

MINISTER'S SUBMISSIONS

Introduction and background

1. These submissions are filed on behalf of The Hon Christian Porter, MP, Minister for Industrial Relations in response to the Statement on 3 May 2020¹, and amended directions issued by the Full Bench on 8 May 2020,² in respect of the Application filed under s 157 of the *Fair Work Act 2009 (Cth)* (**FW Act**) by the Australian Industry Group (**Ai Group**) in relation to the *Fast Food Industry Award 2010* (**Fast Food Award**).
2. The Minister relies on s 597 of the FW Act in order to make these submissions on behalf of the Commonwealth. The Minister submits that, given the extraordinary nature of the current circumstances, it is in the public interest for the Minister to be permitted to do so.
3. The Application is supported by the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Council of Trade Unions (**ACTU**) and the National Retailers Association (**NRA**). The Application is opposed by the incorporated association, the Retail and Fast Food Workers Union (**RAFFWU**).
4. As a result of the COVID-19 pandemic and various resulting public health orders, Ai Group has proposed a flexibility Schedule H to be inserted into the Fast Food Award, to provide, on a temporary basis, for an alternate scheme for part-time employment, as well as conditions relating to the taking of annual leave and close downs caused by restrictions necessary to curb COVID-19. The Application proposes that the draft Schedule H only apply to employers and employees who do not qualify for JobKeeper payments. If an employer/employee becomes eligible for JobKeeper, Schedule H will not apply.
5. The variation is designed to fill the regulatory gap for businesses who are unable to access the payment and flexibilities contained in section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. In that regard, the proposal is a measured and proportionate one.
6. The Minister congratulates the consenting parties on their preparedness to respond collaboratively to find practical solutions to reduce the hardship suffered by employers and employees created by this extraordinary crisis.

¹ [2020] FWCFB 2301

² [2020] FWCFB 2428

7. In addition, the Minister also thanks the Full Bench for its continued preparedness to respond in a practical, flexible and timely way to this situation.
8. It is plain that the COVID-19 pandemic has had and will continue to have unprecedented impacts on the Australian economy.
9. The focus of the Minister and Government is on keeping people in work, enhancing the safety net for those who are not in work and keeping businesses alive so that they can get to the other side of this crises with the capacity to return to normal activity and eventually to full employment.

Timeframe for easing restrictions

10. The National Cabinet agreed on 24 March 2020 to further prohibit activities and introduce enhanced social distancing measures, and it agreed to prohibit additional non-essential facilities from opening and services being offered. This included closing the dining rooms of fast food restaurants and restrictions on non-essential domestic travel. The intervening period has obviously been one of real dislocation and adjustment for many Australians.
11. National Cabinet met on 8 May 2020, and released a three-step framework for the easing of COVID-19 restrictions. Under that framework, and in relation to café, restaurants and food courts:
 - (a) **Step One** - cafes and restaurants will be able to seat up to 10 patrons at a time but will need to maintain an average density of 4m² per person. Food courts will remain closed, and restrictions on local and regional travel may be lifted.
 - (b) **Step Two** - cafes and restaurants will be able to seat up to 20 patrons at a time but will need to maintain an average density of 4m² per person. Food courts will remain closed to seated patrons. Caravan parks or camping grounds will be able to open and restrictions on some interstate travel may be lifted.
 - (c) **Step Three** – cafes, restaurants and food courts will be able seat up to 100 patrons at a time but may need to maintain an average density of 4m² per person. Arrangements under step three will be the 'new normal' while the virus remains a threat. Restrictions on all interstate travel may be relaxed. International travel and mass gatherings over 100 people will remain restricted.
12. Under the three-step plan, States and Territories will continue to make decisions based on their individual circumstances and local conditions. Jurisdictions may ease restrictions at different paces, and in response to how the easing of restrictions may impact on the rates of transmission within particular areas.
13. Notwithstanding the staged easing of restrictions which is currently proposed, the restrictions which will remain will continue to significantly impact the capacity of employers in this industry to maintain sustainable businesses and to maintain employment. It is also possible that changed

circumstances may require different responses, including potentially the delay of the easing schedule or the reintroduction of some restrictions.

14. Accordingly, the Minister accepts that there remains an acute need to take whatever fair and proportionate steps are reasonably available to facilitate the maintenance of employment in this industry.

Economic impact on the industries and employees covered by the Fast Food Award

15. The National Cabinet has been very clear: continued suppression of COVID-19 is about collective action. Success depends on maintaining the new community norms – physical distancing, good hygiene practices and downloading the COVIDSafe app to keep us all safe while we are out and about.
16. For businesses, this also means taking the time to prepare and develop a plan to operate in a COVID safe way to protect their customers and workers. However, it is clear that existing restrictions, which will only be progressively and slowly relaxed, will continue to impact fast food business and their employees, and particularly those that have experienced a downturn in trade, which while severe, does not qualify them for the JobKeeper scheme.
17. The Fast Food Award applies on an industry basis. It covers employers engaged in the provision of takeaway meals, snacks and beverages including those in food courts and shopping centres but excludes coffee shops, cafes and restaurants providing a primarily sit down service. Many fast food outlets also offer dine in services and have been impacted by restrictions on their dining room operations and restrictions on non-essential travel and public gatherings.
18. The Fair Work Commission's modern awards mapping tool,³ based on Census data from 2016, indicates around 170,224 people could be employed under the Fast Food Award.
19. The functions in the Fast Food Award fall within the Accommodation and Food Services industry as classified by the Australia and New Zealand Standard Industrial Classification structure used by the Australian Bureau of Statistics. The *Hospitality Industry (General) Award 2010*, *Restaurant Industry Award 2010*, *Registered and Licensed Clubs Award 2010* and other awards may also fall within the overarching Accommodation and Food Services industry.

³ Preston, M et al, Fair Work Australia Research Report 2/2012 – Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 report, Fair Work Australia, February 2012

20. ABS data shows that:
- (a) in April 2020, 88% of businesses in the Accommodation and Food Services industry anticipated reduced cash flow and 84% anticipated reduced demand for goods and services;⁴
 - (b) this industry contributes around \$43 billion to the Australia economy per year,⁵ and employs over 827,000 employees, or 7.6 per cent of all employees;⁶
 - (c) more than two-thirds (68.8 per cent) of employees are remunerated based on modern awards or more generous individual arrangements (43.2 per cent and 25.7 per cent respectively).⁷
21. Young people are over-represented in the Accommodation and Food Services industry, which also has a large number of small businesses. Over half of employees in the industry are aged 15 to 24 years (51.5%)⁸ and small businesses make up 91 per cent of all businesses in this industry.⁹ Previous experience from the Global Financial Crisis shows that young people (due to a relative lack of skills and experience) and small businesses (less equipped to deal with soft demand and less diversified in product offerings) are particularly vulnerable during downturns, as demonstrated by a sharp increase in the youth unemployment rate and a significant increase in small business closures relative to large businesses.

Application consistent with the modern awards objective

22. The measures contained in the Commission's proposed variation represent a temporary but necessary response to a current extraordinary situation which is faced by Australian businesses and their employees.
23. Section 134(1) of the FW Act requires the Fair Work Commission to ensure that modern awards (along with the NES) provide a 'fair and relevant minimum safety net of terms and conditions', taking into account the factors identified in the balance of the section.
24. In this case, the extraordinary circumstances associated with COVID-19, and in particular the risk to security of employment identified in the Statement justify the measures proposed by the Application, and will contribute positively to the 'fairness' and 'relevance' of the Fast Food Award. It is appropriate that the amendments be introduced on a temporary basis as a specific and time-limited response to the current circumstances.

⁴ ABS, Business Indicators Business Impacts of COVID-19, cat. no. 5676.0.55.003, April 2020

⁵ ABS, National Accounts, cat. no. 5206.0, December quarter 2019

⁶ ABS, Labour Force Detailed Quarterly, cat. no. 6291.0.55.003, February 2020

⁷ ABS, Employee Earnings and Hours, cat. no. 6306.0, May 2018

⁸ ABS, Characteristics on Employment, cat. no. 6333.0, August 2019

⁹ ABS, Counts of Australian Businesses, including Entries and Exits, cat. no. 8165.0, June 2015 to June 2019

25. The objective in section 134(h), which includes the sustainability, performance and competitiveness of the national economy remains relevant. The provisions will assist in maintaining employment and the viability of businesses.
26. For the reasons summarised above, the Minister supports the making of the proposed variations.
27. The Minister notes with respect the concerns of the RAFFWU, and is confident the Full Bench will weigh those concerns fairly against the submissions made by parties in favour of the granting of the application, including this submission.

Date: 12 May 2020

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