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

Title	[x] Mr [ ] Mrs [ ] Ms [ ] Other please specify:		
First name(s)	Brian		
Surname	Bruce		
Postal address	[redacted]		
Suburb	[redacted]		
State or territory	Qld	Postcode	[redacted]
Phone number	[redacted]	Fax number	N/A
Email address	[redacted]		

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

Legal name of business	N/A
Trading name of business	N/A
ABN/ACN	N/A
Contact person	N/A

Does the Applicant need an interpreter?

[ ] Yes—Specify language

[x] No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

[ ] Yes— Please specify the assistance required

[x] No

Does the Applicant have a representative?

[ ] Yes—Provide representative's details below

[x] No

Applicant's representative

Name of person	N/A		
Organisation	N/A		
Postal address	N/A		
Suburb	N/A		
State or territory	N/A	Postcode	N/A
Phone number	N/A	Fax number	N/A
Email address	N/A		

1. Coverage

1.1 What is the name of the modern award to which the application relates?

MA000063 Passenger Vehicle Transportation Award 2010

1.2 What industry is the employer in?

Bus/Coach transport

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

[x] 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 attached document

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.

Clauses 3. Definitions and interpretation, 10.5 Casual Employment, 21 Ordinary hours of work and rostering, 22 Breaks, and 23 Overtime and penalty rates in their present form give rise to differing interpretations of their intent and meaning especially where they interact with each other.

This differing interpretation causes conflict over deductions and/or allowances as well as overtime and meal breaks and allowances.

It is recommended that the suggested changes outlined in the attached document be given consideration and inclusion within the FWC processes to bring about an equitable outcome for all concerned.

Attach additional pages, if necessary.

Signature

Signature	
Name	Brian Bruce
Date	24 May 2018
Capacity/Position	Driver/employee

Determination and where necessary clarification and amendment is requested of the relevant clauses of the MA000063 Passenger Vehicle Transportation Award 2010 as amended. (Referred to below simply as MA000063).

Passenger vehicle transportation is provided by two separate participants, these being Government transport authorities and the private industry providers.

The government provided services are generally located in the major cities and some provincial localities using permanent employees, whereas the private operations are generally suburban, outer-urban, rural and provincial and staffed predominantly by casual employees.

Casual employment is used by private operators because the operator does not have to provide sick, annual and long service leave, nor do they generally provide staff facilities such as meal rooms and toilet/washroom facilities thereby making their operations lower cost. On top of this casual employees do not have to be provided with work where the employer either does not want to use any particular employee or the employer considers that there is insufficient work to warrant using an employee.

This award is structured principally for permanent employees with reference to casual employees in clause 10.5 and thereafter little specific consideration is given in the application of the award to the casual employee.

The following addresses a number of clauses that have considerable impact on the pay and conditions of casual employees. There is distinct need for careful consideration of these matters, consideration that should lead to amendment of the award as suggested below.

This request has been brought about by differing interpretations of clauses in the award resulting from a dispute with an employer about variations between hours shown on respective company Weekly Driving Records and paid hours as shown on actual pay sheets.

The affected clauses are,

3. Definitions and interpretation

10.5 Casual Employment

21 Ordinary hours of work and rostering

22 Breaks

23 Overtime and penalty rates

There is dispute about the application of Clauses 3 and 21 in relation to broken shifts and waiting time. In the first instance the concern is about waiting time. Broken shifts is dealt with in a following discussion.

3. Definitions and interpretation

3.1 In this award, unless the contrary intention appears:

Act means the *Fair Work Act 2009* (Cth)

broken shift means a shift with a spread of hours permitted under the relevant State or Territory driving hours legislation and with an unpaid break of greater than 60 minutes between the two portions of work.

waiting time means such time, excluding meal breaks, in which no demand for work is made upon the driver and the driver is placed under no restraint as to their movements and is not otherwise on call by the employer

The other definitions in this clause are not applicable to this request.

The definitions above appear to be simple and definitive, however each is subject to their interpretation in relation to other clauses and it is the relationship to the other clauses that needs determination.

The matter of waiting time is subject to two separate clauses. These are clause 3 and clause 21.

The first requirement is concerned with whether or not a reduction of pay is allowable due to supposed waiting time.

The company concerned has used the practice of paying 70% of the hourly pay rate for periods when the driver is not driving but waiting for the passengers to re-join the vehicle for the next leg of the journey. The company's so called "waiting time".

This was allowed under the Motor Drivers, Etc., Award-Southern Division (No.AR55 of 2002), Queensland Industrial Relations Commission. That award was terminated on 29 July 2011 when it was replaced by the MA000063 Passenger Vehicle Transportation Award 2010 and the practice of paying 70% for waiting time terminated with it. At the time of the dispute the Company had not terminated the practice in contravention of the MA000063 award.

The MA000063 award makes two mentions of waiting time, the first of these is in;

3.0 definitions and interpretation

"waiting time means such time, excluding meal breaks, in which no demand for work is made upon the driver and the driver is placed under no restraint as to their movements and is not otherwise on call by the employer."

Using this definition it is not possible to describe a company employed driver waiting for his passengers to return to the vehicle as being in waiting time as the driver may be, and is subject to redirection, by a radio or phone call, to another task during this period, and is therefore on call by the employer, thus he/she is under restraint. Furthermore the driver still has responsibility for the security and safety of the vehicle during the period and therefore must be present in or near the vehicle, this too is a restraint on the driver's activities.

The second mention of waiting time is in clause 21

21. Ordinary hours of work and rostering

“21.5 An employee who is engaged as a coach driver or a bus driver on a single day charter may have a rostered shift divided into two working periods with no requirement to return to the depot during a rostered shift. Such an employee will be paid waiting time at the rate of 50% of the ordinary rate of pay plus any applicable penalty or loading, provided that the waiting time so paid for will not be taken into account in the computation of hours for overtime purposes.”

The prescribed conditions in this clause are the only conditions under which a driver’s hourly rate may legally be reduced from the normal paid rate.

This clause specifically refers to “single day charter” and “rostered shift”.

As there is no description in the award of what constitutes a single day charter the following is offered for inclusion within clause 3 definitions,

“A single day charter is where a charter picks up passengers at one or more locations and delivers them to one or more locations as a single charter and does not have other tasks before, during, or after the charter commences and finishes.”

Similarly there is no definition of rostered shift or shift work. To clarify rostered shifts and shift work the following definitions may be applicable and perhaps should be included under clause 3 definitions;

“The following definitions apply to employees working rostered hours:

•'shift roster' is a schedule showing how each employee will work their ordinary hours of work within a particular shift pattern;

•'shift pattern' describes the type of shift arrangement in place with particular reference to the duration of the shift;

•'continuous shift' is worked from beginning to end without being broken for reasons other than a meal break;

•'fixed shift pattern' is where the shift roster sets the same commencing and finishing hours for each shift to be worked on the same days each week throughout the shift roster.”

The following was extracted from the Fair Work Ombudsman web site,

Shiftworkers

A shiftworker is an employee who works shifts and gets an extra payment for working shift hours.

An award, enterprise agreement or other registered agreement can have a specific definition of what a shiftworker is, and what type of shifts they can work.

Perhaps this too should be included under clause 3.

The determination needed is whether under the above circumstances the 50% reduction of pay rate should apply. The reduction of 50% is punitive on the driver in

any case as the driver is not responsible for the way his/her work is arranged but is penalized for it, this gives rise for the 50% reduction to be removed from the award as it should be.

The next concern arises from the use of the words rostered duty/shift and the application of clause 21.4 in relation to casual employees.

Clause 21.4 states,

"21.4 All known rostered duty, which may include broken shifts and days off, must be displayed at least seven days prior to the commencement of such duty. Changes to the roster, including alterations to days off must be displayed at least 24 hours in advance and the employee must be notified. Any changes for which less than 24 hours' notice has been given must be agreed to by the employee."

The highlighted words, "**must be displayed at least seven days prior to the commencement of such duty"** in this clause contain the key as each driver in this company, and perhaps many others, is notified of his next duty the night before it is to be performed.

This is illustrated in the following way: The Company of concern in this issue currently sends emails, during the afternoon/evening of the current day to advise their drivers of; the vehicle, depot, tasks and timings constituting the work that has been allocated to them for the next day. The drivers have to either accept or reject the contents of the email.

This methodology, which appears to be expanding widely within the industry, does not allow 7 days' notice of "rostered duty" to comply with this clause, therefore the clause is either not applicable or is ineffective in relation to this type of operation in as much as there is no rostered duty according to this clause.

"**All known rostered duty, which may include broken shifts and days off, must be displayed at least seven days prior to the commencement of such duty**".

This condition is not possible when notice of the work to be performed is given, at best the day before, and when given by e-mail, the night before, it is to be performed. This condition is exacerbated by the fact that the company generally does not have confirmation of their charter/tasking requirements until the day before. These circumstances preclude the company from producing a roster of any kind that gives 7 days advance notice let alone develop shifts.

It is suggested that the application of shifts should only apply to permanent employees not to casual employees. This may mean that a new clause should be developed to cover casual employees specifically. It may be easier to append the following to the present clause; **This clause does not apply to casual employees**.

The definitive words appear to be "rostered duty" and in this case the company drivers are allocated their tasks on a daily basis therefore they cannot be interpreted as being rostered or on a shift basis.

As there has been no extra payment for shift work nor is there a "registered agreement" in place, none of the drivers employed by the company can be

considered to be employed on a “rostered shift” basis as they are casual and do not perform “rostered” duties as they are tasked on a daily basis and their start and finish hours, in the main, vary day by day. This is typical of the majority of privately owned bus/coach operators.

The determination needed here is whether this clause in its present form applies to casual employees given the circumstance outlined above.

The requirement for determination etc., continues in regard to,

Clause 3. Definitions and interpretation and

Clause 10.5 Casual Employment

The next consideration is in reference to doing school runs only, performed during morning and afternoon periods and this infers broken shifts. The award defines broken shifts as follows;

“3. Definitions and interpretation

Broken shift means a shift with a spread of hours permitted under the relevant State or Territory driving hours legislation and with an unpaid break of greater than 60 minutes between the two portions of work.”

This clause appears to be applicable where morning and afternoon school runs only are worked, but only if a casual driver is considered by the award to be working as a shift worker. It is particularly applicable where a driver is required only for short periods either side of an inactive period during a day or night of duty, except where the requirements of waiting time in clause 21 apply, but again only if the casual driver is considered by the award to be a shift worker.

Further:

“10.5 Casual employment

(d) A casual employee is to be paid a minimum payment of three hours pay for each shift. ***A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement****.”*

There have been numerable occasions when drivers have worked under these circumstances and the requirements of the award have not been reflected in the pay for those periods.

Consequently there is real need for some form of ratification so as to make the intent of this clause clear. Perhaps the following may make the situation clearer in relation to clause 10.5;

(d) (1) A casual employee solely engaged for the purpose of transportation of school children to and from school is to be paid a minimum payment of two hours for each engagement. Otherwise,

(d) (2) A casual employee is to be paid a minimum payment of three hours pay for each shift.

Here again the use of the word shift needs clarification, Casual drivers employed under the circumstances outlined herein do not necessarily work shifts as their tasks are not consistently the same nor of the same duration as those worked by recognised permanent staff shift workers.

The determination needed here relates to whether casual employees are in fact shift workers and whether broken shifts apply to them.

The next area needing determination is in regard to breaks, especially meal breaks.

The award makes provision for meal breaks in;

22. Breaks

"22.1 An employee may be rostered for an unpaid meal break of between 30 minutes and one hour to be taken at the depot or any other reasonable location. An employee must not be required to work for more than five and a half hours without a break for a meal.

22.2 Where a rostered meal break cannot be provided, an employee will be provided with a paid crib break of between 15 and 30 minutes to be taken at any reasonable location."

Casual drivers employed as outlined above may not be considered as being rostered, however, once tasked they should technically be entitled to be covered by this clause and therefore there must be some directive that a meal break should be built into the day's tasking. This could be achieved by altering the wording to the following: **An employee's working hours/tasks should be arranged to allow for an unpaid meal break,** or**, An employee's working hours/tasks are to be arranged to allow for an unpaid meal break.**

The way the company concerned structures their tasking often requires the driver to work through a continuous series of tasks and timings which do not include a meal break of between 30 minutes and one hour, nor do they pay the crib break or provide for the ability to take it.

The company's Weekly Driving Record states "60 minute lunch automatically deducted". The deduction of an hour of a driver's time should be specifically disallowed by the award. Doing this is taking the driver's earnings for that period for the financial advantage of the company. To resolve this type of activity perhaps the clause should also include the following**; No deduction from a driver's hours shall be made to provide for a meal break.**

The determination needed here is whether or not it is legal for a bus/coach owning company to deduct time from a drivers hours to cover a meal break and how to cover that in an appropriate clause.

The final area needing determination etc., relates to overtime and penalty rates which is dealt with in clause 23.

“23. Overtime and penalty rates

“23.1 Overtime rates must be paid for all time worked in excess of the hours in clause 21.1 or any hours in excess of the rostered ordinary hours on any day at the rate of time and a half for the first three hours and double time thereafter.

23.2 Ordinary hours worked on a Saturday will be paid at the rate of time and a half and on a Sunday at the rate of double time. Where an employee is entitled to overtime rates on a Saturday or Sunday, the employee will be paid at the applicable overtime rate or the Saturday or Sunday penalty, whichever is the greater. Weekend penalty rates and overtime rates are not cumulative.”

There is no disagreement with the wording or intent of clause 23, however the company concerned does not abide by this clause when tasking and paying their employees. Employees who have asked if overtime is to be paid when they were asked to work Saturday, Sunday and public holidays have been told no and subsequently not tasked for those days.

Perhaps there should be consideration given to the insertion of some form of effective penalty to any employer who does not comply with the clause.

The determination needed here is how these clauses can be modified to indicate that penalties apply to disregard of them.