

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 Mr Mrs Ms Other please specify:

First name(s) Gerard

Surname Dwyer

Postal address 6th Floor, 53 Queen Street

Suburb Melbourne

State or territory Victoria Postcode 3000

Phone number (03) 8611 7000 Fax number

Email address Sue-anne@sda.org.au

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

Legal name of business Shop, Distributive and Allied Employees' Association

Trading name of business

ABN/ACN 99 789 302 470

Contact person Sue-Anne@sda.org.au

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	Dominic Macken		
Firm, organisation or company	A J Macken & Co.		
Postal address	11 th Floor, 53 Queen Street		
Suburb	Melbourne		
State or territory	Vic	Postcode	3000
Phone number	(03) 9614 4899	Fax number	
Email address	djmacken@macken.com.au		

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

General Retail Industry Award 2010 MA000004

1.2 What industry is the employer in?

Retail industry

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 varying the General Retail Industry Award 2010 (the Award) in the following respect:

Delete clause 29.4(e)(iv) and insert in its place new clause 29.4(e)(iv) as follows:

“(iv) From 1 February 2021:

A penalty payment of an additional 50% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual on a Sunday (including of the casual loading)”

The Applicant further seeks pursuant to section 165(2) of the (Cth) Fair Work Act that the determination sought by it take effect from 1 July 2020.

See attached draft determination

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 Penalty Rates Decision [2017] FWCFB 1001 and [2017] FWCFB 3001 provided for the phased reduction of Sunday penalty rates in relation to, amongst other Modern Awards, the General Retail Industry Award, in circumstances where the Fair Work Commission was at that time satisfied that:
 - (a) a reduction was necessary to meet the moderns award objective in relation to the Awards to which the reduction would apply; and
 - (b) a phased reduction would be implemented “on 1 July each year, at the same time as the implementation of any increases arising from the Annual Wage Review decision” and that, in relation to the General Retail Industry Award, the Full Bench decided that its proposed transitional arrangement was “necessary to ensure that the Award achieves the modern awards objective”. (emphasis added)
- See generally paragraphs [23] and [26] – Summary of Decision dated 5 June 2017 – 4 yearly review of modern awards – penalty rates – transitional arrangements.

2. The Annual Wage Review Decision [2020] FWCFB 3500 in relation to the 2020/21 financial year has determined by a majority decision that there should be an increase of 1.75% in the minimum weekly wage for, amongst other awards, the General Retail Industry Award but that the increase shall take operative effect from 1 February 2021, not 1 July 2020.
3. The basis therefore upon which the Fair Work Commission was earlier satisfied that its phased reduction met the modern awards objective, namely the stated coincidence in timing between the reduction and any increase arising from the Annual Wage Review decision is now demonstrated to be falsely premised in circumstances where the increase as determined will now not take effect until 1 February 2021.
4. Further to paragraph 3., in circumstances where the effect of the transitional arrangements decision, if not varied, will be to impose a reduction in take-home pay for Award covered retail workers working relevant penalty rate hours without (at least until 1 February 2021) what is submitted to be the intended offsetting benefit of the national wage increase as determined, it is submitted that the General Retail Industry Award will not be meeting the modern awards objective from 1 July 2020 in relation to those affected employees unless the phased penalty rates reduction is itself deferred in lockstep with the national wage increase.
5. The SDA further submits that, in the event that the Commission determines after 1 July 2020 to vary the General Retail Industry Award 2010 in the terms proposed by the Applicant, exceptional circumstances justify the determination as made operating from a date earlier than the date on which the determination is made, namely 1 July 2020 so as to ensure that affected employees are not prejudiced by any relevant delay.

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

Gerard Dwyer.

Date

19 June 2020

Capacity/Position

National Secretary



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

MA000004 PRXXXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s157 – Application to vary etc modern awards if necessary to achieve modern awards objective

Sunday Penalty rate

(AM2020/xx)

GENERAL RETAIL INDUSTRY AWARD 2010

MA000004

Retail industry

PRESIDENT

VICE PRESIDENT

COMMISSIONER

MELBOURNE, DD MM 2020

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined that the *General Retail Industry Award 2010* be varied as follows.

1. Delete Clause 29.4(e)(iv) and insert

(iv) From 1 February 2021:

A penalty payment of an additional 50% loading will apply for all hours worked by a full-time or part-time employee on a Sunday. A penalty payment of an additional 75% loading will apply for all hours worked by a casual on a Sunday (inclusive of the casual loading) .

B. Pursuant to section 165(2)(b) of the Act and upon the Commission being satisfied that exceptional circumstances exist that justify specifying an earlier day, the Determination comes into operation on 1 July 2020.

PRESIDING MEMBER