STATEMENT

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

4 yearly review of modern awards—Plain language re-drafting—*Fast Food Industry Award 2010*

(AM2016/15; AM2021/72)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI SYDNEY, 18 MAY 2022
COMMISSIONER O'NEILL

4 yearly review of modern awards – plain language re-drafting – Fast Food Industry Award 2010

Introduction and background

[1] The Full Bench as constituted in this matter is the same Full Bench which is currently dealing with an application lodged by Menulog Pty Ltd for the making of a proposed new award, the *On Demand Delivery Services Award*.[1] In that matter, the Full Bench issued an interlocutory decision on 28 January 2022[2] (Menulog decision) in which it concluded that the industry which the proposed new award would cover was already covered by the *Road Transport and Distribution Award 2020* (Road Transport Award). In the course of the Menulog decision, the Full Bench also considered whether the *Fast Food Industry Award 2010* (Fast Food Award) covered the industry in question.

[2] Clause 4.1 of the Fast Food Award provides that, subject to identified exclusions, it covers employers throughout Australia in the "*fast food industry*" and their employees in the classifications listed in clause 17 of the award (which classifications are defined in Schedule B to the award). The expression "*fast food industry*" is defined in clause 3.1 of the Fast Food Award as follows:

> **fast food industry** means the industry of taking orders for and/or preparation and/or sale and/or delivery of:
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> - meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;

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[2] [2022] FWCFB 5

- take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or

- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment.

[3] The classification definitions in respect of the classifications referred to in clause 4.1 of the Fast Food Award are set out in Schedule B. The classification descriptor of "*Fast Food Employee Level 1*" (Level 1) in clause B.1 of Schedule B includes the following:

> **B.1.1** An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.

[4] In the Menulog decision, the Full Bench said the following in relation to whether the coverage of the proposed new award fell within the coverage of the Fast Food Award:

> "[51] … It may be accepted that, read strictly literally, the definition of "*fast food industry*" in clause 3.1 of the Fast Food Award may encompass an employer that only takes orders for and delivers fast food without actually preparing it. That is a result of the disjunctive "*or*" used in the description of the industry in the chapeau to the definition as "*...taking orders for and/or preparation and/or sale and/or delivery...*". However, this literal reading is inconsistent with the stated intention of the Full Bench of the Australian Industrial Relations Commission which made the Fast Food Award. In a decision issued on 19 December 2008, the Full Bench set out the process by which it had arrived at the conclusion that a separate award for the fast food sector should be made:
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> > '[279] A major proportion of the submissions on the retail industry exposure draft award concerned its scope and application. In our decision of 20 June 2008 we indicated that we proposed to consider all aspects of the retail industry, apart from real estate agencies and motor vehicle related retailing, as part of the priority stage.
> >
> > [280] In response to that decision the Shop, Distributive and Allied Employees Association (the SDA) proposed a single award in the industry. The exposure draft adopted that approach while providing for variations for some parts of the industry in relation to classifications and hours. In our statement of 12 September 2008 we invited submissions on the inclusion of additional flexibilities to reflect current award and NAPSA provisions.
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> > [281] In the subsequent consultations, employer groups continued to oppose the inclusion of fast food, beauty and hairdressing, meat retailing, and community pharmacies within the same award as applies to general retailing. In response to these submissions the SDA indicated that its approach, which was revised following our decision of 20 June 2008, was based on the Commission's

> decision. Arising from consultations in relation to the Agriculture industry in Stage 2, employers who conduct stand alone nurseries also indicated their opposition to the inclusion of nurseries within a general retail award.
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> [282] The issue of the scope of the retail award raises important considerations concerning the objectives of award modernisation. The objective of reducing the number of awards applying in an industry carries with it the objective of rationalising disparate terms and conditions so that the resultant safety net is more uniform, consistent and fair. However, it is also evident that there are wide variations in terms and conditions in safety net awards and NAPSAs in the retail industry.
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> [283] The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a 'swings and roundabouts' approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.
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> [284] We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies. Further, we will exclude stand alone meat retailing and, at this stage, stand alone nurseries from the general retail award to enable those types of operations to be considered as part of the meat and agriculture industries respectively. The position regarding real estate agencies and motor vehicle related retailing will also be considered in subsequent stages.
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> [285] In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.'

[52] The original inclusion of the fast food sector in the then-proposed retail industry award is not suggestive of an intention that the sector was to be taken to include employers who did not actually produce and sell fast food. There are textual indicators in the Fast Food Award itself which confirm this:

- clause 25.1 provides that the hours of work for employees as provided in clause 25 operate subject to legislated retail trading hours in each State or Territory, indicating that employers under the award are understood to be operating retail establishments;

- clause 19.6(b) refers to an employee performing delivery "*of the employer's products*" using their own motor vehicle and prescribes an allowance for this and, as such, does not contemplate that the products of any business but that of the employer will be delivered; and

- the descriptor for the classification of Fast Food Employee Level 3 in Schedule B refers to an employee being appointed by the employer to be in charge of "*a shop, food outlet or delivery outlet*" – that is, a "bricks and mortar" business operation.

> [53] Accordingly, we would prefer to read the chapeau to the industry definition in clause 3.1 as if it said: "**fast food industry** means the industry of taking orders for, preparing and selling (by direct provision to the customer and/or by delivery to the customer's address) ...". If read this way, the "*on demand delivery services industry*" as defined in Menulog's proposed award would not fall within the definition of "*fast food industry*" in clause 3.1 of the Fast Food Award and thus would not be covered by the Fast Food Award."
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> (citation omitted)

[5] The Menulog decision went on to say that, even if the definition of "*fast food industry*" in clause 3.1 of the Fast Food Award was read literally, that award would still not cover the industry to be covered by the proposed new award because the relevant classifications in the Road Transport Award would more appropriately cover the work performed by employees in that industry.

[6] Separate to the above matter, a differently-constituted Full Bench has been engaged in the consideration of the plain language redrafting of the Fast Food Award as part of the Commission's conduct of the 4 yearly review of modern awards. In a decision issued by this Full Bench on 1 April 2022,[3] one of the outstanding issues identified was that the Shop, Distributive and Allied Employees Association (SDA) sought alterations to the definition of "*fast food industry*" in the award.[4] The Full Bench noted that the Australian Industry Group's (Ai Group) position was that it did not oppose the retention of the current coverage provisions.[5] The Full Bench then said that the definition of "*fast food industry*" had recently been considered in the Menulog decision and quoted the substantive parts of paragraphs [51] and [53] of that decision. The Full Bench then said:

> "[34] In light of the discussion set out in the Menulog decision set out above, we have determined to revert the PLED [Plain Language Exposure Draft] to the current award wording. The President has referred the coverage issue to the *Menulog Full Bench*."

[7] In the same decision, the Full Bench also identified an outstanding issue concerning that part of the definition of the Level 1 classification in clause B.1.1 (set out above). The Full Bench stated that the revised Plain Language Exposure Draft published for the Fast Food Award on 18 February 2021 (revised PLED) proposed that this definition be redrafted as follows (with adjusted clause numbering):

> **(a)** Fast food employee level 1 means an employee who is:

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[3] [2022] FWCFB 48

[4] Ibid at [29]-[31]

[5] Ibid at [32]

> **(i)** engaged in taking orders for, preparing, serving, selling or delivering, ~~food or~~ meals, snacks and/or beverages that are sold to the public for consumption away from the point of sale or in a food court~~,~~ in a shopping centre ~~or retail complex~~; …

[8] The Full Bench noted that the SDA was opposed to the changes and that the Ai Group and Australian Business Industrial, together with the SDA, all opposed the omission of the function of cooking from the definition,[6] and said:

> "[107] The classification levels in the current award align closely with the definition of fast food industry which has been discussed above. The President has referred the classification issues (items 21, 22, 23, 24, 25 and 26) to the *Menulog Full Bench* to be determined with the industry definition issue. For the finalisation of the PLED, we will revert to the current award clause 12.4 wording."

[9] Accordingly, these matters are to be determined by this Full Bench.

[10] On 13 April 2022, the presiding member conducted a mention in relation to these matters. The Ai Group and the SDA were the only interested parties which appeared. By agreement, the proceeding was stood over for a report-back on 5 May 2022 to allow the parties further time to consider their respective positions.

[11] Prior to the report-back, the SDA lodged a written submission in relation to the Menulog decision.[7] The SDA submitted that the Fast Food Award applies to employers in the fast food industry, and that operators in that industry may then engage third-party operators to effect the delivery of fast food prepared by the fast food operator to a customer. Consistent with the Menulog decision, the SDA submitted these third-party operators should be covered by the Road Transport Award, assuming that they were in no way connected with selling, preparation, cooking or ordering of fast food, or any incidental tasks associated with operating a fast food business which fall within the work classifications contained in the Fast Food Award. The SDA submitted that it did not cavil with the conclusion in the Menulog decision as summarised in its submission.

[12] At the report-back on 5 May 2022 the SDA referred to and relied on its written submission lodged in advance of the hearing. The Ai Group confirmed that its position regarding the definition issue was consistent with that of the SDA — that is, the definition of "*fast food industry*" in the Fast Food Award should not include entities who are engaged in delivery of food (and not preparing or selling it). As to the Level 1 classification descriptor, the Ai Group submitted that the descriptor should be left as it is in the current award and not re-drafted. The SDA agreed.

Consideration

[13] In relation to the definition of the expression "*fast food industry*" in clause 3.1 of the Fast Food Award, we affirm the conclusion stated in paragraph [53] of the Menulog decision

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[6] Ibid at [104]-[105]

[7] SDA Submission, 4 May 2022

concerning the proper meaning of this definition. Because this meaning does not necessarily accord with a strictly literal reading of the definition, our *provisional* view is that it is necessary to achieve the modern awards objective that the drafting of the definition in clause 3.1 be altered to the following to ensure that it is not misunderstood or misapplied by users of the Fast Food Award:

> **fast food industry** means the industry of taking orders for, preparing and selling (by direct provision to the customer and/or by delivery to the customer's address):
>
> - meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
>
> - take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
>
> - food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment.

[14] In relation to the Level 1 definition in clause B.1.1, our *provisional* view is that, subject to the above change to the definition of "*fast food industry*" in clause 3.1 being made, the changes to the Level 1 definition proposed in the revised PLED should not be made and that no change to the definition is necessary to meet the modern awards objective. Clause 4.1 of the Fast Food Award read together with the revised definition of "*fast food industry*" and the existing classification definitions would clearly describe the intended coverage of the award.

Next steps

[15] A draft determination for the variation of the Fast Food Award consistent with the *provisional* views expressed above will be published in conjunction with this statement. Interested parties will be given an opportunity to make submissions in response to the *provisional* views and the draft determination. Such submissions shall be filed **within 14 days of the date of this statement**.

VICE PRESIDENT

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