

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 checked="" type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Phillip		
Surname	Ryan		
Postal address	27 Murray Crescent		
Suburb	Griffith		
State or territory	Australian Capital Territory	Postcode	2603
Phone number	0418 602 989	Fax number	
Email address	legal@aha.org.au		

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

Legal name of business	Australian Hotels Association	
Trading name of business	Australian Hotels Association	
ABN/ACN	78 756 030 961	
Contact person	Phillip Ryan	

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			
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

- Hospitality Industry (General Award) 2020
MA000009

1.2 What industry is the employer in?

Hospitality

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?

1. This Application is made pursuant to s.158 of the *Fair Work Act 2009* (**FW Act**).
2. The Applicant is an organisation registered under the relevant provisions of the *Fair work (Registered Organisations) Act 2009* and has standing to make this application under Item 1 of s.158 (1) of the FW Act.
3. The Application seeks a determination pursuant to s.157 of the FW Act varying the *Hospitality Industry (General) Award 2020* (**Hospitality Award**) to **extend and vary** Schedule J to provide for award flexibility on a temporary basis during the COVID-19 Pandemic and the ongoing resulting public health orders.
4. The proposed variation is set out in Annexure A to this Application.
5. This Application is made with the consent of the United Workers Union.

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. In response the outbreak of COVID-19, the Commonwealth of Australia, as well as State and Territory Governments have imposed a range of restrictions on travel, mass gatherings and social gatherings, which included from 23 March 2020, a shutdown of the hospitality industry.
2. This resulted in the Applicant making an application with the consent of the United Workers Union to vary the *Hospitality Industry (General) Award 2010* (as it was formerly known) on 24 March 2020 to implement flexibilities to respond to the unique circumstances and facilitate the retention of employees.
3. In determining the application, a Full Bench of the Fair Work Commission observed that the measures encompassed in the variation strike an appropriate balance between the provision of additional flexibility and treating affected employees fairly (see *Australian Hotels Association and United Worker's Union* [2020] FWCFB 1574 at [77]).
4. While there has been a partial relaxation of trading and social gathering restrictions, which varies with respect to State and Territory jurisdictions, the hospitality industry continues to be subject to trading restrictions, as well as the impact of ongoing domestic and international border closures.
5. As observed by the majority in *Annual Wage Review 2019-20* [2020] FWCFB 3500 at [32], “the speed of the economic recovery is dependent on the health outcomes which in turn affects the ability of governments to remove restrictions. The strictest limitations to contain the spread of the virus were imposed from late March, as the number of confirmed cases increased. Some states and territories began easing these restrictions from late April. By mid-May, all states and territories

had begun to reduce the limitations on work and social gatherings, although border controls for most states and territories remain.”


6. The Australian Hotels Association and the United Workers Union (**Parties**) have agreed to a proposed variation and extension to Schedule J to provide a further short term period of flexibility for employers and employees with the aim of preserving the ongoing viability of businesses and job retention for employees.
7. The Parties submit that the variation is necessary in order to achieve the modern awards objective in the current circumstances and relies on:
 - s.134 (1) (a) of the FW Act;
 - s.134 (1) (c) of the FW Act;
 - s.134 (1) (d) of the FW Act;
 - s.134 (1) (f) of the FW Act; and
 - s.134 (1) (h) of the FW Act.

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	Phillip Ryan
Date	26 June 2020
Capacity/Position	National Director – Legal & Industrial Affairs



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

ANNEXURE A

MA000009 PR717757

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.157—Application to vary or revoke a modern award

Australian Hotels Association

(AM2020/_____)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010

[[MA000009](#)]

Hospitality industry

JUSTICE ROSS, PRESIDENT

XXXXX

XXXXX

MELBOURNE, X DATE X

Application to vary the Hospitality Industry (General) Award 2010.

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

1. By deleting Schedule J and inserting as follows:

Schedule J—Award Flexibility During the COVID-19 Pandemic

J.1 The provisions of Schedule J are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

J.2 Schedule J operates from 1 July 2020 until 27 September 2020. The period of operation can be extended on application.

J.3 A direction under this Schedule ceases to have effect when it is withdrawn, revoked or replaced by the employer, or on 27 September 2020, whichever is earlier.

J.4 Schedule J does not apply to any employee employed by an employer that qualifies for the JobKeeper Scheme if the employee is an ‘eligible employee’ as defined in s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

J.5 If an employer or employee becomes entitled to Jobkeeper payments for an employee, the terms of Schedule J will not apply in relation to that employer and that employee.

J.6 Any dispute regarding the operation of Schedule J may be referred to the Fair Work Commission in accordance with Clause 40 – Dispute Resolution.

J.7 Any direction given by an employer under this Schedule is not valid unless the employee is advised in writing that the employer consents to a dispute arising from the direction being settled by the Fair Work Commission through arbitration in accordance with Clause 40 – Dispute resolution and section 739(4) of the Act.

J.8 During the operation of Schedule J, the following provisions apply:

J.9.1 Classifications and duties

(a) As directed by their employer, where necessary employees will perform any duties that are within their skill and competency regardless of their classification under clause 14—Classification and Schedule A—Classification Definitions, provided that the duties are safe and the employee is licensed and qualified to perform them.

(b) Clause 22—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

J.9.2 Hours of Work—Full-time and part-time employees

(a) Subject to clause J.9.2(c), and despite clause 9—Full-time employment and requirements for notice in clause 15.5-Rostering, an employer may direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week. The employee will be paid on a pro-rata basis. The arrangements for working ordinary hours in clause 15.1—Full-time (Ordinary hours of work and rostering arrangements) will apply on a pro-rata basis.

(b) Subject to clause J.9.2(c), and despite clause 10-Part-time employment and the requirements for notice in clause 15.5-Rostering, an employer may direct a part-time employee to work an average of between 60% and 100% of their guaranteed hours per week, or an average of between 60% and 100% of the guaranteed hours per week over the roster cycle.

(c) A direction under clause J.9.2(a) or (b) may only be given if:

(i) the employee cannot usefully be employed for the employee’s normal days or hours during the period of the direction because of changes to business attributable to:

(A) the COVID-19 pandemic; or

(B) government initiatives to slow the transmission of COVID-19; and

(ii) the direction is reasonable in all the circumstances; and

(iii) the direction is given in writing.

(d) Prior to any employer issuing any direction under clause J.9.2(a) or (b) an employer must:

(i) consult with the affected employee/s in accordance with clause 39—Consultation about changes to rosters or hours of work and provide as much notice as practicable; and

(ii) if the affected employee/s are members of the United Workers Union, notify the United Workers Union of its intention to implement these arrangements.

(e) An employee given a direction under clause J.9.2(a) or (b) will continue to accrue annual leave and personal leave, and any other applicable accruals under this Award, based on each full-time or part-time employee’s ordinary hours of work prior to the commencement of Schedule J.

(f) If an employee given a direction under clause J.9.2(a) or (b) takes a period of paid annual leave or personal leave, the payment for that leave will be based on the full-time or part-time employee’s ordinary hours of work prior to the commencement of Schedule J.

(g) An employee given a direction under clause J.9.2(a) or (b) may make any of the following requests, and the employer must consider the request and must not unreasonably refuse the request:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training; or

(iii) a request for professional development.

J.9.3 Annual leave

(a) Subject to clause J.9.3(c) and J.9.3(f) and despite clauses 30.4, 30.6, 30.7 and 30.8 (Annual leave), an employer may, subject to considering an employees’ personal circumstances, request the employee in writing to take paid annual leave.

(b) If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

(c) An employer may only make a request under clause J.9.3(a) where it is reasonable in all the circumstances.

(d) A period of leave must start before 13 September 2020 but may end after that date.

(e) An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and is necessary to assist the employer to avoid or minimise the loss of employment.

(f) Clause J.9.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.

(g) During the period of operation of Schedule J, instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*, an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave.

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into effect on 1 July 2020.

PRESIDENT

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