



# STATEMENT

*Fair Work Act 2009*

s.157—Variation of a modern award to achieve the modern awards objective

## **Application by the Restaurant and Catering Industrial**

(AM2020/11)

Restaurant industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

MELBOURNE, 30 MARCH 2020

*Application to vary the Restaurant Industry Award 2010 to achieve the modern awards objective – provisional views.*

### **1. Background**

[1] This statement concerns an application to vary the *Restaurant Industry Award 2010* (MA000119) (the Restaurant Award) filed by the Restaurant and Catering Industrial (RCI), with the support of the United Workers Union (UWU) and the Australian Council of Trade Unions (ACTU) on 30 March 2020 (the Restaurant Application).

[2] RCI, the UWU and the ACTU have been in dialogue to reach a consent position on changes to the Restaurant Award that can mitigate against the current impacts COVID-19 is having on employees and employers covered by the Restaurant Award. The Restaurant Application is the product of that dialogue and is moved by consent of the parties.

[3] At the request of the parties, the Commission’s consideration of the application will be expedited. Any party wishing to respond to the Restaurant Application and the *provisional* views set out in this statement is to file a submission by **4pm on Tuesday, 31 March 2020**. Instructions for the filing these submissions are in ‘Next steps’ below.

[4] The application will be *provisionally* listed for hearing at **10am on Wednesday, 1 April 2020 by telephone**.

[5] The hearing will only take place in the event that there are any submissions filed by **4pm Tuesday, 31 March 2020** opposing the *provisional* views in this statement. Further details of the process for this hearing are set out under ‘Next steps’ below.

## 2. COVID-19 Pandemic

[6] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed [here](#).

[7] On 24 March 2020, we granted an application to vary the *Hospitality Industry (General) Award 2010* (the Hospitality award). Our reasons for that decision were published on 25 March 2020<sup>1</sup> (the Hospitality decision). On 28 March 2020, we granted an application to vary the *Clerks – Private Sector Award 2010* (the Clerks award). Our reasons for that decision were published on the same day.

[8] The Restaurant Application notes (at [54] – [59] of Annexure B) the following impacts of the COVID-19 pandemic upon the Restaurant industry:

‘The restaurant and catering industry is currently materially impacted by CoV.

Restaurants, cafes and food court outlets can no longer trade, save for the provision of takeaway and/or delivery services.

Those still attending work are adopting new work patterns to reduce the level of exposure to colleagues and clients.

This includes rostering a limited number of employees into work at any one time and spacing employees out in the relevant worksite.

Some workplaces are closing to enable them to transition their business from a traditional restaurant model to a take away delivery business. These closures will necessitate placing employees on leave for a period, whilst the business explores transition to a new business model.

The businesses have no choice in this matter, given the directives issued by the Federal Government and supported by State Government public health orders.’<sup>2</sup>

## 3. The Application

[9] The Restaurant Application seeks to add a new schedule; Schedule I—Award Flexibility during the COVID-19 Pandemic, to the Restaurant Award. It is proposed that the new schedule operate until 30 June 2020. Schedule I proposes flexibilities in the relation to:

---

<sup>1</sup> [\[2020\] FWCFB 1574](#)

<sup>2</sup> [Joint Application](#), 30 March 2020, at Annexure B at [54]-[59]

- the range of duties employees can be required to perform;
- the reduction of ordinary hours of work for full time and part time employees;
- employees being directed to take accrued annual leave with 24 hours' notice, subject to considering an employees' personal circumstances;
- employees, by agreement, taking up to twice the amount of the accrued annual leave at half pay; and
- a reduction in the notice period for a close-down.

[10] The provisions contained in the Draft Determination at Annexure A to the Restaurant Application mirrors the provisions which we have already made in the Hospitality award and the Clerks award. Specifically:

- (a) Clause I.2.1 mirrors clause L.2.2 which was inserted into the Hospitality Industry (General) Award 2010.
- (b) Clause I.2.2 mirrors clause L.2.2 which was inserted into the Hospitality Industry (General) Award 2010.
- (c) Clause I.2.3 mirrors clause L.2.3 which was inserted into the Hospitality Industry (General) Award 2010.
- (d) Clause I.2.4 mirrors clause L.2.4 which was inserted into the Hospitality Industry (General) Award 2010.
- (e) Clause I.2.5 mirrors clause I.2.7 which was inserted into the Clerks - Private Sector Award 2010.

[11] The draft award variation determination in the Restaurant Application is attached.

#### **4. Provisional views**

[12] The Commission may make a determination varying a modern award if the Commission is satisfied that the determination is necessary to achieve the modern award objective. The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[13] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are

relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.<sup>3</sup>

**[14]** The Restaurant Application addressees the modern awards objective in the following way:

‘In terms of the matters the Commission has regard to in setting the safety net the following is now relevant:

- (a) “relative living standards and the needs of the low paid”; this must now be seen in the context of seeking to maintain employment rather than losing employment even if this means some employees choose temporarily to maintain employment while accepting reduced employment benefits and take-home pay.
- (b) “the need to promote social inclusion through increased workforce participation”; this must be seen in the context of seeking to maintain employment rather than losing employment.
- (c) “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”; this must be seen in the context of allowing business to survive the Pandemic and the Measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the Pandemic passes.
- (d) “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy”; again this must be seen in the context of allowing business to survive the Pandemic and the Measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the Pandemic passes.’<sup>4</sup>

**[15]** We have set out at [9] above what is proposed through the Restaurant Application. We note that proposed Schedule I is about matters that may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

**[16]** Additional considerations apply to the annual leave flexibilities and reduced close down notice in proposed clauses I.2.3 and I.2.5.

**[17]** Subsections 93(3) and (4) of the Act are relevant in this regard and provide as follows:

*“Terms about requirements to take paid annual leave*

---

<sup>3</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

<sup>4</sup> [Joint Application](#), 30 March 2020, at Annexure B at [80]

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

*Terms about taking paid annual leave*

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.” (emphasis added)

[18] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).<sup>5</sup>
- A modern award may include terms that:
  - (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or
  - (ii) terms that supplement the NES (s.55(4)).

[19] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type contemplated by s.93(3) of the Act.

[20] The issue before us is whether these provisions are ‘reasonable’ within the meaning of s 93(3).

[21] We note that the terms in clause 1.2.3(a) are of limited duration to address an extraordinary set of circumstances. Further, a direction to take annual leave requires the giving of at least 24 hours’ notice and such a direction may only be made after the employer has considered the employee’s personal circumstances. It is our *provisional* view that the term proposed is a permitted term and that it is ‘reasonable’ within the meaning of s.93(3). We take the same view in relation to the term dealing with reduced notice of Close-down.

[22] In relation to clause 1.2.3(c) – twice the amount of annual leave at half pay - we note that, the statutory notes to s.55(4) provides a relevant example. Note 1 states:

‘Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay.’

---

<sup>5</sup> Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made

[23] It is our *provisional* view this clause is an ancillary or incidental term permitted by s.55(4).

[24] It is our *provisional* view, taking into account the relevant s.134 considerations, that the variation of the Restaurant Award as proposed in the Restaurant Application is necessary to achieve the modern awards objective.

## 5. Next steps

### *Submissions*

[25] Any submission supporting or opposing the Restaurant Application and our *provisional* views set out above must be filed by **4pm on Tuesday 31 March 2020**. Submissions should be:

- sent to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au) and include the matter number (AM2020/11) in the subject line.
- filed in Word format.

[26] If no submissions are filed opposing the Restaurant Application and our *provisional* views we will grant the application and vary the Restaurant Award accordingly.

### *Provisional hearing*

[27] If any submissions are filed opposing the Restaurant Application and our *provisional* views, then a hearing will take place at **10am on Wednesday 1 April 2020, by telephone**.

[28] Any party who wishes to attend the hearing in relation to this matter should send an email to [Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au) specifying a name and contact telephone number by **4pm on Tuesday, 31 March 2020**.

[29] In the event that no submissions are filed opposing our *provisional* view then the hearing proposed for the morning of **Wednesday, 1 April 2020** will not be necessary and will be vacated.



PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR717945>

# DRAFT DETERMINATION

*Fair Work Act 2009*

s.157 – Application to vary a modern award to achieve the modern awards objective

## **Restaurant Industry Award 2010**

(AM2020/11)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

*Application to vary the Restaurant Industry Award 2010.*

Further to decision [[2020] FWCFB XXXX] issued by the Full Bench on XX March 2020, the above award is varied as follows:

1. In the Table of Contents add a new Schedule I
2. Add the following Schedule I to the award:

### **Schedule I—Award Flexibility During the COVID-19 Pandemic**

- I.1** Schedule I operates from [\_\_\_\_\_] until 30 June 2020. The period of operation can be extended on application.
- I.2** During the operation of Schedule I, the following provisions apply:
- I.2.1 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 19 – Classifications and Schedule B **Error! Reference source not found.**, provided that the duties are safe and the employee is licensed and qualified to perform them.
  - (b) Clause 29—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

### **I.2.2 Hours of Work—Full-time and part-time employees**

- (a) Subject to clause I.2.2(c), and despite clause 11—Full-time employment and requirements for notice in clause 31.6 (Roster), 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 31 — Hours of Work will apply on a pro-rata basis.
- (b) Subject to clause I.2.2(c), and despite clause 12.3(a) (Part-time employment), and the requirements for notice in clause 31.6 (Roster), 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) Prior to any employer issuing any direction under clause I.2.2(a) or (b) an employer must:
  - (i) consult with the affected employee/s in accordance with clause 8A— 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.
- (d) An employee given a direction under clause I.2.2(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 I.
- (e) If an employee given a direction under clause I.2.2(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 I.

### **I.2.3 Annual leave**

- (a) Despite clauses 35.4, 35.5 and 35.6 (Annual leave), an employer may, subject to considering an employees’ personal circumstances, direct the employee to take annual leave with 24 hours’ notice.

- (b) Clause I.2.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
- (c) During the period of operation of Schedule I, 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.

#### **I.2.4 Dispute Resolution**

Any dispute regarding the operation of Schedule I may be referred to the Fair Work Commission in accordance with Clause 9—Dispute Resolution.

#### **I.2.5 Close down**

- (a) Instead of clause 35.3 (Close-down), and subject to clause I.2.5(b), an employer may:
  - (i) require an employee to take annual leave as part of a close-down of its operations, or part of its operations, by giving at least one week's notice or any shorter period of notice that may be agreed; and
  - (ii) where an employee who has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.
- (b) Clause I.2.5(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.
- (c) Where an employee is placed on unpaid leave pursuant to clause I.2.5(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.