

Form F68A Application for Consent to the Alteration of Eligibility Rules of an Organisation by General Manager

IN FAIR WORK AUSTRALIA

FWA use only

FWA Matter No.:

APPLICATION FOR CONSENT TO THE ALTERATION OF ELIGIBILITY RULES OF AN ORGANISATION BY GENERAL MANAGER

Fair Work (Registered Organisations) Act 2009 section 158A

Fair Work (Registered Organisations) Regulations 2009—section 125B

Applicant Organisation

Name:	The Australian Workers' Union		
	ABN:	28 853 022 982	
Address:	Level 10, 377 Sussex Street		
Suburb:	State:	Postcode:	
	Sydney	NSW	2000
Contact person:	Stephen Crawford Crawford de Carne Lawyers Lawyer for the Applicant		
Title:	Mr		
Telephone:	02 8835 4889	Mobile:	0425 303 265
Facsimile:	N/A	Email:	stephen@crawforddecarne.com.au

1. The Australian Workers' Union ("**the Applicant**") applies pursuant to s. 158A of the *Fair Work (Registered Organisations) Act 2009* ("**the Act**") for consent to the alteration of the eligibility rules of the Applicant to extend them to apply to persons who are within the eligibility rules of an association of employees that is registered under a State or Territory industrial law.

The Applicant is the Federal Counterpart of the Association

2. Pursuant to Regulation 8A of the *Fair Work (Registered Organisations) Regulations 2009* ("**the Regulations**"), an organisation mentioned in column three of an item in Schedule 1A is prescribed as the federal counterpart of an association of employees, registered under a State industrial law, which is listed as the association in column two of the item.
3. At Item 317 of Schedule 1A of the Regulations, The Australian Workers' Union West Australian Branch, Industrial Union of Workers ["AWUWA" or the "Association"] is listed in column 2, and the Applicant is listed in column three as the organisation which is the federal counterpart of the AWUWA.
4. The Applicant also meets the definition appearing in section 9A(2) of the Act because its West Australian Branch has substantially the same eligibility rules as, and a history of integrated operation with, the AWUWA.
5. The AWUWA is registered as an organisation for the purposes of Division 4, Part II of the *Industrial Relations Act 1979* (WA).

6. A copy of the certificate of registration of the AWUWA as an employee organisation in the State of Western Australia, dated 14 December 2016 is attached to this application and marked “Attachment 1”.
7. A copy of the Rules of AWUWA is attached to this application and marked “Attachment 2”. Eligibility for membership of the AWUWA is set out in Rule 4 of Attachment 2 (“Association Rule 4”). This documentation is also available online at the following address: <http://www.wairc.wa.gov.au/Files/orgRules/rule273.pdf>
8. A copy of the Transitional Registration of the AWUWA is attached to this application and marked “Attachment 3”. The documentation is also available online at the following address: http://www.fwa.gov.au/documents/organisations/transitional_registrations/1023_TRW_App.pdf
9. A copy of the current certified rules of the Applicant is attached to this application and marked “Attachment 4” (incorporating alterations of 20 December 2016 in R2016/304).

The Alteration

Background

10. On 24 May 2016 the Fair Work Commission gave consent to alterations to the rules of the Applicant to extend its coverage in Western Australia to persons falling within the eligibility rules of the Association: *The Australian Workers’ Union* [2016] FWCG 1822.
11. Subsequent to this Decision the Association has amalgamated with The Food Preservers’ Union of Western Australia Union of Workers (FPU). The amalgamation was approved by the Western Australian Industrial Relations Commission (WAIRC) on 14 December 2016. A copy of the Orders made by the WAIRC are attached to this application and marked “Attachment 5”.
12. The Applicant is now applying under section 158A of the Act to extend its coverage in Western Australia to include the Association’s additional eligibility rules arising from the amalgamation.

Current application

13. The alteration to the eligibility rules of the Applicant for which consent is sought is that the rules of the Applicant be altered by inserting a new sub-rule 6B (40) and (41) immediately following the current sub-rule 6B (39) (hereinafter referred to as “Organisation Rule 6B (40) and (41)”).
14. The rules of the Applicant as amended to include Organisation Rule 6B (40) and (41) are attached to this Application and marked “Attachment 6”.
15. Organisation Rule 6B (40) and (41) consists of the complete text of Association Rule 4 (40) and (41). Association Rule 4 (40) and (41) contain the additional eligibility rules of the AWUWA arising from its amalgamation with the FPU.
16. The alteration will not extend the eligibility rules of the Applicant beyond those of the Association.

17. Words limiting the application of the proposed Organisation Rule 6B (40) and (41) already appear at the beginning of Rule 6B. These words restrict the application of Organisation Rule 6B (40) and (41) to the State of Western Australia.
18. The alteration only includes the extended coverage of the AWUWA in accordance with Regulation 125B(2)(a)(ii) of the Regulations.

The Alteration was made under the Rules of the Applicant

19. Attached to this application and marked “Attachment 7” is a Declaration of Mike Zoetbrood, a member of the committee of management of the Applicant who is authorised to make the declaration in support of the Application and under the Rules of the Applicant.
20. The alteration has been made under the rules of the Applicant. The alteration was approved by the National Executive on 16 December 2016 and the actions taken to make the alteration are set out in the Declaration of Mike Zoetbrood, which also verifies the facts stated in this Application.

The Reasons for the Alteration

21. The *Workplace Relations Amendment (Work Choices) Act 2005* caused many employers and employees in the State of West Australia to be covered by Federal workplace relations laws for the first time, and to the exclusion of the West Australian State industrial relations laws.
22. A system of transitional recognition was established to allow the state registered industrial associations, including the Association, which had enrolled as members and represented many employees formerly in the State system, to represent those members and employees in the Federal system.
23. Whilst the AWUWA’s transitional recognition has recently been extended on an interim basis by the Fair Work Commission (see *The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers* [2016] FWC 9241), it will inevitably lapse in the near future. Given the eligibility rules and membership of the FPU now form part of the AWUWA, this application is necessary to ensure the former FPU members can continue being represented in the Federal system into the future. The application essentially allows the consent amalgamation between the FPU and the AWUWA in Western Australia to be fully implemented.

The Association of employees actively represents the classes of employees to which the extension of the eligibility rules will apply

24. The Association actively represents all of the classes of employees to which the extension of the eligibility rules will apply, within the meaning of the Regulation 125A(3) of the Regulations, in that the Association is engaged in at least one of the following activities in relation to each such class of employees –
 - i. organising and recruitment activity;
 - ii. representing employees in negotiations with employers;
 - iii. representing employees in industrial bodies;
 - iv. obtaining and maintaining award conditions; and
 - v. collective bargaining.

25. There are a number of tables attached to the Application, which are marked Annexure 1 to 5 respectively. Those tables set out the manner and means by which the Association has complied with the requirements of sub-Regulation 125A(3) of the Regulations, in relation to each of the respective classes of employees included within Association Rule 4 (40) and (41).
26. Annexures 1 to 5 describe events that have occurred throughout the period of approximately ten years prior to the date of this Application.
27. In considering this material, it is important to note the effect of section 72(5) of the *Industrial Relations Act 1979* (WA) in relation to the amalgamation between the FPU and the AWUWA. This provision ensures all property, rights, duties and obligations previously held by, vested in, or imposed on the FPU are held by, vested in, or imposed on the AWUWA.

Annexure 1 – AWUWA Rules and the five “activity tests”

28. Within the table marked “Annexure 1” and attached to this Application there are six columns –
 - a. the first column sets out the eligibility rules of the Association as they are numbered within Association Rule 4 (40) and (41), “Membership”, of the Rules of the Association;
 - b. the second column provides information as to the state of financial membership of the Association, related to the corresponding class of members set out in the first column of the table;
 - c. the third column provides examples of matters in which the Association has represented employees in negotiations with employers, related to the corresponding class of members set out in the first column;
 - d. the fourth column provides examples of matters in which the Association, either alone or in conjunction with the Applicant have represented the corresponding classes of members set out in the first column;
 - e. the fifth column provides details of the West Australia State Awards (“West Australia Awards”), NAPSA’s, obtained and/or maintained by the Association, and which apply to the corresponding class/s of members set out in the first column and details of the Modern Awards in which the Association, either alone or in conjunction with the Applicant have represented the corresponding classes of members set out in the first column; and
 - f. the sixth column provides details of the collective agreements entered into and/or negotiated by the Association in relation to the corresponding class/s of employees set out in the first column.
29. The West Australian Awards referred to in the fifth column of “Annexure 1” are described in more detail in “Annexure 3”.
30. The representation in respect of the “Modern Awards” referred to in the fifth column of “Annexure 1” are described in more detail in “Annexure 4”.

31. The representation in respect of the collective/enterprise agreements referred to in the sixth column of “Annexure 1” are described in more detail in “Annexure 5”.

Annexure 2 – General Ruling Applications of WAIRC and obtaining and maintaining award conditions

32. Under Division 3 of Part II of the *Industrial Relations Act 1979* (WA), the Western Australia Industrial Relations Commission (“WAIRC”) has the power to make general rulings, which have the effect of varying affected awards.

33. “Annexure 2” contains details of the general rulings by the WAIRC between the years of 2002 to 2016 inclusive.

34. Within “Annexure 2” –

- a. the first column describes the matter dealt with by the WAIRC;
- b. the second column specifies the application number of that matter;
- c. the third column described effect of the decision; and
- d. the fourth column provides Western Australia Industrial Gazette (“WAIG”) reference.

35. General rulings have operated to deal with matters such as state wage cases, increasing casual loadings, allowances, guaranteed minimum wages, introduction of the 38-hour week, jury service, and superannuation.

36. The Association assisted with the matters set out in “Annexure 2”, which matters involved the obtaining and/or maintaining of award conditions for effectively all classes of employees engaged in Western Australia under awards of the WAIRC, including all classes of employees whose callings fall within Association Rule 4 (40) and (41).

37. The Association’s separate representation as an applicant, respondent or a participant in general rulings matters satisfies two requirements set out in 125A(3)(a), those being –

- a. obtaining and maintaining award conditions; and
- b. representing employees in industrial bodies.

Annexure 3 – WAIRC Awards

38. “Annexure 3” contains four columns –

- a. the first column provides the name of the Award or the Notional Agreements Preserving State Awards [collectively referred to as “State Awards”] currently in force in the State of Western Australia;
- b. the second column describes the award coverage and application provision(s) for the corresponding award in the first column;
- c. the third column provides an internet link to the award named in the first column; and
- d. the fourth column describes in brief terms the Association’s involvement in the making and/or maintaining of the corresponding award in the first column, including the part of Association Rule 4 to which the corresponding award in the first column has application.

39. The fourth column of “Annexure 3” also specifies whether or not the Association is a

“named party” in each respective award.

40. It is not always necessary for the Association to be named in a West Australian award in order for the Association to be a “named party” in that Award for the purposes of the Western Australia State system.
41. This is because section 38(1a) of the *Industrial Relations Act 1979* (WA) provides that a party to the proceedings in which an award is made is taken to be a named party to the award. Section 38(1a) provides –

“(1) The parties to proceedings before the Commission in which an award is made, other than UnionsWA, the Chamber, the Mines and Metals Association and the Minister, shall be listed in the award as the named parties to the award.

(1a) If after the commencement of section 12 of the Industrial Relations Amendment Act 1993¹ —

(a) any party to proceedings in which an award is made, other than UnionsWA, the Chamber, the Mines and Metals Association and the Minister, is not listed in the award as a named party as required by subsection (1); and

(b) the Commission has not ordered that the party is not to be a party to the award,

the party is to be taken to be a named party to the award.

(1b) In subsections (1) and (1a) party does not include an intervener. ”

42. The coverage clause of West Australian Awards, such as those set out in the second column “Annexure 3”, should be read in conjunction with the classification structure in that award for a proper understanding of the callings and all classes of employees covered by the award.
43. It is apparent that a class of employees covered by these awards may fall within more than one part of Association Rule 4 (40) and (41) at the same time.

Annexure 4 – Modern Awards.

44. On 28 March 2008, the then Minister for Employment and Workplace Relations requested that the Australian Industrial Relations Commission [“AIRC”] modernise awards, pursuant to section 576C of the *Workplace Relations Act 1996* (hereinafter referred to as “Award Modernisation”).
45. The Association, in concert with the Applicant, consulted, made submissions, raised matters of concern, and appeared in proceedings for the majority of industry sectors and/or occupational areas comprising the four stages that the AIRC outlined for Award Modernisation, with respect to those modern awards that affected the interests of the classes of employees mentioned in Association Rule 4 (40) and (41).
46. The Association, in conjunction with the Applicant, also drafted numerous awards for to the AIRC in the Award Modernisation proceedings.
47. In 2012, Fair Work Australia commenced a review of all modern awards pursuant to the requirement in Part 2 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, (hereinafter referred to as “Modern Awards Review 2012”).

48. On 1 January 2014, the Fair Work Commission commenced a 4-yearly review of all modern awards pursuant to the Fair Work Act 2009, Part 2-3, Division 4, (hereinafter referred to as “Modern Awards Review 2014”).
49. While the Modern Awards Review is still in progress, a number of modern awards have been the subject of conferences and hearings before the Fair Work Commission as at the date of this application.
50. This has included common issue proceedings relating to annual leave, casual and part-time employment and award flexibility terms. These proceedings generally affect most, if not all, modern awards.
51. The Association, in concert with the Applicant, consulted, made submissions, raised matters of concern and appeared in proceedings for the review of the modern awards that affected the interests of the classes of employees mentioned in Association Rule 4 (40) and (41), during the Modern Awards Review 2012 and the Modern Awards Review 2014.
52. “Annexure 4” details the written representation of the Applicant and the Association in obtaining and maintaining award conditions through the Award Modernisation process.
53. “Annexure 4” contains 4 tables which relate to the Applicant and the Association’s involvement in the following:
- Table 1: Award modernisation process
 - Table 2: Modern award variations
 - Table 3: 2012 modern award review
 - Table 4: 2014 modern award review
54. The relevant material can be accessed through the Fair Work Commission’s website at: www.fwc.gov.au

Annexure 5 – enterprise agreements

55. “Annexure 5” lists four enterprise agreements that are effectively expressed to cover the Association following its amalgamation with the FPU.
56. Under section 183 of the *Fair Work Act 2009*, an employee organisation can only apply to become covered by an enterprise agreement if it was a bargaining representative in relation to the agreement.

Representing employees in negotiations with employers generally

57. In respect of the requirement set out in of 125A(3)(a)(ii) of the Regulations, the Association is and has been consistently engaged in negotiations with employers for many decades.
58. In industrial matters, it is not unusual for negotiations with employers to take place, through the encouragement and/or facilitation of the industrial body or independently of the industrial body, prior to determination of the application. The Association conducts such negotiations on a very regular basis in its own right and in conjunction with the Applicant.

Actively represent requirements

59. In respect of the requirement to “actively represent a class of employees” set out in 125A of the Regulations, the Association and the Applicant have not dealt with each of the alternative requirements set out in 125A(3)(a) for each of the respective areas of the eligibility rules of the Association where it has been clearly demonstrated that the requirements of one of the alternative activities has been met on the material provided.

60. Upon this Application and the Appendices attached, the General Manager of the Fair Work Commission can be affirmatively satisfied that the actions and activities of the Association satisfy the requirements of s.125(A)(3) of the Regulations.

A notice that this application has been filed will be published

61. Once this Application is filed, a notice that this Application has been filed will be published on the website of the Applicant at <http://www.awu.net.au/>

Date: 07.02.2017

Signature:



**Daniel Walton
NATIONAL SECRETARY**

Note 1: The application must:

1. be accompanied by a copy of the rules of the organisation and a copy of the rules of the association to which the organisation is the federal counterpart; and
2. set out the alteration, the reasons for the alteration and the effect of the alteration in sufficient detail to enable the General Manager to satisfy himself or herself that:
 - (a) the alteration has been made under the rules of the organisation; and
 - (b) the organisation is a federal counterpart of the association; and
 - (c) the alteration will not extend the eligibility rules of the organisation beyond those of the association; and
 - (d) the alteration will not apply outside the limits of the State or Territory for which the association is registered; and
 - (e) the association of employers or employees actively represents the class or classes of employers or employees to which the extension of eligibility rules will apply.
3. include a declaration:
 - (a) that the alteration was made in accordance with the rules of the organisation; and
 - (b) describing the action taken under the rules of the organisation to make the alteration; and
 - (c) verifying the facts stated in the application.

Note 2: An application must be sealed with the Common Seal of the organisation or be signed by a person authorised to sign the application. See regulation 13 of the *Fair Work (Registered Organisations) Regulations 2009*.

Note 3: An organisation that has a website must publish on the website a notice that it has lodged the application.