

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 (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			
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) 2010
- 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 Schedule H of the *Hospitality Industry (General) Award 2010 (Hospitality Award)* so that it applies to, and provides the same terms and conditions to, part-day public holidays declared or prescribed between 6:00pm and midnight on Christmas Eve or New Year's Eve.
4. The proposed variation is set out in Annexure A to this Application and identifies additional wording in red text and wording to be omitted in strikethrough.
5. Despite the Application being made pursuant to s.158 of the FW Act, for the reasons below, the Applicant also relies on s.160 of the FW Act.

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. Schedule H of the Hospitality Award was incorporated as part of the Modern Award Review 2012 proceedings (AM2012/355). Similarly worded schedules were incorporated into approximately 113 modern awards at the time.
2. The purpose of the part-day public holiday schedule was to resolve uncertainty and ambiguity associated with the interaction of part-day public holidays and common public holiday provisions in modern awards (see *Modern Awards Review 2012* [2012] FWA FB 10738 at [11]-[20]).
3. On 27 November 2019, the Parliament of Queensland passed the *Holidays and Other Legislation Amendment Bill 2019*, which amends the *Holidays Act 1983 (Qld)*, and declares a part-day public holiday in the State of Queensland from 6:00pm to midnight on 24 December each year, commencing in 2019.
4. The Applicant submits that the declaration of a part-day public holiday from 6:00pm to midnight on Christmas Eve in the State of Queensland gives rise to similar ambiguity and uncertainty as was found by the Full Bench of Fair Work Australia in 2012.
5. The Applicant submits that this ambiguity and uncertainty can be resolved by amending Schedule H of the Hospitality Award so that it applies to part-day public holidays declared or prescribed for the time period of 6:00pm to midnight on 24 December in any year.

6. The Applicant submits that the variation is necessary in order to achieve the modern awards objective and relies on s.134 (1) (g) 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	28 November 2019
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

Schedule H —Part-day Public Holidays

This schedule operates where this award otherwise contains provisions dealing with public holidays that supplement the NES.

H.1 Where a part-day public holiday is declared or prescribed between 6.00pm and midnight, or 7.00pm and midnight, on Christmas Eve (24 December in each year) or New Year's Eve (31 December in each year) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this award relating to public holidays to the extent of the inconsistency:

- (a) All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.
- (b) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday between 7.00pm and midnight but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.
- (c) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday between 7.00pm and midnight but as a result of being on annual leave does not work, they will be taken not to be on annual leave during the hours of the declared or prescribed part-day public holiday between those hours of 7.00pm and midnight that they would have usually been rostered to work, and will be paid their ordinary rate of pay for such hours.
- (d) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday between 7.00pm and midnight, but as a result of having a rostered day off (RDO) provided under this award, does not work, the employee will be taken to be on a public holiday for such hours and paid their ordinary rate of pay for those hours.
- (e) Excluding annualised salaried employees to whom clause A.1.1(f) applies, where an employee works any hours on the declared or prescribed part-day public holiday between 7.00pm and midnight they will be entitled to the appropriate public holiday penalty rate (if any) in this award for those hours worked.
- (f) Where an employee is paid an annualised salary under the provisions of this award and is entitled under this award to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked on the declared or prescribed part-day public holiday between 7.00pm and midnight.
- (g) An employee not rostered to work on the declared or prescribed part-day public holiday between 7.00pm and midnight, other than an employee who has exercised their right in accordance with clause A.1.1(a), will not be entitled to another day off, another day's pay or another day of annual leave as a result of the part-day public holiday.

H.2 An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES.

This schedule is not intended to detract from or supplement the NES.