

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 checked="" type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Bianca		
Surname	Grubor		
Postal address	27 Murray Crescent		
Suburb	GRIFFITH		
State or territory	Australian Capital Territory	Postcode	2603
Phone number	(08) 9321 7701	Fax number	
Email address	wra@ahawa.asn.au		

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

Legal name of business	Australian Hotels Association
Trading name of business	Australian Hotels Association
ABN/ACN	78 756 030 961
Contact person	Bianca Grubor

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			
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

Hospitality Industry (General) Award 2020

MA000009

1.2 What industry is the employer in?

Hospitality

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?

1. This application is being made pursuant to section 158 of the *Fair Work Act 2009* (Cth) (**Act**).
2. The Applicant is an organisation registered under the relevant provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth) and has standing to make this application under Item 1 of section 158(1) of the Act.
3. The Applicant seeks a determination pursuant to section 157 of the Act to vary the *Hospitality Industry (General) Award 2020* (**Award**) and incorporate a new schedule to provide a simplified pay arrangement in the form of loaded rates to reduce administrative costs and risks arising from existing pay complexities (**Variation**).
4. The proposed Variation is set out in Annexure A to this application.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?



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.

Request from Attorney-General to vary modern awards of distressed industries

1. On 9 December 2020, the former Attorney-General and Minister for Industrial Relations, the Hon Christian Porter MP wrote to the Fair Work Commission (**FWC**) President, the Hon Justice Iain Ross AO regarding the “*extraordinary circumstances*” caused by the COVID-19 pandemic (**December Letter**).
2. Specifically, Minister Porter wrote: “*it would be in Australia’s economic best interest for the Fair Work Commission to use its powers under section 157(3)(a) of the Fair Work Act 2009 (the Act) to undertake a process to ensure several priority modern awards in sectors hardest hit by the pandemic be amended*”.
3. The hospitality industry was identified as being an industry hardest hit by the COVID-19 pandemic.
4. Minister Porter outlined two (2) award flexibilities which could be “*critically important for providing businesses in the most distressed parts of the economy with the confidence to increase hiring during the recovery*”:
 - a. the introduction of a simplified pay arrangement in the form of loaded rates / exemption rates to reduce businesses’ administrative cost and address concerns regarding risks arising from existing pay rate complexities; and
 - b. the streamlining of classification structures making them easier and simpler to apply.

FWC response

5. On 10 December 2020, President Ross issued a statement, responding to the December Letter.
6. President Ross confirmed, the FWC would, of its own motion, consider the inclusion of loaded rates into modern awards and whether any changes can be made to simplify the existing classification structures in awards most affected by the COVID-19 pandemic.
7. President Ross initiated proceedings and listed commencement conferences with interested parties on 17 and 18 December 2020.
8. The Applicant participated in conferences between December 2020 and March 2021.

Applicant’s engagement with the FWC and UWU

9. On 25 March 2021, the Applicant submitted a proposed draft determination to the Award for the inclusion of a schedule detailing a loaded rate arrangement.
10. Between 26 March and June 2021, the Applicant worked constructively with the FWC enterprise agreement team (**Agreement Team**) and the United Workers Union (**UWU**) regarding the proposed draft determination.
11. To date, two (2) formal teleconferences have been held between the Applicant, Agreement Team and the UWU to discuss, consider and provide feedback regarding the proposed draft determination. As a result of these meetings, and in light of the feedback it received, the Applicant has made a number of changes to its 25 March 2021 proposed draft determination.

Modern award objectives

12. The Applicant submits the Variation will ensure the Award operates as a fair and relevant minimum safety net and assist the industry’s recovery efforts as a result of the COVID-19 pandemic.

13. The Applicant contends Schedule K satisfies the following modern award objectives:
- a. section 134(1)(a) of the Act;
 - b. section 134(1)(d) of the Act;
 - c. section 134(1)(f) of the Act; and
 - d. section 134(1)(g) of the Act.

Impact of the COVID-19 pandemic and the hospitality industry

14. As a result of the COVID-19 global pandemic, Australia's hospitality industry was one of the most severely impacted industries in the country.
15. Since March 2020, all states and territories have imposed varying degrees of restrictions at various times on hospitality businesses in an effort to combat the spread of COVID-19 in the community. The restrictions resulted in:
- a. businesses across the country closing on a permanent or temporary basis;
 - b. reductions in available working hours for employees; and
 - c. reductions in operating hours.
16. The Applicant accepts between March 2020 and July 2021, Australia's hospitality industry has shown periods of both decline and recovery. These periods have coincided with the imposition of snap lockdowns in response to community transmission and subsequent easing of restrictions when the risk subsides.
17. However, the COVID-19 pandemic continues to negatively affect employment rates, business turnover and business' ability meet financial commitments within Australia's hospitality industry.
18. The Applicant contends the hospitality industry is still in a state of recovery and not back to its pre-pandemic levels. This is supported by the findings of Professor Jeff Borland in his April 2021 report, prepared for the purposes of the FWC's 2020-21 Annual Wage Review; '*An assessment of the economic effects of COVID-19 – Version 3*'. The Accommodation and food services sector remains one of the industries most adversely affected by the COVID-19 pandemic.
19. Accordingly, the Applicant submits the proposed Variation balances the Government's request for sensible workplace flexibility in response to changing economic conditions against the need to maintain appropriate safeguards and ensuring employees are not 'worse off' when compared to Award entitlements.

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.
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	Bianca Grubor
Date	Monday, 19 July 2021
Capacity/Position	Acting Workplace Relations Manager



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

Attachment A

DRAFT DETERMINATION

Fair Work Act 2009

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



Hospitality Industry (General) Award 2020

(AM2020/103)

JUSTICE ROSS, PRESIDENT

XXXXX

XXXXX

_____ 2021

Award schedule – COVID-19 pandemic – Loaded rate arrangements

A. Further to the decision [_____] issued by the Full Bench of the Fair Work Commission on _____ 2021, the above award is varied as follows:

1. In the Table of Contents add a new Schedule K and Schedule L.

Schedule K – Loaded Rate Arrangements

K.1. Subject to the provisions of this Schedule, an employer may elect to pay a full-time employee classified at Level 3 or above, a percentage of the employee's ordinary hourly rate (**Loaded Rate**) in satisfaction of the requirements of:

- a) Clause 26.14 – Split shift allowance;
- b) Clause 28 – Overtime; and
- c) Clause 29 – Penalty rates, with the exception of penalty rates in relation to Public Holidays.

K.2. If an employer elects to pay an employee a Loaded Rate, the employer must provide the employee a written loaded rate arrangement in accordance with the form set out in Schedule L (**Loaded Rate Arrangement**).

K.3. The employer must keep a copy of the Loaded Rate Arrangement as a time and wages record.

K.4. Any dispute regarding the operation of Schedule K may be referred to the Fair Work Commission in accordance with clause 40 – Dispute resolution.

K.5. A Loaded Rate Arrangement under this Schedule is not valid unless it contains a notice that the employer consents to a dispute arising from the arrangement being settled by the Fair Work Commission through arbitration in accordance with clause 40 – Dispute resolution and section 739(4) of the Act.

Loaded Rate Parameters

K.6. The Loaded Rate Parameters are:

- a) The roster cycle must operate weekly commencing on a Monday;

- b) Monday to Friday: a maximum of 11.5 hours (excluding meal breaks) per day / shift rostered between 7:00am and 12:00am (midnight);
- c) Saturday: a maximum of 10 hours (excluding meal breaks);
- d) Sunday: a maximum of 10 hours (excluding meal breaks);
- e) The provision of the split shift allowance, if the period between shifts is 3 hours or less; and
- f) The Loaded Rate Range of Days and Loaded Rate Maximum Weekly Hours applicable to the Loaded Rate Percentage as set out in the table below:

Loaded Rate Percentage (% of ordinary hourly rate)	Loaded Rate Range of Days	Loaded Rate Maximum Weekly Hours
10.20%	Monday to Friday	40
20.00%	Monday to Friday	45
16.95%	Monday to Saturday	40
23.40%	Monday to Saturday	45
26.85%	Monday to Sunday	40
30.80%	Monday to Sunday	45

Tables K.6.1 and K.6.2 set out the Loaded Rate in dollar value based on the Loaded Rate Percentage.

Table K.6.1 – Loaded Rate Percentage dollar value

	Loaded Rate Percentages					
	10.20%	20.00%	16.95%	23.40%	26.85%	30.80%
	\$	\$	\$	\$	\$	\$
Level 3	\$24.16	\$26.30	\$25.64	\$27.05	\$27.81	\$28.67
Level 4	\$25.45	\$27.71	\$27.00	\$28.50	\$29.29	\$30.20
Level 5	\$27.04	\$29.45	\$28.70	\$30.28	\$31.13	\$32.10
Level 6	\$27.77	\$30.24	\$29.47	\$31.10	\$31.97	\$32.97

Table K.6.2 – Loaded Rate Percentage dollar value – casino gaming classifications

	Loaded Rate Percentages					
	10.20%	20.00%	16.95%	23.40%	26.85%	30.80%
	\$	\$	\$	\$	\$	\$
Level 3	\$25.45	\$27.71	\$27.00	\$28.50	\$29.29	\$30.20
Level 3A	\$26.64	\$29.02	\$28.28	\$29.84	\$30.68	\$31.63
Level 4	\$27.04	\$29.45	\$28.70	\$30.28	\$31.13	\$32.10
Level 5	\$27.85	\$30.32	\$29.55	\$31.19	\$32.06	\$33.06
Level 6	\$28.65	\$31.20	\$30.41	\$32.10	\$32.99	\$34.00

K.7 Unless modified by clauses K.1, K.6, and subject to clause K.8 a Loaded Rate Arrangement does not vary the application of the other terms of this award.

K.8. The Loaded Rate Percentage will only apply to, and be in satisfaction of, work performed and the allowances specified within the Loaded Rate Parameters.

NOTE 1: An employee will be entitled to overtime in accordance with clause 28 – Overtime for work which exceeds the daily and / or shift maximum hours, the

Loaded Rate Range of Days or the Loaded Rate Maximum Weekly Hours each week.

NOTE 2: An employee will be entitled to the relevant penalty rates and applicable entitlements for work completed on, or other arrangements relating to a public holiday in accordance with clause 29 – Penalty rates and clause 35 – Public holidays.

NOTE 3: If an employee performs work beyond the scope of the Loaded Rates Parameters, but does not exceed the daily and / or shift maximum hours, the Loaded Rate Range of Days or the Loaded Rate Maximum Weekly Hours each week, the employee will be entitled to the applicable penalty rate or allowance in accordance with the award.

For example, if the employee commences work at 6:00am on a Tuesday, the additional payment pursuant to clause 29.2 – Penalty Rates will be \$3.46. If the employee has a split shift where the period exceeds 3 hours, the additional payment is \$1.49, being the difference between the split shift allowances in clause 26.14 – Split Shift Allowance.

K.9. The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken. This record must be signed by the employee or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

Base Rate of Pay for employees on a Loaded Rate Arrangement

K.10. For the purposes of the [NES](#), the base rate of pay of an employee receiving a Loaded Rate under this Schedule is the employee's ordinary hourly rate and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Variation and Termination of a Loaded Rate Arrangement

K.11. Subject to clause 39 – Consultation about changes to rosters or hours of work, an employer may vary the Loaded Rate Arrangement by giving 2 weeks' written notice of the issuing a new Loaded Rate Arrangement.

K.12. A Loaded Rate Arrangement may be terminated:

- a) at any time by written agreement between the employee and the employer; or
- b) by the employer giving 2 weeks' written notice.

K.13. A Loaded Rate Arrangement terminated in accordance with clause K.12 (b) ceases to have effect at the end of the notice period.

Loaded Rate Arrangements not to be applied to Certain Employees

K.14. Schedule K does not apply to employees:

- a) paid in accordance with Clause 18.4 – Junior Rates;
- b) paid in accordance with Schedule E.4 – Supported Wage Rates;
- c) engaged in accordance with Clause 15.3 – Catering in remote locations; and
- d) rostered in accordance with Clause 15.1(b) (vii) of this award.

Schedule L - Loaded Rate Arrangement Form

Name of employer: _____

Name of employee: _____

Employee Classification/Wage Level: _____

Loaded Rate Range of Days: _____

Loaded Rate Maximum Weekly Hours: _____

Loaded Rate Percentage: _____

Ordinary Hourly Rate: _____ Loaded Rate: _____

Acknowledgement by Employer

The employer acknowledges that by entering into this arrangement, the employee must be paid the employee Loaded Rate for all hours up to the Loaded Rate Maximum Weekly Hours each week.

The employer acknowledges and agrees to roster the Loaded Rate Maximum Weekly Hours in accordance with the Loaded Rate Parameters defined in clause K.6 of Schedule K.

The employer acknowledges additional payments will apply to work performed on days, or at times, beyond the scope of the Loaded Rate Parameters, or for allowances not specified in the Loaded Rate Parameters.

By entering into this arrangement, the employer consents to any dispute arising from this arrangement being settled by the Fair Work Commission through arbitration in accordance with clause 40 – Dispute resolution and section 739(4) of the Act.

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ____/____/20__

2. Updating cross references accordingly
3. This determination comes into effect on __2021.

PRESIDENT