

## 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	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Registered Organisation		
First name(s)	Australian Industry Group		
Surname			
Postal address	Level 3, 51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	02 9466 5530	Fax number	
Email address	<a href="mailto:brent.ferguson@aigroup.com.au">brent.ferguson@aigroup.com.au</a> and <a href="mailto:ruchi.bhatt@aigroup.com.au">ruchi.bhatt@aigroup.com.au</a>		

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

Legal name of business	Australian Industry Group
Trading name of business	
ABN/ACN	76 369 958 788
Contact person	Brent Ferguson

### 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 (e.g. 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

Nurses Award 2010 [MA000033]

### 1.2 What industry is the employer in?

NA

## 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?

The Applicant seeks a determination retrospectively varying the *Nurses Award 2010* (**Award**) such that it expressly requires that, in respect of casual employees:

- (a) The Saturday and Sunday penalty rates prescribed by clause 26 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).
- (b) The overtime rates prescribed by clause 28 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).
- (c) The public holiday penalty rates prescribed by clause 32.1 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).

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. The Award should be varied to address an ambiguity or uncertainty relating to how the rate payable to casual employees during overtime, ordinary hours on a weekend and for work performed on a public holiday is to be calculated pursuant to the aforementioned provisions of the Award (s.160 of the *Fair Work Act 2009 (Act)*).
2. In support of this primary position it is respectfully contended that the Full Bench in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 (**Domain Aged Care**) erred in its rulings regarding the proper interpretation of the Award's provisions dealing with the rate payable to casual employees during overtime and ordinary hours worked on a weekend and that an amendment of the Award is required to remove an ambiguity or uncertainty so as to ensure that such provisions cannot be read in the manner adopted in Domain Aged Care.
3. In the alternate, if the interpretation adopted in Domain Aged Care is accurate, that the relevant provisions reflect an error that ought to be corrected in the manner we have proposed pursuant to s.160 of the Act.
4. The variation sought should be made retrospectively because there are exceptional circumstances justifying such an approach (s.165(2)(b) of the Act).
5. In the further alternate, that the proposed variations to the Award be made pursuant to s.157 of the Act on the basis that it is necessary to ensure that the Award achieves the modern awards objective. Specifically, the variation:
  - (a) Is consistent with the need to encourage collective bargaining (s.134(1)(b) of the Act);
  - (b) Will promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d) of the Act);
  - (c) Is not inconsistent with the need to provide additional remuneration for employees working overtime, on weekends or public holidays (s.134(1)(da) of the Act);
  - (d) Will have a positive impact on business, particularly in relation to employment costs (s.134(1)(f) of the Act);
  - (e) Will facilitate the need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g) of the Act); and
  - (f) Will ensure that employers are not unfairly or unjustifiably required or misled into applying the relevant overtime and penalty rates in a manner that requires that they compound on the casual loading prescribed the Award.

6. Any other relevant ground(s) that the Applicant seeks to advance during the course of the proceedings.

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	Stephen Smith
Date	6 January 2020
Capacity/Position	Head of National Workplace Relations Policy



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**