

# REPORT



*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

**FAST FOOD INDUSTRY AWARD 2010**  
(AM2017/49) [MA000003]

DEPUTY PRESIDENT MASSON

MELBOURNE, 27 MAY 2019

*4 yearly review of modern award – Fast Food Industry Award 2010*

[1] On 20 February 2019 the Full Bench issued a Decision<sup>1</sup> in relation to the 4 yearly review of the *Fast Food Industry Award 2010* (the Award) pursuant to s. 156 of the *Fair Work Act 2009* (the Act).

[2] The Full Bench expressed provisional views in the Decision in relation to guaranteed minimum hours for part time employees and in the simplification of the requirements attaching to the variation of part time employees' agreed hours of work. The Full Bench relevantly stated as follows;

[151] But the rejection of Ai Group's proposed clause is not the end of the matter. We see merit in the provision of guaranteed minimum hours for part time employees and in the simplification of the requirements attaching to the variation of a part time employee's agreed regular pattern of work. It is our *provisional* view that the current award places unwarranted restrictions on the capacity to vary part time hours.

.....

[154] It is our *provisional* view that:

- agreed variations need not be recorded *before* the variation occurs – it should be sufficient to record the variation at the end of the relevant shift.
- it is unnecessary to provide a copy of the agreed variation to the employee, it is sufficient if a record is retained by the employer.
- some clarification as to the meaning of 'in writing' may be appropriate.<sup>2</sup>

[3] As foreshadowed in the Decision conferences were then conducted by me with the interested parties on 21 March 2019 and 12 April 2019, the purpose of which was to provide those parties with an opportunity to comment on the provisional views expressed by the Full Bench at [151] and [154] of the Decision.

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<sup>1</sup> [2019] FWCFB 272

<sup>2</sup> Ibid at paragraphs [151] – [154]

[4] To assist the conduct of the conferences Background Papers were prepared and distributed in advance to the parties and included options for re-drafting of clause 12 and associated clauses of the Award. A Background Paper (Background Paper 1) dated 20 March 2019 was distributed in advance of the 21 March 2019 conference and is provided at Attachment 1 of this Report. The conference conducted on 21 March 2019 was attended by the;

- Ai Group;
- Shop Distributive and Allied Employees' Association (SDA); and
- Retail and Fast Food Workers Union (RAFFWU).

[5] Following conduct of that conference during which feedback was obtained from the parties a further Background Paper (Background Paper 2) dated 5 April 2019 was prepared for the 12 April 2019 conference. Background Paper 2 included refinement of the options for re-drafting of Clause 12 and associated clauses and is provided at Attachment 2. The conference conducted on 12 April 2019 was attended by;

- Ai Group; and
- Shop Distributive and Allied Employees' Association (SDA).

[6] During the course of the conference conducted on 12 April 2019 the Ai Group and SDA provided feedback on Background Paper 2 and subsequently provided drafting suggestions in relation to Clause 12 and associated clauses. A summary of the feedback and drafting suggestions in response to Background Paper 2 follows.

### **Ai Group**

[7] The Ai Group provided the following comments and feedback on Background Paper 2;

- 1) Agreed to the structure of the clause as proposed in 12.3 and 12.4 so as to distinguish between agreed in-shift changes in hours of work from that of on-going changes in hours of work for part time employees.
- 2) Opposed to the minimum engagement of part time employees of 8 hours per week as proposed at 12.2(e) for a number of reasons;
  - (i) The 8 hour minimum engagement proposed by the Ai Group in its application to vary the Award was part of a package of proposals which was put forward as a joint position with the SDA;
  - (ii) As noted at [143] in the Decision the existing part time clause is consistent with the general principle in the 2009 award modernisation decision in that it provides employees with a degree of regularity and certainty. Absent the broader changes sought (unsuccessfully) by the Ai Group it is unnecessary to make the change reflected in the draft clause.
  - (iii) The imposition of a minimum engagement per week of 8 hours without the flexibility as to when those hours may be rostered is more onerous on employers, having regard to the demographics of the industry and the evidence of average hours worked per week.

- (iv) Noted that the Hospitality Industry (General) Award 2010, the Restaurant Industry Award 2010 and Registered and Licenced Clubs Award 2010 provide for a minimum of 8 hours per week for part time employees. However, those awards also contain flexibilities that were sought by the Ai Group in the present matter but were declined by the Full Bench in its Decision.
- 3) Clause 12.2 (f) is problematic in that the restriction at 12.2(f) may not be compatible with additional agreed hours. Consequential amendments to clause 27.1(d) of the Award were suggested as necessary. The following re-draft of clause 27.1(d) of the Award was subsequently provided;

*“(d) The time of taking rest and meal breaks and the duration of meal breaks are subject to agreements, and variations to those agreements, made pursuant to clauses 12.2, 12.3 and 12.4 of this Award.”*

- 4) With respect to clause 12.3(a), concern was raised as to the practicality of the timing of the record being made of the agreed change in hours. The following wording was proposed;

*“(a) Any agreement to vary the regular pattern of work for a particular rostered shift must be recorded by the end of the shift or as soon as reasonably practicable after the end of the shift.”*

## **SDA**

**[8]** The SDA advised that while they were largely satisfied with the proposed clause they did have some drafting suggestions as follows;

- 1) Supported the structuring of the clause as proposed in 12.3 and 12.4 so as to distinguish between agreed in-shift changes in hours of work from that of on-going changes in hours of work for part time employees.
- 2) In clause 12.2(d) they believed use of the term “any” in the phrase “.....by any *electronic means of communication*” was very broad and their preference would be to remove the word “any” and use words to the effect of “.....by commonly used electronic means”.
- 3) In respect of clause 12.5 they proposed additional wording to make clear that where there was no record of agreed changes in hours then overtime would be payable. Suggested additional wording of “*where there is no record of such agreement, overtime is payable*”.
- 4) With respect to clause 26.2(e) they suggested there was potential for some confusion and proposed some minor re-drafting along the following lines;

*“26.2 A full-time or part-time employee shall be paid overtime for all work as follows*

.....

*(e) Hours worked by part-time employees in excess of;*

*(i) The agreed hours in clause 12.2; or*

(ii) *In excess of the agreed hours as varied under clauses 12.3 or 12.4.*”

5) Also suggested that a new sub-clause 26.2(f) be included to make clear that overtime is payable in circumstances where a record of agreed variation of part-time hours is not available. The following wording was suggested;

“(f) *any additional hours worked where there is no written or electronic record of agreement to work such hours.*”

6) With respect to the Ai Group’s proposed changes to clause 27.1(d) of the Award the SDA responded by submitting that the current wording of that clause should be retained with the addition of a further sentence. The clause would consequently read as follows;

“(d) *The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award. An agreed variation pursuant to sub clauses 12.3 or 12.4 may include a variation to the time of taking rest and meal breaks.*

7) In responding to the Ai Group’s suggested changes to clause 12.3(a) they acknowledged the potential problem of staff members agreeing verbally to a change of hours during the shift but then failing to formalise such agreement. They did however express concern at the lack of precision in relation to use of the words “*as soon as reasonably practicable*” and how that would be enforced.

[9] A summary of the feedback received from SDA and Ai Group at and following the 12 April 2019 conference is contained in Attachment C which seeks to reflect the competing positions on particular elements of the draft clause provided in Background Paper 2.

## **Next Steps**

[10] In order for the Full Bench to now finalise the Award review in respect of the *provisional* views expressed at [151] and [154] of the Decision directions will be shortly issued providing interested parties with an opportunity to file final submissions and materials in relation to the draft clause provided at Attachment B.



DEPUTY PRESIDENT

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## BACKGROUND PAPER

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

### **4 yearly review of modern awards—*Fast Food Industry Award 2010***

(AM2017/49)

MELBOURNE, 20 MARCH 2019

*Fast Food Industry Award 2010 – Award stage – substantive issues*

**Below are two options for re-drafting current clauses 12.3 and 12.4 of the *Fast Food Industry Award 2010*. The options are provided in order to assist discussion and do not represent the view of the Full Bench.**

#### **Option 1—Proposed re-draft:**

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the number of hours worked each day;
- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- that the minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 The employer and employee may agree to vary an agreement made under clause 12.2 on an ongoing basis or for a specified period of time, as follows:

- (a) the variation must be recorded by the end of the first affected shift; and
- (b) the variation must be recording in writing, including by any electronic means of communication.

- 12.4 The employer must keep a copy of any agreement made under clause 12.2 and any variation made under clause 12.3 and provide a copy to the employee, if requested to do so.

**Option 2—Proposed re-draft:**

- 12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the number of hours worked each day;
- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- that the minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

- 12.3 The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows;

- (a) the variation must be recorded by the end of the affected shift; and
- (b) the variation must be recording in writing, including by any electronic means of communication.

- 12.4 The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows;

- (a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time will be made in writing before the variation occurs; and
- (b) the variation must be recording in writing, including by any electronic means of communication.

- 12.5 The employer must keep a copy of any agreement made under clause 12.2 and any variation made under clause 12.3 and 12.4 and provide a copy to the employee, if requested to do so.



## **BACKGROUND PAPER**

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

### **4 yearly review of modern awards—*Fast Food Industry Award 2010***

(AM2017/49)

MELBOURNE, 5 APRIL 2019

*Fast Food Industry Award 2010 – Award stage – substantive issues*

**Below is an option for re-drafting current clause 12 of the *Fast Food Industry Award 2010*. This option is provided in order to assist discussion and does not represent the view of the Full Bench.**

#### **Proposed re-draft:**

**12.1** A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

**12.2** At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- (a) the number of hours worked each day;
- (b) which days of the week the employee will work;
- (c) the actual starting and finishing times of each day;
- (d) that any variation will be in writing, including by any electronic means of communication;
- (e) that the weekly engagement is a minimum of 8 hours and that the daily engagement is a minimum of 3 consecutive hours; and
- (f) the times of taking and the duration of meal breaks.

**12.3** The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:

- (a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and
  - (b) the agreed variation must be recorded in writing, including by any electronic means of communication.
- 12.4** The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:
- (a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and
  - (b) the agreed variation must be recorded in writing, including by any electronic means of communication.
- 12.5** The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so.
- 12.6** An employer is required to roster a part-time employee for a minimum of 8 hours per week and a minimum of 3 consecutive hours on any shift.
- 12.7** An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13— Casual employment.
- 12.8** A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.

**Consequential minor amendment:**

[1] As a consequence of the changes proposed to clause 12 above it will also be necessary for a minor consequential amendment to be made to **Clause 26—Overtime** by adding the reference to clause 12.4 in 26.2(e) in the following terms:

**26.2** A full-time or part-time employee shall be paid overtime for all work as follows:

- (a) In excess of:
  - (i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or



- (ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or
    - (iii) eleven hours on any one day; or
- (b) Before an employee's rostered commencing time on any one day; or
- (c) After an employee's rostered ceasing time on any one day; or
- (d) Outside the ordinary hours of work; or
- (e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 or 12.4.

Attachment C

Background Paper 2 dated 5 April 2019 – Draft Fast Food Industry Award 2010 Provisions	SDA Position	AIG Position
<p><b>12.1</b> A part-time employee is an employee who:</p> <ul style="list-style-type: none"> <li>(a) works less than 38 hours per week; and</li> <li>(b) has reasonably predictable hours of work.</li> </ul>	<p><b>12.1</b> A part-time employee is an employee who:</p> <ul style="list-style-type: none"> <li>(a) works less than 38 hours per week; and</li> <li>(b) has reasonably predictable hours of work.</li> </ul>	<p><b>12.1</b> A part-time employee is an employee who:</p> <ul style="list-style-type: none"> <li>(a) works less than 38 hours per week; and</li> <li>(b) has reasonably predictable hours of work.</li> </ul>
<p><b>12.2</b> At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:</p> <ul style="list-style-type: none"> <li>(a) the number of hours worked each day;</li> <li>(b) which days of the week the employee will work;</li> <li>(c) the actual starting and finishing times of each day;</li> <li>(d) that any variation will be in</li> </ul>	<p><b>12.2</b> At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:</p> <ul style="list-style-type: none"> <li>(a) the number of hours worked each day;</li> <li>(b) which days of the week the employee will work;</li> <li>(c) the actual starting and finishing times of each day;</li> <li>(d) that any variation will be in</li> </ul>	<p><b>12.2</b> At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:</p> <ul style="list-style-type: none"> <li>(a) the number of hours worked each day;</li> <li>(b) which days of the week the employee will work;</li> <li>(c) the actual starting and finishing times of each day;</li> <li>(d) that any variation will be in</li> </ul>

<p>writing, including by any electronic means of communication;</p> <p>(e) that the weekly engagement is a minimum of 8 hours and that the daily engagement is a minimum of 3 consecutive hours; and</p> <p>(f) the times of taking and the duration of meal breaks.</p>	<p>writing, including by <del>any</del> <u>commonly used</u> electronic means of communication;</p> <p>(e) that the weekly engagement is a minimum of 8 hours and that the daily engagement is a minimum of 3 consecutive hours; and</p> <p>(f) the times of taking and the duration of meal breaks.</p>	<p>writing, including by any electronic means of communication;</p> <p>(e) that the <del>weekly engagement is a minimum of 8 hours and that the</del> <u>minimum</u> daily engagement is <del>a minimum of 3</del> consecutive hours; and</p> <p>(f) the times of taking and the duration of meal breaks.</p>
<p><b>12.3</b> The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:</p> <p>(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>	<p><b>12.3</b> The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:</p> <p>(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>	<p><b>12.3</b> The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift as follows:</p> <p>(a) any agreement to vary the regular pattern of work for a particular rostered shift must be recorded <del>at or</del> by the end of the affected shift <u>or as soon as reasonably practicable after the end of the affected shift</u>; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>

<p><b>12.4</b> The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:</p> <p>(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>	<p><b>12.4</b> The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:</p> <p>(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>	<p><b>12.4</b> The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:</p> <p>(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and</p> <p>(b) the agreed variation must be recorded in writing, including by any electronic means of communication.</p>
<p><b>12.5</b> The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so.</p>	<p><b>12.5</b> The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so. <u>Where there is no record of such agreed variation, overtime is payable.</u></p>	<p><b>12.5</b> The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clauses 12.3 and 12.4 and provide a copy to the employee, if requested to do so.</p>
<p><b>12.6</b> An employer is required to roster a part-time employee for a minimum of 8 hours per week and a minimum of 3 consecutive hours on any shift.</p>	<p><b>12.6</b> An employer is required to roster a part-time employee for a minimum of 8 hours per week and a minimum of 3 consecutive hours on any shift.</p>	<p><b>12.6</b> An employer is required to roster a part-time employee for a minimum <del>of 8 hours per week and a minimum</del> of 3 consecutive hours on any shift.</p>

<p><b>12.7</b> An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.</p>	<p><b>12.7</b> An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.</p>	<p><b>12.7</b> An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.</p>
<p><b>12.8</b> A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.</p>	<p><b>12.8</b> A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.</p>	<p><b>12.8</b> A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.</p>
<p><b>26.2</b> A full-time or part-time employee shall be paid overtime for all work as follows:</p> <p>(a) In excess of:</p> <p>(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or</p> <p>(ii) five days per week (or six days in one week if in</p>	<p><b>26.2</b> A full-time or part-time employee shall be paid overtime for all work as follows:</p> <p>(a) In excess of:</p> <p>(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or</p> <p>(ii) five days per week (or six days in one week if in</p>	<p><b>26.2</b> A full-time or part-time employee shall be paid overtime for all work as follows:</p> <p>(a) In excess of:</p> <p>(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or</p> <p>(ii) five days per week (or six days in one week if in</p>

<p>the following week ordinary hours are worked on not more than four days); or</p> <p>(iii) eleven hours on any one day; or</p> <p>(b) Before an employee’s rostered commencing time on any one day; or</p> <p>(c) After an employee’s rostered ceasing time on any one day; or</p> <p>(d) Outside the ordinary hours of work; or</p> <p>(e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 or 12.4.</p>	<p>the following week ordinary hours are worked on not more than four days); or</p> <p>(iii) eleven hours on any one day; or</p> <p>(b) Before an employee’s rostered commencing time on any one day; or</p> <p>(c) After an employee’s rostered ceasing time on any one day; or</p> <p>(d) Outside the ordinary hours of work; or</p> <p>(e) Hours worked by part-time employees in excess of:</p> <p>(i) the agreed hours in clause 12.2; or</p> <p>(ii) <del>or—in excess of the agreed hours</del> as varied under clause 12.3 or 12.4.</p> <p>(f) <u>any additional hours worked by a part time employee in excess of their agreed hours where there is</u></p>	<p>the following week ordinary hours are worked on not more than four days); or</p> <p>(iii) eleven hours on any one day; or</p> <p>(b) Before an employee’s rostered commencing time on any one day; or</p> <p>(c) After an employee’s rostered ceasing time on any one day; or</p> <p>(d) Outside the ordinary hours of work; or</p> <p>(e) Hours worked by part-time employees in excess of:</p> <p>(i) the agreed hours in clause 12.2; or</p> <p><del>(i)(ii) or—in excess of the agreed hours</del> as varied under clause 12.3 or 12.4.</p>
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	<p><u>no written or electronic record of agreement to work such hours.</u></p>	
	<p><b>27.1 Breaks during work periods</b></p> <p><u>.....</u></p> <p>(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to the roster provisions of this award. <u>An agreed variation pursuant to sub-clauses 12.3 or 12.4 of this award may include a variation to the time of taking rest and unpaid breaks.</u></p>	<p><b>27.1 Breaks during work periods</b></p> <p><u>.....</u></p> <p>(d) The time of taking rest and meal breaks and the duration of meal breaks <del>form part of the roster and</del> are subject to <del>the roster provisions of this award.</del> <u>agreements, and variations to those agreements, made pursuant to clauses 12.2, 12.3 and 12.4 of this Award.</u></p>