

# About the F46 application form

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## Application to vary a modern award

### Who can use this form

Use this form if you want to make an application for the Fair Work Commission (the Commission) to make:

- a modern award,
- a determination varying a modern award, or
- a determination revoking a modern award.

You should only use this form to make an application **outside** of the system of the 4 yearly reviews of modern awards (4 yearly reviews) or the annual wage reviews.

You must be a person, organisation or outworker entity covered by the modern award to be eligible to make an application, or be an organisation that is entitled to represent the industrial interests of the person(s) or organisation(s) that are covered by the modern award.

You may make applications for 2 or more related things at the same time, depending on the kind of application you want to make. See section 158 of the [Fair Work Act 2009](#) (the FW Act) for more information about who may apply to make a modern award or for a determination varying or revoking a modern award.

### About varying modern awards

The Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. In order to achieve the modern awards objective, the Commission must take into account the matters set out in section 134 of the FW Act, such as relative living standards and the needs of the low paid.

The FW Act allows the Commission to make a modern award, or make a determination varying or revoking a modern award **outside** of the system of 4 yearly reviews if the Commission is satisfied that to do so is necessary to achieve the modern awards objective (s.157(1)).

The Commission may also make a determination varying modern award minimum wages **outside** of the 4 yearly review and the system of annual wage reviews if the Commission is satisfied that to do so is:

- justified by work value reasons, and
- necessary to achieve the modern awards objective (s.157(2)).

Note: section 157 to 160 of the FW Act set out other situations where the Commission may vary a modern award.

See the Commission's [Awards & agreements](#) web page for more information about the 4 yearly review and the annual wage review.

## Lodgment and service of your completed form

1. **Lodge this application** and any supporting documents with the Commission.

You can lodge this application and any supporting documents through the Commission's [Online Lodgment Service](#) or by post, fax, email or in person at the [Commission's office](#) in your state or territory.

2. **Serve a copy of your application and any supporting documents** on each Respondent listed in the application as soon as practicable after lodging with the Commission. You can send this application and supporting documents in a number of ways, including by email or by express or registered post.

## Where to get help

### Commission staff & resources

Commission staff cannot provide legal advice. However, staff can give you information on:

- processes in the Commission
- how to make an application to the Commission
- how to fill out forms
- where to find useful documents such as legislation and decisions
- other organisations that may be able to assist you.

The Commission's website [www.fwc.gov.au](http://www.fwc.gov.au) also contains a range of information that may assist.

## Throughout this form



This icon appears throughout the form. It indicates information to help you answer the question following.

## Legal or other representation

Representation is where another person (such as a family member or friend, lawyer or paid agent, or an employee of a union or employer organisation) speaks or acts on a person's behalf, or assists a person in certain other ways in relation to a matter before the Commission. There is no requirement to be represented at the Commission.

There are some restrictions on representation by a lawyer or paid agent.

Generally, a person must give notice to the Commission (by lodging a Form F53 – Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for a lawyer or paid agent to participate in a conference or hearing) and seek permission from the Commission Member dealing with the matter if they wish to have a lawyer or paid agent represent them by participating in a conference or a hearing. However, the requirement to give notice and seek permission does not apply to matters arising under Part 2-3 of the [Fair Work Act 2009](#).

The requirement to give notice and seek permission for a lawyer or paid agent to participate in a conference or hearing, also does not apply if the lawyer or paid agent is:

- an employee or officer of the person **or**

- a bargaining representative that is representing the person **or**
- an employee or officer of an employee or employer organisation, or an association of employers or a peak council, that is representing the person.

For more information about representation by lawyers and paid agents, see section 596 of the [Fair Work Act 2009](#), rules 11, 12 and 12A of the [Fair Work Commission Rules 2013](#) and the Commission's [practice note on representation by lawyers and paid agents](#).

## Glossary of common terms

**Applicant** – This is the person or organisation that is making an application.

**Lawyer** – This is a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

**Paid agent** – In relation to a matter before the Commission, is an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

**Party** – A party is a person or organisation involved in a matter or case that is brought to the Commission.

**Respondent** – The person or business responding to an application made by an Applicant.

**Service** – Serving a document means giving a copy of the document to a person or organisation, usually to the other party to the matter. You can serve a document in a number of ways, including by email, fax, express or registered post, or in person. Parts 7 and 8 of the [Fair Work Commission Rules 2013](#) deal with service.

## Privacy

The Commission collects the information (including personal information) provided to it in this form for inclusion on the case file, and may disclose this information to the other parties to this matter and to other persons. For more details of the Commission's collection, use and disclosure of this information, please see the [Privacy notice](#) for this form, or ask for a hard copy to be provided to you.



**Remove this cover sheet** and keep it for future reference – it contains useful information

## 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](#).

### Applicant 1



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)	Australian Entertainment Industry Association (trading as Live Performance Australia)		
Surname			
Postal address	Level 1, 15 – 17 Queen Street		
Suburb	Melbourne		
State or territory	Victoria	Postcode	3000
Phone number	0419363744	Fax number	
Email address	dhamilton@liveperformance.com.au		

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

Legal name of business	Australian Entertainment Industry Association
Trading name of business	Live Performance Australia
ABN/ACN	43 095 907 857
Contact person	David Hamilton, Director Workplace Relations

### Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

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 2**



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)	Media Entertainment and Arts Alliance		
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

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

Legal name of business

Trading name of business	
ABN/ACN	
Contact person	

**Does the Applicant need an interpreter?**



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

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	N/A
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

Live Performance Award 2020 [MA000081]

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

Live Entertainment

**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?

See Draft Determination in Attachment A.

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.

See Attachment 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	
Name	David Hamilton
Date	2/3/21
Capacity/Position	Director - Workplace Relations, Live Performance Australia

Signature	
Name	Paul Murphy
Date	2/3/21
Capacity/Position	Chief Executive, MEAA



## ATTACHMENT A

*Fair Work Act 2009*

s.160—Variation of Modern Award to remove ambiguity or uncertainty or correct error

### **The Australian Entertainment Industry Association (trading as Live Performance Australia)**

**and**

### **The Media Entertainment and Arts Alliance (AM2020/ )**

### **LIVE PERFORMANCE AWARD 2020 [MA000081]**

Live Performance industry

JUSTICE ROSS, PRESIDENT

XX

XX

MELBOURNE, XX MARCH 2021

*Application to vary the Live Performance Award 2020.*

A. Further to decision [[2020] FWCFB XX] issued by the Full Bench on XX December 2020, the above award is varied as follows:

1. By deleting clause **25.3(d)** and inserting the following:

#### **(d) Failure to produce or present production**

If the employer fails to produce or present the production for which the employee is definitely engaged, the following provisions will apply:

- (i) If the contracted period of engagement is 4 weeks or more, the employer will pay to the employee 4 weeks' wages at the employee's prescribed rate of pay, in satisfaction of all claims.
- (ii) If the contracted period of engagement is less than 4 weeks, the employer will pay to the employee a sum of money equivalent to the wages for that period of engagement, in satisfaction of all claims.
- (iii) The provisions of (i) and (ii) above will not apply to an employee who has been definitely engaged for a production which cannot be produced or presented due to a

COVID-19 related closure of the venue in which the performance was to take place, or as a direct result of a government directive or health authorities restricting the number of people gathering in a place of live entertainment. In these circumstances an employee will be entitled to 2 weeks payment at the applicable minimum weekly rate for such classification.

B. This determination comes into effect on XX March 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 that starts on or after XX March 2021.

PRESIDENT

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## Attachment B

### Grounds relied upon and submission in support of the Application

1. The Australian Entertainment Industry Association (trading as Live Performance Australia (LPA)) and the Media Entertainment and Arts Alliance (MEAA) seek a variation to the *Live Performance Award 2020 (Award)* in the terms as set out at Attachment A of the Application.
2. If granted, the proposed variation would result in the removal of any ambiguity and/or uncertainty in situations where a production cannot be produced or presented due to circumstances for which the employer cannot be held responsible, including but not limited to directions issued by governments or health authorities restricting the number of people gathering in a place of live entertainment and/or the closure of places of live entertainment.
3. The application is made because of the ongoing challenges and uncertainty facing employers and employees in the live performance industry due to the COVID-19 pandemic (**Pandemic**). The possibility of productions being unable to commence due to government or health authorities directions will be a feature of our industry for some years whilst the Pandemic continues to be present in the community.

### Background

4. Clause 25.3.4(d) of the Award, the “failure to produce” clause historically has been enforced where an employer makes a conscious decision not to produce or present a production because of a reason or reasons that an employer has control over (e.g. poor ticket sales etc.). Where such a decision is made, contracted performers are paid 4 weeks’ pay where the production is to run for more than 4 weeks and where the run is less than 4 weeks a sum of money the employee would have received for that particular engagement.
5. When the Pandemic hit our industry in March 2020 and governments and health authorities ordered restrictions on mass gatherings. There were many productions impacted by such restrictions. A number of productions were closed mid-season, others were in rehearsal and had to cease and there were productions that had contracted cast, crew, musicians and associated personnel and were unable to commence work at all.
6. With the Pandemic a now known potential disrupter, the issue going forward is whether the “failure to produce” clause would apply to future productions that have contracted performers and are unable to commence work due to government and/or health authority directions. Directions not allowing work to commence are beyond the control of the employer and employees and cannot be reasonably attributable to an employers’ conscious decision not to present or produce a show.
7. The words of the “fail to produce” clause do not distinguish between a situation where a producer makes a conscious decision not to produce or present a production or a situation where a producer cannot produce or present a production due to restrictions on work made by governments and health authorities.
8. This application seeks to remove any uncertainty and avoid unnecessary disputes between the parties due to circumstances beyond their control.
9. The parties submit that the proposed variation to the award:
  - 1) is advanced by consent;

- 2) is confined to situations where an employer has contracted performers and cannot produce or present a production because of a government and/or health authority direction for which the employer cannot reasonably be held responsible;
- 3) is seen as necessary based on the parties experiences dealing with the effect of the pandemic and the impact of government and health authorities directives on the live performance industry;
- 4) is necessary in the removal of any ambiguity and/or uncertainty in situations where a production cannot be produced or presented due to circumstances for which the employer cannot be held responsible, including but not limited to directions issued by governments or health authorities restricting the number of people gathering in a place of live entertainment and/or the closure of places of live entertainment; and
- 5) is necessary to ensure that employers are given confidence to produce shows and employ cast for those productions and will provide an incentive for employers to restart producing and will assist the industry in reactivating.

May it please the Commission.

