

## 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	[ ] Mr [ ] Mrs [ ] Ms [ ] Other please specify:		
First name(s)			
Surname			
Postal address	Ground Floor, 116 Queensberry Street		
Suburb	Carlton South		
State or territory	VIC	Postcode	3053
Phone number	(03) 9342 1414	Fax number	
Email address	<a href="mailto:crabaut@asu.asn.au">crabaut@asu.asn.au</a> <a href="mailto:info@asu.asn.au">info@asu.asn.au</a>		

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

Legal name of business	Australian Municipal, Administrative, Clerical and Services Union (' <b>the ASU</b> ')
Trading name of business	Australian Services Union
ABN/ACN	28 519 971 998
Contact person	Corey Rabaut <a href="mailto:crabaut@asu.asn.au">crabaut@asu.asn.au</a> <a href="mailto:info@asu.asn.au">info@asu.asn.au</a>

### 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

Labour Market Assistance Industry Award 2020 - MA000099

### 1.2 What industry is the employer in?

Labour Market Assistance Industry Award

## 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 concerns an ambiguity and uncertainty as to the correct public holiday rate of pay for casual employees under the *Labour Market Assistance Industry Award 2020* (**'the Award'**).

2. 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. This application concerns an ambiguity and uncertainty as to the correct public holiday rate of pay for casual employees under the *Labour Market Assistance Industry Award 2020* (**‘the Award’**).

### Commission’s Jurisdiction

1. Section 160 empowers the Fair Work Commission (**‘the Commission’**) to vary a modern award to remove ambiguity or uncertainty.
2. There are two steps in the process before the Commission can exercise its power under s.160.
3. Firstly, identifying an ambiguity or uncertainty. An objective judgment must be made as to whether, on the proper construction of the relevant provision of an Award, the wording of that provision is susceptible to more than one meaning. Further, it is not confined to identifying which words of a clause give rise to an ambiguity or uncertainty – a combination of clauses may have the effect. This is set out in paragraphs [5] to [10] of this application.
4. Secondly, and once the ambiguity or uncertainty is established, the Commission is to have regard to the intention of the parties at the time the Award was made.

### Ambiguity and uncertainty – Body of the Award

5. Clause 21.2(c) provides public holiday overtime rates of pay for permanent full-time and part-time employees (**collectively ‘permanent employees’**). Relevantly, subsection (c) states:

#### **(c) Public holidays**

*An employee who, with the approval of the employer, works on a public holiday will be paid at the following rates:*

- a. **250%** of the minimum hourly rate for work performed between 6.00 am and 8.00 pm, and not exceeding 10 hours in one day; or

*[21.2(c)(ii) varied by PR723994 ppc 20Nov20]*

- b. **350%** of the minimum hourly rate for work performed outside the hours in clause 21.2(c)(i) or in excess of 10 hours in one day.

6. The public holiday overtime rates for casual employees are greater than the rate of pay for permanent employees.
7. Clause 21.3(c) provides the casual overtime payment for working on a public holiday. Specifically, it states:

#### **(c) Public holidays**

*An employee who, with the approval of the employer, works on a public holiday will be paid at the following rates:*

- a. **312.5%** of the minimum hourly rate for work performed between 6.00 am and 8.00 pm, and not exceeding 10 hours in one day; or
- b. **437.5%** of the minimum hourly rate for work performed outside the hours in clause 21.3(c)(i) or in excess of 10 hours in one day.

*NOTE: The overtime rates for casual employees have been calculated by adding the casual loading prescribed by clause 11.3(b) to the minimum hourly rate before applying the overtime rates for full-time and part-time employees prescribed by clause 21.2.*

8. Clause 29 of the Award supplements the NES by providing additional provisions dealing with public holidays.

9. Clause 29.2 is entitled '*Payment for working on a public holiday*'.

10. Clause 29.2 creates ambiguity and uncertainty because:

- a. Clause 29.2 does not determine the rate of pay for working on a public holiday;
- b. Clause 29.2 notes that payment for working on a public holiday '*is provided for*' by cl 21.2(c);
- c. Clause 21.2(c) only applies to permanent employees; and
- d. Clause 29.2 does not refer to the provisions for casual employees at clause 21.3(c).

11. The ambiguity can be removed by varying cl. 29.2 to refer to the rates of pay for both permanent and casual employees.

12. The Commission should vary the Award to remove this ambiguity and uncertainty.

#### Ambiguity and uncertainty – Schedule 2.B.1

13. Consequentially to the amendment to the body of the Award, the Commission should vary Schedule 2.B.1 to reflect the actual rates of pay applicable to casual employees.

#### Intention of the Parties

14. The Commission is to have regard to the mutual intention of the parties at the time the Award was made.

15. In *4 yearly review of modern awards – Overtime for casuals* [2020] FWCFB 4350, the Full Bench considered casual employees entitlement to overtime under the Award. At [124], it determined that casual loading is payable on overtime and is calculated on a compounding basis. The Award was amended to include a new provision, PR723994.

16. The amended Award included a change to the public holiday rates to give effect to the Full Bench decision.

17. The amendment did not include a corresponding change in Cl. 29.2, "*Payment for working a public holiday*".

18. The amendment made by the Full Bench in *4 yearly review of modern awards – Overtime for casuals* to the Award was to give effect to compounded entitlement.

19. The Commission should give effect to the compounded rates and ambiguity by varying cl. 29.2 to refer to the rates of pay for both permanent and casual employees.

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	Emeline Gaske
Date	14 October 2021
Capacity/Position	Assistant 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**

MA000099 PRXXXX

FAIR WORK COMMISSION

# DETERMINATION

*Fair Work Act 2009*

s.157 FWC may vary etc. modern awards if necessary to achieve modern award objectives

## LABOUR MARKET ASSISTANCE INDUSTRY AWARD 2010

[\[MA000099\]](#)

Social, community, home care and disability services

X

\_\_\_\_\_ 2021

*Review of Labour Market Assistance Award 2020– remove ambiguity or uncertainty*

A. Further to the decision \_\_ issued on \_\_2021, the above award is varied as follows:

1. By amending clause 29.2 as follows:

### 29.2 Payment for working on a public holiday

(a) For full-time and part-time employees, payment for working on a public holiday is provided for in clause 21.2(c).

(b) For casual employees, payment for working on a public holiday is provided for in clause 21.3(c)

2. By amending Schedule 2.B.1 as follows:

### B.2.1 Casual and sessional employees—ordinary and penalty rates

	Ordinary hours	Late work <sup>1</sup>	Early work <sup>2</sup>	Saturday	Sunday	Public holiday
% of minimum hourly rate						
	125%	145%	160%	200%	225%	<del>275%</del> 337.5%
	\$	\$	\$	\$	\$	\$
<b>Administrative assistant</b>						
Pay point 1	28.78	33.38	36.83	46.04	51.80	<del>63.31</del>

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						77.69
Pay point 2	29.26	33.94	37.46	46.82	52.67	<del>64.38</del> 79.01
Pay point 3	30.33	35.18	38.82	48.52	54.59	<del>66.72</del> 81.88
Pay point 4	31.29	36.29	40.05	50.06	56.32	<del>68.83</del> 84.48
<b>Administrative officer</b>						
Pay point 1	33.14	38.44	42.42	53.02	59.65	<del>72.90</del> 89.47
Pay point 2	33.88	39.30	43.36	54.20	60.98	<del>74.53</del> 91.46
Pay point 3	34.61	40.15	44.30	55.38	62.30	<del>76.15</del> 93.05
Pay point 4	35.58	41.27	45.54	56.92	64.04	<del>78.27</del> 96.05
<b>Employment services officer grade 1</b>						
Pay point 1	32.16	37.31	41.17	51.46	57.89	<del>70.76</del> 86.84
Pay point 2	33.14	38.44	42.42	53.02	59.65	<del>72.90</del> 89.47
Pay point 3	33.88	39.30	43.36	54.20	60.98	<del>74.53</del> 91.46
<b>Employment services officer grade 2</b>						
Pay point 1	34.61	40.15	44.30	55.38	62.30	<del>76.15</del> 93.45

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Pay point 2	35.58	41.27	45.54	56.92	64.04	<del>78.27</del> 96.05
Pay point 3	36.54	42.38	46.77	58.46	65.77	<del>80.38</del> 98.65
Pay point 4	37.50	43.50	48.00	60.00	67.50	<del>82.50</del> 101.25
Pay point 5	38.39	44.53	49.14	61.42	69.10	<del>84.45</del> 103.65
<b>Employment services co-ordinator</b>						
Pay point 1	38.39	44.53	49.14	61.42	69.10	<del>84.45</del> 103.65
Pay point 2	39.35	45.65	50.37	62.96	70.83	<del>86.57</del> 106.25
Pay point 3	40.24	46.68	51.50	64.38	72.43	<del>88.52</del> 108.64
Pay point 4	41.20	47.79	52.74	65.92	74.16	<del>90.64</del> 111.24
<b>Manager grade 1</b>						
Pay point 1	38.39	44.53	49.14	61.42	69.10	<del>84.45</del> 103.65
Pay point 2	39.35	45.65	50.37	62.96	70.83	<del>86.57</del> 106.25
Pay point 3	40.24	46.68	51.50	64.38	72.43	<del>88.52</del> 108.64
Pay point 4	41.20	47.79	52.74	65.92	74.16	<del>90.64</del> 111.24
Pay point 5	42.16	48.91	53.97	67.46	75.89	<del>92.76</del>

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						113.84
Pay point 6	43.14	50.04	55.22	69.02	77.65	<del>94.90</del> 116.47
<b>Manager grade 2</b>						
Pay point 1	44.10	51.16	56.45	70.56	79.38	<del>97.02</del> 119.07
Pay point 2	45.06	52.27	57.68	72.10	81.11	<del>99.14</del> 121.67
Pay point 3	46.04	53.40	58.93	73.66	82.87	<del>101.28</del> 124.30
Pay point 4	46.99	54.51	60.14	75.18	84.58	<del>103.37</del> 126.87
Pay point 5	47.96	55.64	61.39	76.74	86.33	<del>105.52</del> 129.50

<sup>1</sup> **Late work** means work performed between 8.00 pm and midnight Monday to Friday inclusive.

<sup>2</sup> **Early work** means work performed between the hours of midnight and 6.00 am from Sunday to Friday inclusive.

<sup>3</sup> A **sessional employee** will be at Employment services officer grade 1 Pay point 3.

B. This determination comes into operation from \_\_\_ 2021. 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 on or after \_\_\_ 2021.

## Form F48 – Application for directions on procedure

Fair Work Commission Rules 2013, Rule 7

This is an application to the Fair Work Commission for directions about procedure in relation to a matter in accordance with the [Fair Work Act 2009](#).

### The Applicant



These are the details of the person who is making this application. The applicant for directions on procedure may be different from the applicant in the matter before the Commission.

<b>Title</b>	[ ] Mr [ ] Mrs [ ] Ms [ ] Other please specify:		
<b>First name(s)</b>			
<b>Surname</b>			
<b>Postal address</b>	Ground Floor, 116 Queensberry Street		
<b>Suburb</b>	Carlton South		
<b>State or territory</b>	VIC	<b>Postcode</b>	3053
<b>Phone number</b>	(03) 9342 1414	<b>Fax number</b>	
<b>Email address</b>	<a href="mailto:crabaut@asu.asn.au">crabaut@asu.asn.au</a> <a href="mailto:info@asu.asn.au">info@asu.asn.au</a>		

### If the Applicant is a company or organisation

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

<b>Legal name of Applicant</b>	Australian Municipal, Administrative, Clerical and Services Union ('the ASU')
<b>Applicant's trading name or registered business name</b>	Australian Services Union
<b>Applicant's ACN (if a company)</b>	
<b>Applicant's ABN (if applicable)</b>	28 519 971 998
<b>Contact person</b>	Corey Rabaut <a href="mailto:crabaut@asu.asn.au">crabaut@asu.asn.au</a> <a href="mailto:info@asu.asn.au">info@asu.asn.au</a>

### Does the Applicant need an interpreter?



If you have 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).

<b>Name of person</b>			
<b>Firm, organisation or company</b>			
<b>Postal address</b>			
<b>Suburb</b>			
<b>State or territory</b>		<b>Postcode</b>	
<b>Phone number</b>		<b>Fax number</b>	
<b>Email address</b>			

**Is the Applicant's representative a lawyer or paid agent?**

Yes

No

**The other party**



These are the details of the other party in the matter.

<b>Title</b>	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:
<b>First name(s)</b>	
<b>Surname</b>	
<b>Postal address</b>	
<b>Suburb</b>	

<b>State or territory</b>		<b>Postcode</b>	
<b>Phone number</b>		<b>Fax number</b>	
<b>Email address</b>			

**If the other party is an organisation**

If the other party is an organisation please also provide the following details

<b>Legal name of organisation</b>	
<b>Trading name of organisation</b>	
<b>ABN/ACN</b>	
<b>Contact person</b>	

**1. Preliminary**

**1.1 Are you seeking directions for an existing matter?**

Yes – Go to 1.2

No – Go to 1.3

**1.2 What is the name and matter number for the matter?**

AM2017/51 Overtime for casuals

**1.3 What is the type of matter that you want to initiate?**

Briefly, provide the details of the type of matter.

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## 2. Reasons for seeking directions

### 2.1 Why are you applying to the Commission for directions?

The procedure is not prescribed by the FW Act, the Fair Work Commission Rules, the regulations or any other Act or regulations. Provide details below.

You are in doubt about the proper procedure to follow. Provide details below.

Rule 49 requires this application to be made connection with an application to vary a modern award

## 3. Proposed directions.

Set out your proposed directions you are seeking, if any (optional).

1. That the attached application to vary a modern award be published on the Fair Work Commission's website at a location deemed appropriate to the Commission
2. That, upon completion of the above steps, the attached application be deemed served.

## 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.

<b>Signature</b>	
<b>Name</b>	Corey Nelson Rabaut
<b>Date</b>	14 October 2021
<b>Capacity/Position</b>	National Industrial Office



Where this form is not being completed and signed by the Respondent, 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**