



# STATEMENT

*Fair Work Act 2009*

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

## **Application by Australian Industry Group** (AM2020/20)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT MASSON  
COMMISSIONER LEE

MELBOURNE, 3 MAY 2020

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

### **1. Background**

[1] This statement concerns an application to vary the *Fast Food Industry Award 2010* (MA000003) (the Fast Food Award) filed by Ai Group on Friday 1 May 2020 (the Application).

[2] Ai Group, the Shop, Distributive and Allied Employees' Association (the SDA) and the Australian Council of Trade Unions (the ACTU) have been in discussions directed at reaching a consent position on changes to the Fast Food Award to mitigate the impact of COVID-19 on employees and employers covered by the award. The Application is the product of those discussions and is supported by the SDA and the ACTU.

[3] The Application seeks to insert a new Schedule – Schedule H: *Award flexibility during the COVID-19 pandemic* – into the Fast Food Award. Schedule H is expressed to operate for a period of 3 months.

[4] There are three key components of proposed Schedule H:

- a temporary and alternate scheme for part time employment;
- clause H.8 provides that, in certain circumstances an employer may request that an employee take paid annual leave. The employee is obliged to consider and not unreasonably refuse the request; and
- close down: subject to a series of safeguards clause H.9 enables an employee to require an employee to take annual leave as part of a close down of its operations or part of its operations.

[5] At the request of the parties, the Commission's consideration of the application will be expedited. Any party wishing to respond to the Application and the *provisional* views set out

in this statement is to file a submission by **12noon** on **Tuesday 5 May 2020**. Instructions for the filing these submissions are in ‘Next steps’ below.

[6] The application will be *provisionally* listed for hearing at **2pm** on **Tuesday 5 May 2020 by telephone**.

[7] The hearing will only take place in the event that there are any submissions filed by **12noon, Tuesday 5 May 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

[8] 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](#).

[9] In a series of decisions we have granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*<sup>1</sup>
- *Clerks – Private Sector Award 2010*<sup>2</sup>
- *Restaurant Industry Award 2010*<sup>3</sup>
- *Educational Services (Schools) General Staff Award 2010*<sup>4</sup>

[10] These decisions inserted short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[11] On 8 April 2020 a Full Bench of the Commission issued a decision<sup>5</sup> (the April 2020 Decision) varying 99 modern awards to insert the new Schedule – ‘Schedule X: Additional measures during the COVID-19 pandemic’. Schedule X provides an entitlement to unpaid ‘pandemic leave’ and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission’s decision:

- [Information Note on modern awards and industries](#);
- [Information Note on bargaining by business size](#);
- [Information Note on Government responses to the COVID-19 pandemic](#); and
- [Expert report by Professor Borland](#).

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

<sup>2</sup> [\[2020\] FWCFB 1690](#)

<sup>3</sup> [\[2020\] FWCFB 1741](#)

<sup>4</sup> [\[2020\] FWCFB 2108](#)

<sup>5</sup> [\[2020\] FWCFB 1837](#)

[12] In the April 2020 Decision the Full Bench also encouraged industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards.

### 3. The Application

[13] As mentioned earlier, the Application seeks to add a new schedule – Schedule H – to the Fast Food Award. It is proposed that the new schedule operate for a period of 3 months. Schedule H proposes flexibilities in the relation to:

- a temporary and alternate scheme for part time employment;
- clause H.8 provides that, in certain circumstances an employer may request that an employee take paid annual leave. The employee is obliged to consider and not unreasonably refuse the request; and
- close down: subject to a series of safeguards clause H.9 enables an employee to require an employee to take annual leave as part of a close down of its operations or part of its operations.

[14] We note at the outset that the proposed Schedule only applies to an employer and their employees where they do not qualify for the Jobkeeper scheme. As Ai Group put it in its submission in support of the Application:

‘the proposed variations are designed to fill the regulatory gap left by the Jobkeeper scheme and provide employers who cannot access the flexibilities now contained in the Act with a combination of measures that may be implemented to moderate the impacts of the Pandemic.’

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

### 4. Provisional views

[16] The Commission may make a determination varying a modern award if the Commission is satisfied that the determination is necessary to achieve the modern awards 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).

[17] 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>6</sup>

[18] We note that proposed Schedule H 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.

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<sup>6</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

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

## 5. Next steps

### *Submissions*

[20] Any submission supporting or opposing the Application and our *provisional* views set out above must be filed by **12noon on Tuesday 5 May 2020**. Submissions should be:

- sent to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au) and include the matter number (AM2020/20) in the subject line.
- filed in Word format.

[21] If no submissions are filed opposing the Application and our *provisional* view we will grant the Application and vary the Fast Food Award accordingly.

### *Provisional hearing*

[22] If any submissions are filed opposing the Application and our *provisional* view, then a hearing will take place at **2pm on Tuesday 5 May, by telephone**.

[23] 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 **12noon on Tuesday 5 May 2020**.

[24] In the event that no submissions are filed opposing our *provisional* view then the hearing proposed for **2pm on Tuesday 5 May 2020** will not be necessary and will be vacated.

PRESIDENT

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**Attachment A**



# DRAFT DETERMINATION

*Fair Work Act 2009*

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

**Application by the Australian Industry Group**  
([insert matter number])

**FAST FOOD INDUSTRY AWARD 2010**  
[MA000003]

[COMMISSION MEMBER(S)]

[INSERT LOCATION AND DATE]

*Application to vary the Fast Food Industry Award 2010*

A. Further to the decision [insert citation] issued by the Full Bench on [insert date], the above award is varied as follows:

1. By inserting the following Schedule H:

**Schedule H - Award flexibility during the COVID-19 Pandemic**

**H.1** The provisions of Schedule H are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

**H.2** Schedule H operates from [insert date] (**Date of Operation**) until [insert date 3 months from the date of operation]. The period of operation can be extended on application to the Fair Work Commission.

**H.3** Schedule H applies to:

- (a) employers who do not qualify for Jobkeeper payments and their employees;  
and
- (b) employees who do not qualify for Jobkeeper payments and their employers  
in relation to those employees.

**H.4** If an employer or employee become eligible for Jobkeeper payments, the terms of Schedule H will not apply.

**H.5** Schedule H is intended to assist in the continuing employment of employees.

**H.6** During the operation of Schedule H, the following provisions apply.

**H.7 Flexible part-time employment**

While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.7.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until [insert date 3 months from the Date of Operation]:

**H.7.1** A part time employee is an employee who:

- (a) Works at least 8 but less than 38 hours per week;
- (b) Has reasonably predictable hours of work; and
- (c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

**H.7.2** The employer and the part-time employee will agree in writing upon:

- (a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and
- (b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

**H.7.3** The employee must not be rostered to work less than 3 consecutive hours in any shift.

**H.7.4** The guaranteed minimum hours shall not be less than 8 hours per week.

**H.7.5** Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

**H.7.6** An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

- (a) The additional hours are offered in accordance with clause 25 – Hours of work and clause 26 – Overtime;

- (b) The employee may not be rostered for work outside of the employee's agreed availability;
- (c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);
- (d) An employee will accrue entitlements such as annual leave and personal/carer's leave on agreed additional hours worked;
- (e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;
- (f) The employee can refuse to work additional hours when offered on any occasion;
- (g) Additional hours worked in accordance with this clause are not overtime; and
- (h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

**H.7.7** A part-time employee who immediately prior to the Date of Operation 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 H.7.2. If a part-time employee agrees to such a change, they shall, beyond Schedule H ceasing operation, revert to the previously agreed regular pattern of hours.

**H.7.8** If an employee is first employed as a part-time employee during the operation of Schedule H, their employment beyond Schedule H ceasing operation will be on a casual basis unless:

- (a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and
- (b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

## **H.8 Annual leave**

**H.8.1** Subject to clause H.8.3 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

**H.8.2** If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

**H.8.3** A period of leave under clause H.8 must start before [insert date 4 weeks from the Date of Operation] but may end after that date.

**H.8.4** Clause H.8.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.

**H.8.5** An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.

## **H.9 Close down**

**H.9.1** Subject to clauses H.9.2, H.9.3 and H.9.4, an employer may:

- (a) Require an employee to take annual leave as part of a close down of its operation or part of its operation by giving at least 48 hours' notice or any shorter period of notice that may be agreed; and
- (b) Where an employee 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.

**H.9.2** Clause H.9.1 applies if the employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19.

**H.9.3** An employer must provide an employee with written notice of any requirement to take annual leave or unpaid leave in accordance with this clause. An employee is not required to take leave under clause H.9.1 unless the employee is also advised in writing that the employer consents to a dispute arising from the requirement being settled by the Fair Work Commission through consent arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

**H.9.4** Clause H.9.1 only permits an employer to require an employee to take unpaid leave if it is in connection with a close down that commenced prior to [insert date 4 weeks from the Date of Operation] and the unpaid leave does not extend beyond [insert date 8 weeks from the Date of Operation].

**H.9.5** Where an employee is placed on unpaid leave pursuant to H.9.1(b), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

**H.9.6** If an employee is required to take unpaid leave pursuant to clause H.9.1(b) and the employee makes a request to engage in:

- (a) reasonable secondary employment;
- (b) training;
- (c) professional development;

during the period of unpaid leave, the employer must consider and not unreasonably refuse the request.

#### **H.10 Dispute resolution**

Any dispute regarding the operation of Schedule H may be referred to the Fair Work Commission in accordance with clause 9 – Dispute resolution.

2. Insert the following in clause 3.1:

**Jobkeeper payment** means a jobkeeper payment payable to an entity under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

3. By updating the table of contents and cross-references accordingly.

- B. This determination comes into operation on [insert date]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT