(1)) of the FW Act to make clear that:<sup>1</sup>
  - (a) the two periods of work or shifts on either side of a sleepover may be organised by an employer such that they stand alone, as separate shift, each constituting ordinary hours; and
  - (b) a sleepover can constitute a break between shifts, including for the purposes of clause 25.4(b) of the Award.
19. Parkerville supports and adopts the grounds relied upon in the Australian Industry Group's application.

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<sup>1</sup> Form F46 application dated 2 November 2023 (AM2023/28).

20. Further to the grounds in that application, the variations sought are appropriate having regard to:
- (a) the importance of Therapeutic Carers providing care to residents in a manner which best meets therapeutic goals, which necessarily requires that those employees perform sleepovers in out of home care settings;
  - (b) the substantial and unsustainable overtime costs which (on the contrary construction of the sleepover provisions) would apply to employers providing Therapeutic Carer services to residents;
  - (c) the risk that employers will cease implementing arrangements for children and youth in out of home residential settings which most appropriately address therapeutic goals on the basis that those arrangements are not economically viable; and
  - (d) the Award's provisions which apply to home care employees performing comparable services (see "24 hour care" at clause 25.8(d) of the Award).

**24 hour care arrangements**

21. In the alternative, if the Commission does not consider variation of the sleepover provisions to be appropriate, Parkerville seeks to vary clause 25.8 of the Award by extending its coverage to Therapeutic Carers.
22. It is appropriate that the variations be made as for the same reasons set out at paragraph 20 above.
23. If the Commission varies the Award to clarify coverage in respect of Therapeutic Carers, it will give rise to a related ambiguity and / or uncertainty, being the terms that cover persons employed in that role. Variation of the "24 hour care" terms to expressly cover those employees would resolve that ambiguity and / or uncertainty.
24. Alternatively, if the Commission does not consider the circumstances at paragraph 23 above give rise to a relevant ambiguity and / or uncertainty, the proposed variations should be made pursuant to s 157(1)(a) of the FW Act on the basis that it is necessary to do so in order to achieve the modern awards objective because those variations would:
- (a) provide terms and conditions that reflect the care model that the employees work within and the employment arrangements that have been developed in relation to the Applicant's workplaces where such therapeutic care is provided;
  - (b) result in a fair safety net for employees providing such therapeutic care to children and young people;
  - (c) help ensure that employers will be able to provide Therapeutic Carer services to residents in a manner that is financially sustainable and reduces the risk that provision of those services becomes economically unviable;

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(d) facilitate provision of quality care to these traumatised children and young people that will achieve the trauma informed, attachment-based care objectives set by the Western Australian Department of Communities.

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	Simon Billing
Date	7 March 2023
Capacity/Position	Lawyer for the Applicant



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