

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 checked="" type="checkbox"/> Other please specify: Registered organisation		
First name(s)			
Surname			
Postal address	Level 3, 51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	0400 395 348	Fax number	
Email address	ruchi.bhatt@aigroup.com.au		

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

Applicant's legal name	Australian Industry Group
Applicant's trading name	Ai Group
Applicant's ABN/ACN	76 369 958 788 / 369 958 788
Contact person	Ruchi Bhatt Principal Advocate E: ruchi.bhatt@aigroup.com.au P: 0400 395 348

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.

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.

Ai Group seeks variations that would result in the Award expressly and clearly identifying that the performance of work on shifts before and after (and that are each contiguous with one end of) a sleeperover, are permitted as separate shifts each constituting ordinary hours.

The variations are sought pursuant to s.160(1) of the *Fair Work Act 2009 (Act)*, with retrospective effect from 1 January 2010, pursuant to s.165(2) of the Act. In the alternative, the variations are sought pursuant to s.157(1)(a) of the Act.

Ai Group makes the application pursuant to s.160(2)(c), or in the alternative, s.158(1) of the 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.

Overview of sleepover arrangements in the Award

1. Clause 25.7 of the Award provides for the performance of a 'sleepover', as defined by clause 25.7(a). Sleepover arrangements are commonly implemented by employers covered by the Award, including those who provide disability support services and undertake youth work.
2. Clause 25.7(f) of the Award contemplates the performance of work before 'and / or' after a sleepover.
3. The Award is ambiguous and / or uncertain as to whether an employee's ordinary hours of work can be arranged such that they include the performance of ordinary hours of work both immediately before a sleepover, and during a separate shift of ordinary hours immediately after that sleepover, without such an arrangement automatically resulting in the work before and after being regarded as one continuous shift. The Award is arguably capable of being read both ways (the Fair Work Ombudsman appears to currently read the Award differently to Ai Group). That ambiguity or uncertainty is exacerbated by clauses 25.4 and 29.4 of the Award.

Variation to remove ambiguity or uncertainty

4. The Award should be varied pursuant to s.160(1) to remove the ambiguity and / or uncertainty, and to make clear that:
 - (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 shifts, each constituting ordinary hours; and
 - (b) a sleepover is capable of constituting a break between shifts, including for the purposes of clause 25.4(b) of the Award.
5. It is appropriate that the variations be made, for the following reasons:
 - (a) of the two competing interpretations, the preferable one is that each shift on either side of the sleepover is capable of constituting a separate shift, each consisting of ordinary hours;
 - (b) the construction upon which the variation is sought is more consistent with a plain reading of the text and context of the Award and its provision for sleepover arrangements, in providing a facility for an employer to implement, and employees to work, sleepover rosters, with periods of work before and after. The proposed variation seeks to make that construction clear, by removing the ambiguity and uncertainty;
 - (c) the ambiguity and uncertainty as to whether sleepover arrangements require an employer to treat contiguous periods of work before and after the sleepover as one continuous shift (attracting shift penalties when they ought not to arise) or as requiring the performance and payment of large stretches of overtime, will likely lead employers to cease implementing these arrangements; and

- (d) making the variation will therefore give clarity and certainty to employers that they can implement these arrangements without incurring a disproportionate shift penalty or requiring the routine performance of significant periods of overtime. Conversely, the variation will also give clarity and certainty to employees and other stakeholders as to the obligations and entitlements that arise from working such arrangements.

Variation necessary to achieve the modern awards objective

- 6. Alternatively, if the Commission finds that the Award is not relevantly ambiguous or uncertain, the variation proposed in paragraph 4 above should nonetheless be made pursuant to s.157(1)(a), on the basis that it is necessary to do so in order to achieve the modern awards objective.
- 7. The reasons for why those variations would be necessary are as follows:
 - (a) they would result in a *fair* safety net from the perspective of employers and employees, noting that many employees wish to perform work as described above;
 - (b) they would promote flexible modern work practices and the efficient and productive performance of work – specifically, they would enable an employee to provide care to a client before they go to bed and when they awake the following day;
 - (c) they would have a positive impact on business, including on productivity and employment costs;
 - (d) they would ensure that the Award is simple and easy to understand; and
 - (e) critically, they would facilitate greater quality of care for clients.

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	Brent Ferguson
Date	2 November 2023
Capacity/Position	Head of National Workplace Relations Policy

FAIR WORK COMMISSION

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



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