

APPLICATION TO VARY A MODERN AWARD - 2012 REVIEW

Application to vary a modern award (*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Part 2 of Schedule 5*)

Applicant

Name:	Western Australian Local Government Association				
	Title <i>[if applicable]</i>	Mr []	Mrs []	Ms []	Other [] specify:
Address:	15 Altona Street				
Suburb:	West Perth	State:	WA	Postcode:	6005
If the Applicant is a company or organisation:					
Contact person:	Simon White	ABN:	28126945127		
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Applicant’s representative (if any)

Name:				
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Address:				
Suburb:	State:	Postcode:		
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1. What is the name of the modern award to which the application relates?
[Also include the Award ID/Code No. of the modern award.]

Local Government Industry Award 2010 [MA000112]


2. What variation(s) are sought?
[Set out, or attach a separate schedule the variation(s) sought.]

- Clause 4: Coverage
- Clause 10.4 – Part-time employees
- Clause 10.5 – Casual Employees
- Clause 14 – Minimum wages
- Clause 15.6 – Leading Hand Allowance
- Clause 15.7 – First aid allowance
- Clause 18 – Higher duties
- Clause 21 – Ordinary hours of work and rostering
- Clause 22 – Meal breaks
- Clause 24.2 – Payment for overtime
- Clause 25 – Annual leave
- Clause 28 – Public holidays

3. Grounds:

[Using numbered paragraphs, set out, or attach as a separate schedule, the grounds upon which the Applicant relies in seeking such variation(s) and, an outline of the submissions to be made in relation to each ground and an indication of the evidence and other material upon which the applicant will seek to rely.]

As attached.

Date:	2 March
Signature:	
Name:	Simon White
Capacity/Position:	Agent

The application will be published on the Fair Work Australia website and relevant subscribers notified.

FAIR WORK AUSTRALIA

MODERN AWARD REVIEW

Submission of the combined Local Government Associations 8 March 2012

Local Government Industry Award 2010

1. **Local Government Associations** (“Associations”) mean:
 - 1.1 The Municipal Association of Victoria;
 - 1.2 The Local Government Association of Northern Territory;
 - 1.3 The Local Government Association of Tasmania;
 - 1.4 The Western Australian Local Government Association;
 - 1.5 The Local Government Association of South Australia;
 - 1.6 The Local Government Association of Queensland;
 - 1.7 The Local Government Association of New South Wales; and
 - 1.8 The Shires Association of New South Wales.

2. The Associations are pleased to provide the following application to vary a modern award to the Tribunal to assist in reviewing the Local Government Industry Award 2010 (“the Award”).

3. Collectively the Associations represent the interests of Local Government by presenting the views of councils to governments, promoting Local Government to the community and by providing specialist advice and services to the industry.

4. The Associations seek to provide witness evidence from Local Governments as to the need for the proposed changes, for any matters where it is required by the Tribunal.

5. During the initial two years’ the Award has applied to Local Governments in the Northern Territory and Western Australia, and to labour hire and group training providers when performing work for Local Governments in each of the states and the Northern Territory. Arising from the application of the Award the following issues have been identified:

Clause 4: Coverage

6. The Associations submit that amendments to the coverage clause of the Award are necessary to clarify an apparent anomaly relating to Award coverage and Award applicability.
7. The Associations submit that, when interpreted in accordance with provisions of the *Fair Work Act* 2009 (“Act”), Clause 4 of the Award results in a confusing and presumably unintended outcome that the Award will not ‘apply’ to certain employees yet the Award may still ‘cover’ those employees.
8. Section 47(2) of the Act states that a modern award does not apply to an employee at a time when the employee is a high income employee. The definition of a high income employee is an employee whose guarantee of annual earnings exceeds the high income threshold (currently \$118,100).
9. Section 48 of the Act states that a modern award covers an employee if the award is expressed to cover the employee. Clause 4.1 of the Award states that it covers employers throughout Australia in the local government industry and their employees in the classifications listed in Schedule B.
10. This creates a situation where the Award does not apply to an employee who is earning above the high income threshold but the award may still cover this employee. This has caused confusion for Local Government employers as it is unclear whether the conditions of the Award need to be adhered to when setting terms and conditions for employees who are earning above the high income threshold.
11. The Associations submit that the following amendments to Clause 4 would clarify the intention of the coverage of the Award. The insertion of a new subclause, being subclause 4.3(g), which states “local government employees whose annual income exceeds the high income threshold.”

Clause 10.4 – Part-time employees

12. The Associations submit that an amendment to subclause 10.4(f) of the Award is necessary to clarify what appears to be a drafting error. It is proposed to alter the subclause to apply the correct award reference and state that:

*“A part-time employee may agree to work up to an average of 38 ordinary hours per week at the hourly ordinary time rate provided the agreement is entered into without duress, in writing and stipulates that hours are to be paid at **hourly ordinary time rates.**”*

Clause 10.5 – Casual Employees

13. The Associations submit that an amendment to subclause 10.5(c) of the Award is necessary to clarify the intended interpretation of the clause.
14. The Associations submit that the phrase “exclusive of the casual loading” in this subclause has caused confusion and uncertainty for Local Government employers.
15. The Associations submit that the subclause intends that when casual employees work hours that attract penalties, that the penalties will be calculated without including the casual loading. The Associations submit that the subclause 10.5(c) be amended to state: *“Penalties, including public holiday penalties and overtime, for casual employees will be calculated on the hourly ordinary time rate for the classification in which they are employed. These penalties will be calculated without including the casual loading in the calculation.”*
16. It is contended by the Associations that casual employees should be able to be rostered to work up to 38 ordinary hours on the same basis as full and part time employees. The Association submit that a new subclause 10.5(d) be added as follows to clarify this:

“(d) A casual employee may agree to work up to an average of 38 ordinary hours per week at the hourly ordinary time rate provided the agreement is entered into without duress, in writing and stipulates that hours are to be paid at the hourly ordinary time rate”.

Clause 14 – Minimum wages

17. The Associations submit that Local Governments have a history of annualised salary arrangements and this should be catered for in the Award.
18. The inclusion of clause 17 from the Clerks–Private Sector Award 2010 would be suitable for inclusion at subclause 14.7.

“14.7 Annual salary instead of award provisions

- (a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
 - (i) clause 14—Minimum wages;*
 - (ii) clause 15—Allowances;*
 - (iii) clauses 23 and 24—Penalty rates and Overtime; and*
 - (iv) clause 25.4—Annual leave loading.**
- (b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.*
- (c) Annual salary not to disadvantage employees*

The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

- (d) Base rate of pay for employees on annual salary arrangements*

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 14—Minimum wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Clause 15.6 – Leading Hand Allowance

19. The Associations consider that an amendment to subclause 15.6 of the Award is necessary to clarify the intended interpretation of the clause. The Associations submit that the wording of this clause means that this allowance would only be payable during working periods and hence would not be payable during periods of leave.
20. The Associations submit that the intended interpretation of this clause could be clarified by the addition of a new subclause stating:

15.6(b) “Leading Hand Allowances are not payable during periods of leave.”

Clause 15.7 – First aid allowance

21. The Associations submit that an amendment should be made to subclause 15.7 of the Award to clarify that this allowance is payable during periods of leave.
22. The Associations submit that the intended interpretation of this clause could be clarified by the addition of a new subclause stating:

15.7(c) “First aid allowance is payable during periods of paid leave.”

Clause 18 – Higher duties

23. The Associations submit that to clarify that the minimum higher duties entitlement is based on the Award rate rather than the incumbent’s salary rate, subclause 18.1 should be amended to insert the term ‘hourly ordinary time rate’ at:

*“18.1 An employee directed or appointed to relieve in a higher level position where the employee is required to perform the substantive functions of the role for more than one day will be paid at the higher **hourly ordinary time** rate.”*

Clause 21 – Ordinary hours of work and rostering

24. Two work areas that Local Governments commonly operate appear to have been omitted by error from inclusion in the Award. These work areas are golf courses and caravan parks that are commonly performed by Local Governments.
25. Previously Federal awards and current State awards applying to Local Governments referred to these work areas. In Western Australia the Municipal Employees (WA) Award 1999 and Local Government Officers' (WA) Award 1999 respectively catered for both work areas. In NSW under the Local Government (State) Award the days on which ordinary hours can be worked for employees engaged at golf courses and caravan parks are Monday to Sunday. The Victorian Local Authorities Award 2001 applies to caravan park work while both areas are included in the South Australian Local Government Employees Award.
26. The Associations submit that caravan parks should be included along with caretaker/hall keepers at subclause 21.2(b)(ii) as a similar activity and golf courses would be appropriately combined with recreation centres at subclause 21.2(b)(xii).

Clause 22 – Meal breaks

27. Local Governments have realised that clause 22 has omitted the previous condition within the pre reform Local Government Officer's (WA) Award 1999 allowing employees working in community services to be paid while having their meal break on duty.
28. Many Local Governments in regional areas employ one person to operate the swimming pool. To alleviate the need to close the pool for the employee's meal break and require all patrons to leave, the pre reform Local Government Officer's (WA) Award 1999 allowed an employee to be paid for their break while remaining on the premises. The Victoria Local Authorities Award 2001 contains a similar flexibility provision.
29. This is an important safety issue for Local Government not only for swimming pool, but in areas such as child care, aged care and youth services. It is not feasible in some situations to have qualified and trained relief staff to be employed for a 30 minute break period per day.

30. In some areas such as for child care there is also a regulatory requirement that a teacher is on site at all times and it is not practical to close a child care facility while the teacher is absent on a meal break.

31. The Associations seek for a new subclause 22.3 to be inserted, as follows:

“22.3 An employer may require an employee in the following roles or work areas to remain at their place of work during the meal break if a replacement employee is not reasonably available:

- a. Childcare services;*
- b. Recreation centres;*
- c. Tourism services;*
- d. Community services.*

Provided that where the employee is required to perform work during their meal break the employee shall be paid for such work at the appropriate rate or shall have their meal break extended so that they receive an unpaid meal break of at least 30 minutes in the aggregate”.

Clause 24.2 – Payment for overtime

32. The Associations believe that subclause 24.2 should be amended to clarify that overtime is calculated on a daily basis. This could be through the insertion of a new subclause 24.2(d).

33. The Aquaculture Industry Award 2010 [MA000114] and Animal care and Veterinary Services Award 2010 [MA000118] both use the wording, “In computing overtime, each day’s work stands alone.”

Clause 25 – Annual leave

34. The Association's submit that the shiftworker definition determined by the Commission for the Award is too broad and incorporates groups of employees that have never been considered shiftworkers. These employees have now become entitled to an additional week of annual leave in addition to the penalty rates for working on weekends and public holidays.

35. The Associations submit the definition at subclause 25.2 should be amended to more accurately represent shiftwork in a Local Government environment:

25.2 *Shiftworkers for the purposes of the NES*

(a) *For the purpose of s.87(1)(b) of the Act, a shiftworker is an employee:*

(i) *who works **under a continuous 24 hour** roster and who, over the roster cycle, may be rostered to work ordinary shifts on any of the seven days of the week; and*

(ii) *who is regularly rostered to work on Sundays and public holidays.*

36. The groups of employees that would be captured through the amended definition would be those working in security services, night patrol, parking, aged care and law enforcement.

31. The Associations submit that subclause 25.3 – Payment for annual leave, needs to be amended as the subclause currently only provides for payment during periods of annual leave at the “minimum weekly rate of pay” and does not, on a literal interpretation, allow for less than a “weeks” pay where the period of annual leave is of less than a week’s duration. The Associations suggest that the words “minimum weekly rate” be replaced with the words “hourly ordinary time rate” and that the words “for the hours so taken” be inserted at the end of the subclause. If adopted, the amended subclause would provide as follows:

*“Employees will be paid their **hourly ordinary time rate** of pay during periods of annual leave **for the hours so taken.**”*

37. The Associations seek to clarify the uncertainty relating to the payment of annual leave loading on termination. Subclause 25.4(b)(iii) refers to loading only being paid on the ‘taking’ of leave, however the Associations submit that a separate subclause be inserted to specifically clarify the entitlement:

“25.4(d) *Annual leave loading is not applicable to annual leave paid out in lieu on termination.*”

Clause 28 – Public holidays

38. In the development of the Award, the Associations prepared subclause 28.3 with the intention of explaining the entitlement for an employee working on both the observed and actual public holidays when a public holiday is substituted.

39. This subclause has unfortunately created confusion when an employee works the actual public holiday or the observed public holiday, and not the other day. The Associations propose that

“28.2 *Where an employee is required to work on **the actual** public holiday they will be paid at the rate of double time and a half for the actual hours worked.*

28.3 *Where an employee is required to work on the observed public holiday they will be paid at the rate of double time and a half for the actual hours worked. An employee who works on **both** an observed and actual public holiday will be paid the penalty rate for working on the observed public holiday, but not both.*”