

# 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  Mr  Mrs  Ms  Other please specify:

First name(s)

Surname Shop, Distributive and Allied Employees' Association

Postal address 6<sup>th</sup> Floor, 53 Queen Street

Suburb Melbourne

State or territory Vic Postcode 3000

Phone number (03) 8611 7000 Fax number

Email address Gerard@sda.org.au

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

Applicant's legal name Shop, Distributive and Allied Employees' Association

Applicant's trading name Shop, Distributive and Allied Employees' Association

Applicant's ABN/ACN 99 789 302 470

Contact person Mr Gerard Dwyer

**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	Dominic Macken		
Firm, organisation or company	A J Macken & Co.		
Postal address	11 <sup>th</sup> Floor, 53 Queen Street		
Suburb	Melbourne		
State or territory	Vic	Postcode	3000

FAIR WORK COMMISSION

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Phone number (03) 9614 4899 Fax number

Email address djmacken@macken.com.au

**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.

General Retail Industry Award 2020 (MA00004), Fast Food Industry Award 2020 (MA00003), Pharmacy Industry Award (MA00012)

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

General Retail Industry, Fast Food Industry and Pharmacy Industry

**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.

See attached document A

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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.

See attached document B

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 /Dominic Macken

Name Dominic Macken

Date 6 June 2024

Capacity/Position Solicitor



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

1. The Applicant seeks to vary:

- (a) the General Retail Industry Award 2020 (GRIA)(MA00004);
- (b) the Fast Food Industry Award 2020 (FFIA)(MA00003); and
- (c) the Pharmacy Industry Award (PIA) (MA00012),

as follows:

- (i) by deleting the table setting out junior rates entitled Table 5 included in clause 17.2 of the GRIA;
  - (ii) by deleting the table setting out junior rates entitled Table 4 included in clause 15.2 of the FFIA; and
  - (iii) by deleting the table setting out junior rates entitled Table 4 included in clause 11.2 of the PIA.
2. In each case the table is to be replaced by a table in the following terms:

### **Junior Rates**

A.	% of applicable rate
16 years of age and under	50%
17 years of age	75%
18 years of age and over	100%

## ATTACHMENT B

1. The Shop Distributive and Allied Employees' Association (SDA) is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* and is entitled to cover industrial interests of employees (retail workers) whose employment is covered by each of:
  - (a) the General Retail Industry Award 2020 (GRIA);
  - (b) the Fast Food Industry Award 2020 (FFIA); and
  - (c) the Pharmacy Industry Award 2020 (PIA).
2. Each award currently provides for junior rates for employees under the age of 21.
3. The current junior rates for each award are not identical but are substantially the same.
4. In each award "junior employee" is defined as an employee of less than 21 years of age (GRIA, clause 2; FFIA, clause 2; PIA, clause 16.2).
5. The SDA seeks a variation of the tables which set out junior rates in each of the relevant awards so that, ultimately, employees 16 years of age and under are paid at the rate of 50% of the adult rate, employees 17 years of age are paid at 75% of the adult rate and employees 18 years of age and over are paid at the full adult rate.
6. The SDA's application, by reason of the reduction in the existing differentiation of junior employees invites variation to certain of those junior rates. For example, the SDA's proposal in respect of each award that junior employees aged 16 years and under receive 50% of the adult minimum wage rate will have the consequence that some current junior rates in each award will increase (from 40% to 50% in the FFIA for employees under 16 years, 45% to 50% in the GRIA and PIA for employees under 16 years; 60% to 75% in all three awards for employees 17 years of age). Distinctions presently drawn between 18, 19 and 20 year old junior employees (and 21 year old employees in the case of the FFIA) will also be abolished.
7. The application is made pursuant to s.157 of the *Fair Work Act*. The Commission is permitted to make a variation to a modern award minimum wage if it is satisfied that

- (a) the variation is justified by work value reasons; and
  - (b) making the variation outside the system of annual wage reviews is necessary to achieve the modern awards objective.
8. The SDA is permitted to make such application pursuant to s.158 Item 1.
9. Work value reasons are defined in s.157(2A) as being reasons related to *any* of the following:
- (a) the nature of the work;
  - (b) the level of skill or responsibility involved in doing the work;
  - (c) the conditions under which the work is done.
10. The modern awards objective is defined in s.134 of the Act. Section 284 also applies to minimum wages including junior wages. The minimum wages objective applies to the performance of functions under Part 2-3 including the exercise of a power under s.157.
11. Junior employees are defined in s.12 of the Act to include all employees under the age of 21.
12. The SDA's application is based upon three grounds:
- (a) work value reasons;
  - (b) the modern awards objective; and
  - (c) the minimum wages objective.
- (a) Work value reasons**
13. Work value reasons are those which justify the amount junior workers should be paid for doing work covered by the three awards, having regard to the nature of the work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.
14. The SDA will call evidence from junior employees in the impacted junior wage rate classifications on the work value reasons.



*Nature of the work: section 157(2A)(a)*

15. The SDA will call evidence from junior workers that for the vast majority of them, the nature of the work they perform is appreciably the same as that performed by employees who are over 21 years of age.
16. As to junior employees aged 18 years or older, the SDA's evidence will be that where employees over 18 but under 21 years of age are employed at the same level, they perform the same duties as employees over the age of 21 working in the same classification. This is almost always the case.
17. While some workers over 21 years of age may perform work of a different nature, the reasons for that are more often correlated with the employee's length of service with the employer or their experience, as opposed to simply age. Conversely, some junior retail workers will give evidence that they perform supervisory and managerial roles and take on responsibility, including by supervising workers who are older than them.
18. Overall, the evidence will support a finding that the nature of the work performed for retail workers is not determined, and should not be determined, by reference to age. As a result, the criterion of age, at least for employees over the age of 18, as the determinant of an entitlement to proportionately lower wages is arbitrary.

*Level of skill or responsibility involved in doing the work: section 157(2A)(b)*

19. Similarly, the SDA will call evidence that the level of skill or responsibility involved in doing the work results from training and length of service, as opposed to the age of the employee.
20. Witnesses will speak to performing work at higher levels of skill or responsibility where they have sought out such positions and they have been available. In some cases, those employees are acting in positions senior to older workers but are paid less. In other cases, junior employees and older employees perform at the same level of skill and responsibility, but are paid differently.

*The conditions under which the work is done: section 157(2A)(c)*

21. The SDA will call evidence that junior employees perform their role both with and without supervision. Many junior workers will give evidence that after their training and an initial period of employment, they are no longer closely supervised (or supervised any differently to workers older than 21 years of age) and the conditions under which they perform their work does not differ to older employees.
22. As to junior employees aged 16 years or less, or alternatively aged 17 years, the SDA will call evidence from those classes of employees that the value of the work performed by them warrants an uplift in each case from the percentage of the adult minimum wage rate presently received by them, principally by reference to the quantitative and qualitative work performed by those categories of employees when compared to the work done by the more senior (in terms of age) junior employees. The present calibration of the junior wage rates for these younger employees can no longer be justified on a work value basis assessed by reference to these older employees.

**(b) Modern awards objective**

23. In determining whether to make any variation, the Commission must consider the modern awards objective.
24. The variation to each award sought by the SDA is consistent with and better achieves the modern award objective for at least the following reasons.
25. The SDA will call evidence that for many junior retail workers, their income is limited and after their expenses, they have little funds left over to save or use to spend with friends or family. Employees across the retail industry generally (collectively encompassing those retail industries covered by the GRIA, the FFIA and the PIA) have been previously found by the Commission to be amongst the lowest paid workers in industry.
26. The SDA will call evidence that for some workers, they are aware that they perform the same work and yet are paid less than workers who are older than them performing the same role. For some, this is a source of frustration and leads them to question whether to remain with their employer. While there is no evidence that such workers would necessarily leave the larger workforce, it is evidence that suggests that the current

junior rates adversely affect workforce participation in the retail industry employment market.

27. The SDA will call some witnesses who will give evidence of being asked to perform more senior functions and roles as older workers who were paid more and that this leads to feelings of dissatisfaction. Some of those workers, have complained and then declined to work the more senior roles as they were not being paid more to do so.

28. A sense of being valued and paid fairly for work performed will naturally increase workforce participation. Where retail workers feel that they are not paid fairly, as will be their evidence, it is open to the Commission to find that this is likely to adversely impact workforce participation.

29. As to social inclusion, the SDA will call evidence that for many junior retail workers, they cannot afford to engage in their social lives; for many, they cannot afford to socialise with friends, to pursue sport or entertainment or even to occasionally spend money on seeing a movie with friends. For a majority of the junior retail workers the SDA will call, their capacity to be engaged in a vibrant and social life, as a 15-18 year old, is curtailed by their financial constraints. This is directly linked to the remuneration paid to them for the work they are employed to do.

**(c) Minimum wages objective**

30. In determining the SDA's Variation Application, the Commission must consider the minimum wages objective, in section 284(1).

31. The minimum wages objective is integral to the modern awards objective and ought not be considered as a distinct part of the decision-making process. The Full Court of the Federal Court explained this in *National Retail Association v FWC*, at [64]:

The modern awards objective deals with the content of modern awards and addresses the goal of providing fair and relevant minimum conditions of employment. The terms and conditions of employment contemplated by the modern awards objective must have been intended to include those terms or conditions which provide for minimum wages. One of the primary, if not the primary, term or condition of employment is the provision for the payment of wages. There is no basis for any suggestion that the object of establishing and maintaining "a safety net of fair minimum wages" is not a necessary element in achieving "a fair and relevant minimum safety net of terms and conditions".

Accordingly, the minimum wages objective must be regarded as not only relevant to, but an inherently important consideration in, any assessment of whether, by reference to the minimum wages provided by a modern award, that award achieves the modern awards objective. The intended integral connection of the minimum wages objective to the modern award objective is expressed in Item 6(4) and also in s 138 of the FW Act. It is also reflected in the substantial commonality of matters that need to be taken into account in the pursuit of each of the two objectives, as specified in ss 134(1) and 284(1) of the Act.

32. The SDA will call evidence including expert evidence to the effect that the minimum wages objective will, be promoted by the proposed variations to each award.