

**OUTLINE OF SUBMISSION OF THE AUSTRALIAN INDUSTRY GROUP
ON PROPOSED RE-DRAFTING OF CLAUSE 12 OF FAST FOOD INDUSTRY AWARD**

1. The Australian Industry Group (**Ai Group**) is representing employers in the fast food industry in relation to the review being conducted by the Fair Work Commission (**Commission**) of the *Fast Food Industry Award 2010 (Fast Food Award)* pursuant to section 156 of the *Fair Work Act 2009 (Cth) (FW Act)*.
2. One outstanding aspect of the review relates to the re-drafting of current clause 12 of the Fast Food Award which addresses part-time employees.
3. By this outline, Ai Group sets out its submissions on the re-drafting of clause 12.2 proposed by the Commission.

Summary

4. Ai Group agrees that the re-drafting of the current clause 12 should not require that the variation to the agreed regular pattern of work:
 - (a) be recorded before the variation occurs (and the recording should be permitted to occur at a later time); and
 - (b) be provided to the employee (and that it is sufficient if a record is retained by the employer).
5. Ai Group also agrees that the re-drafting of the current clause 12 should clarify that the recording of the variation may occur by electronic means.
6. Ai Group objects to the re-drafting of the current clause 12 so as to confer, in any form, an award-specified guarantee of a minimum weekly engagement, whether specified by reference to number of weekly hours or otherwise, for part-time employees.
7. Ai Group proposes two specific changes to the re-drafting to the current clause 12.
8. Ai Group seeks that the Commission makes orders in accordance with the attached draft determination.

Procedural Background

9. On 20 February 2019, the Full Bench issued a Decision in relation to the review of the Fast Food Award (see *Re Fast Food Industry Award 2010* [2019] FWCFB 272) (**Decision**).
10. On 20 March 2019, the Commission issued a background paper containing two options for the re-drafting of the current clause 12.3 and current clause 12.4 of the Fast Food Award. The two options contained in the background paper only specified a minimum daily engagement of three hours and did not specify a minimum weekly engagement of eight hours.
11. On 21 March 2019, the Commission (Masson DP) conducted a conference (**March Conference**) with interested persons to consider the background paper.
12. On 5 April 2019, the Commission issued a second background paper containing a proposed re-draft of the entire current clause 12 of the Fast Food Award. The proposed re-draft specified a minimum daily engagement of three consecutive hours and a minimum weekly engagement of eight hours.
13. On 12 April 2019, the Commission (Masson DP) conducted a further conference (**April Conference**) with interested persons to consider the second background paper. During the April Conference, Ai Group objected to the proposed re-draft specifying a minimum weekly engagement of eight hours.
14. On 27 May 2019, the Commission (Masson DP) issued a report summarising the positions of interested persons in the March Conference and the April Conference (**Report**).
15. Ai Group accepts that the Report summarises its position accurately (see Report at [7]).

Opposition to Minimum Weekly Engagement

16. Ai Group's opposition to an award-specified guaranteed minimum weekly engagement is underpinned by two factors.
17. First, a change to the Fast Food Award so as to introduce a guaranteed minimum weekly engagement is not "necessary" to meet the modern awards objective (see section 138 of the FW Act; see also Decision at [18]-[19]):
 - (a) A guaranteed weekly minimum hours is not currently a feature of the Fast Food Award (see current clause 12 of the Fast Food Award).
 - (b) There is no broader change to the structure of part-time work (such as those sought in the flexible part-time provision) that is being introduced to the Fast Food Award as part of the review that requires the inclusion of a guarantee of minimum weekly hours.
 - (c) There is no identified justification for a guarantee of minimum weekly hours.

- (d) There is no identified evidentiary foundation for the need for a guarantee of minimum weekly hours.
 - (e) There is no evidence of exploitation or disadvantage to employees flowing from the absence of a guarantee of minimum weekly hours.
 - (f) It is not necessary to have an award-specified guaranteed minimum weekly engagement in the Fast Food Award in circumstances where the current clause 12.2 provides regularity and certainty (see Decision at [143]).
 - (g) It is not necessary to have an award-specified guaranteed minimum weekly engagement in the Fast Food Award in circumstances where a part time employee by definition has reasonably predictable hours of work (see current clause 12.1(b) and proposed re-drafted clause 12.1(b)).
 - (h) It is not necessary to have an award-specified guaranteed minimum weekly engagement in the Fast Food Award in circumstances where there is (and will be) a mechanism in the Fast Food Award for fixing weekly hours of work, in that the current Fast Food Award requires agreement regarding the number of hours worked each day, the start and finish time, and the days of the week (see current clause 12.2 and proposed re-drafted clause 12.2), such that there will be a contractually guaranteed number of hours agreed between the employer and employee.
 - (i) It is not necessary to have an award-specified guaranteed minimum weekly engagement in the Fast Food Award in circumstances where there is (and will be) the safeguard of minimum shift duration of 3 consecutive hours (see current clause 12.2 and proposed re-drafted clause 12.2(e)).
18. Secondly, a guarantee of minimum weekly hours for part-time employees is not a general feature of traditional (rigid) part-time arrangements:
- (a) It is not currently in the Fast Food Award.
 - (b) It is not a feature of most modern awards.
 - (c) It appears in three related awards (the *Hospitality Industry (General) Award 2010*, the *Restaurant Industry Award 2010* and the *Registered and Licenced Clubs Award 2010*) but only in the context of flexible part-time provisions (in which hours worked in excess of 8 hours per week up to 38 hours per week are not paid at overtime rates).
 - (d) It appears in two other modern awards (the *Social, Community, Home Care and Disability Services Industry Award 2010* and the *Victorian Local Government Award 2015*) but only in the context of flexible part-time provisions (in which hours worked in excess of 8 hours per week up to 38 hours per week are not paid at overtime rates).

- (e) It appears in enterprise agreements within the fast food industry but only in the context of flexible part-time arrangements (in which hours worked in excess of 8 hours per week up to 38 hours per week are not paid at overtime rates).
19. Whilst Ai Group accepts that a minimum weekly guarantee of eight hours was a feature of the flexible part-time clause jointly proposed by the SDA and Ai Group for inclusion in the Fast Food Award as part of the review, this feature was on a “whole of package” basis:
- (a) The inclusion of the minimum weekly guarantee of eight hours was an element of a package negotiated between Ai Group and the SDA with the assistance of the Commission (Lee C) in private conference.
- (b) There was certainly no stand-alone proposition advanced by Ai Group that a minimum weekly guarantee was needed in the Fast Food Award, in the absence of the other flexibilities being sought.

Proposed Changes to Re-drafting

Point by Which Variation Must be Recorded

20. Ai Group submits that the Fast Food Award should permit an employer and employee to record the variation to an agreed regular pattern of work beyond the end of a shift.
21. One practical difficulty associated with the recording of the variation (either at the time of agreeing the variation or subsequently) is the distraction of the employer and the employer from meeting customer demand, particularly in peak periods of trading.
22. The need to meet customer demand may not cease at the end of a shift worked by the employee. It may thus not be practicable for the employer and employee to record the variation at the end of the shift worked by the employee. It may, however, be practicable, for the employer to send the employee a text message, or an email soon after the end of the shift and for the employee to accept the record by text message or email. It may also be practicable for the employer to prepare the record during a non-busy period and to present the record to the employee at the start of the next shift.
23. Ai Group is not proposing that the employee wait during unpaid time at the end of the shift for the variation to be recorded.
24. Ai Group submits that proposed re-drafted clause 12.3 should read:
- “(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 but by no later than 24 hours after the end of the shift.”

Interaction with Meal Breaks

25. Ai Group also submits that the Fast Food Award should address expressly, in the clause of the Fast Food Award that addresses meal breaks (see clause 27.1 of the Fast Food Award), the ability of an employer and employee, as part of the variation to an agreed work pattern, to vary the time of the taking of meal breaks (see proposed re-drafted clause 12.2(f)).
26. Under the Fast Food Award, the current meals break clause provides that the time of the taking of meal breaks and the duration of the meal breaks form part of the roster and are subject to the roster provisions of the Fast Food Award (see clause 27.1(d)). However, there are currently no roster provisions in the Fast Food Award.
27. Ai Group wishes to avoid any future disputes over the ability of the employer and employee to vary the agreed regular pattern of work so as to address the time of taking of meal breaks and the duration of meal breaks. One effective way of doing so is to vary the current clause 27.1(d) to read:

“The time of taking rest and meal breaks and the duration of the meal breaks are subject to agreements on such matters between the employer and the employee and subject to the provisions of the Award allowing for variation of agreements made under clause 12.2 of the Award”.

Alternative Submission

28. In the event that the Commission does not accept the Ai Group’s opposition to an award-specified guaranteed weekly minimum engagement, Ai Group make the following submissions in the alternative:
 - (a) First, the minimum is expressed as “8 hours” “weekly” (see proposed re-drafted clause 12.2(e)) but it does not allow for such hours to be averaged over the roster cycle where an employer operates a fortnightly or monthly roster. Such an inability is unduly restrictive. Ai Group notes that the flexible part time provisions in the *Hospitality Industry (General) Award 2010*, the *Restaurant Industry Award 2010* and the *Registered and Licenced Clubs Award 2010* allow for the guaranteed hours to be provided and paid over the roster cycle.
 - (b) Secondly, the minimum weekly hours should be set at “6 hours” as it is likely, given the high proportion of junior employees in the fast food industry (see Decision at [29] and Table 1; see also Decision at [30](iii) and [31]), given the high proportion of full time students (see Decision at [31]) and given the large number of the workforce working between 1 to 15 hours per week (see Decision at [29] and Table 1; see also Decision at [30](ii) and [31]), that employers and employees agree that the regular work pattern is to be the 3-hour minimum shift length for two shifts in a week (particularly in light of study commitments); and
 - (c) Thirdly, the re-drafted clause should allow for the continuation of regular patterns of hours established in an enterprise prior to the introduction of the change. By way of

example, clause 12.11 of the *Hospitality Industry (General) Award 2010* provides:

“A part-time employee who immediately prior to 1 January 2018 has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause 12.3.”

Ai Group
21 June 2019

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Fast Food Award 2010 (MA000003) (AM2017/49)

JUSTICE ROSS, PRESIDENT

SYDNEY, XX XXXX 2019

4 yearly review of modern awards – Fast Food Award 2010 (MA000003).

A. Further to the decision issued on [insert date]¹ it is ordered that, pursuant to s.156(2)(b)(i) of the *Fair Work Act 2009*, the *Fast Food Industry Award 2010*² be varied by:

1. Deleting existing clause 12.
2. Inserting new clause 12:

12. Part-Time Employment

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 minimum daily engagement is 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 by the end of the shift or as soon as reasonably practicable after the end of the shift but by no later than 24 hours after the end of the 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 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.
3. Deleting existing sub-clause 26.2(e).
 4. Inserting new sub-clause 26.2(e):
 - (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 clause 12.3 or 12.4.
 5. Deleting existing sub-clause 27.1(d).
 6. Inserting new sub-clause 27.1(d):
 - (d) The time of taking rest and meal breaks and the duration of meal breaks are subject to agreements and subject to the provisions of the

Award allowing for variation of agreements made under clause 12.2
of the Award.

B. This determination comes into effect on [insert date].

PRESIDENT

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¹ [insert citation].

² MA000003.