



STATEMENT

Fair Work Act 2009

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

Award flexibility—Hospitality and Retail Sectors (AM2020/103)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 1 FEBRUARY 2021

Industrial relations reform working groups – letter from Minister – award flexibility – loaded rates – exemption rates – classification structures – General Retail Industry Award 2020 – Hospitality Industry (General) Award 2020 – Restaurant Industry Award 2020 – Registered and Licenced Clubs Award 2020 – submissions received – further material published.

1 BACKGROUND

[1] On 9 December 2020, I received a [letter](#) from the Minister for Industrial Relations in which the Minister expresses the Government’s view that:

‘...in the extraordinary circumstances that have been caused by the COVID pandemic that it would be in Australia’s economic best interest for the Fair Work Commission to use its powers under s.157(3)(a) of the *Fair Work Act 2009* (the Act) to undertake a process to ensure several priority modern awards in sectors hardest hit by the pandemic be amended. The process would be envisaged, if you considered it appropriate, to maintain a focus on key changes that could potentially support Australia’s economic recovery. The Government would obviously provide every available assistance to ensure the timely and comprehensive conduct of this process.’

[2] The awards identified by the Minister as the key awards in distressed industry sectors (“priority modern awards”) are:

- *General Retail Industry Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Restaurant Industry Award 2020*
- *Registered and Licenced Clubs Award 2010.*

[3] On 10 December 2020, I issued a [Statement](#) which commenced a process in relation to the awards identified in the Minister’s correspondence.

[4] The Minister’s letter identified the following award flexibility measures that ‘could prove critically important for providing businesses in the most distressed part of the economy with the confidence to increase hiring during the recovery’:

- Potentially simplified pay arrangements in the form of ‘loaded rates’ and/or ‘exemption rates’ designed to reduce the cost of administrative burden and address concerns about perceived risks arising from existing pay rate complexities and complexity risks that may lead to, particularly small business, mistakenly underpaying employees.
- Further streamlining of present classification structures so that they are clearer, easier to understand and simpler to apply. This might involve reducing the number of classifications through a broad-banding exercise with no reductions in pay and minimal increases in pay accompanied by greater variety and higher value work.

[5] An initial conference in relation to the Hospitality, Restaurant and Clubs Award was held on 17 December 2020, and an initial conference in relation to the Retail Award was held on 18 December 2020. Transcript from both conferences is available on the [Commission’s website](#).

[6] Following these conferences, I issued a [Statement](#)¹ (the December Statement) summarising the general discussion that took place, noting that the parties indicated they were not yet in a position to put forward specific proposals for award variations. Parties with an interest in the Hospitality Awards were directed to file proposals for award variations by **4 pm on Wednesday 27 January 2021**, while parties with an interest in the Retail Award were directed to file any proposals for award variations by **4 pm on Thursday 28 January 2021**.

2 SUBMISSIONS

2.1 General Submissions

2.1.1 ACTU and others

[7] The Australian Council of Trade Unions and its affiliates² (collectively, the Union Parties) filed a submission³ containing general principles to guide the process. The Union Parties are not presently seeking any variations to the relevant awards and indicate that they will oppose changes where their effects cannot be predicted or where those effects will (amongst other things) reduce workers’ remuneration or entitlements or require workers to reduce their work/life balance or leave workers worse off or erode the existing safety net in any way.⁴

¹ [2020] FWC 6931

² The Australian Workers Union, The Shop, Distributive and Allied Employees Union and the United Workers Union

³ ACTU and others submission, 28 January 2021

⁴ ACTU and others submission, 28 January 2021 at para 3

[8] The Union Parties note any proposal to vary an award as part of this matter should be made by way of application and accompanied by draft orders, and that such proposals should be accompanied by submissions as well as evidence in support of those submissions.

2.1.2 *Pharmacy Guild of Australia submission*

[9] The Pharmacy Guild of Australia filed a [submission](#) on 18 December 2020, outlining that it is supportive of having a loaded rate included in awards such as the *Pharmacy Industry Award 2020*, and provided parameters around how a loaded rate arrangement could be organised and cover small to medium businesses.⁵ I note that the Pharmacy Award was not one of the awards identified in the Minister's correspondence.

2.2 Submissions - Hospitality, Restaurant and Clubs Awards

[10] The following submissions were received in relation to the Hospitality, Restaurant and Clubs Award:

- [Australian Hotels Association](#)⁶
- [Clubs Australia Industrial](#)⁷
- [Restaurant and Catering Industrial](#)⁸.

[11] The Australian Hotels Association (AHA) filed a submission and draft determinations seeking 4 separate variations in relation to the Hospitality Award as follows:

- Consolidation of junior employee classification rates into one stream
- Simplification of hours of work arrangements
- Simplification of late night and early morning penalties (to be paid on a pro rata basis)
- Introduction of six loaded rates.

[12] Clubs Australia Industrial (CAI) filed a submission noting it was supportive of having a loaded rate clause introduced into the Clubs Award provided it is offered on a voluntary basis, and there are no auditing or consultation requirements. CAI note that it would seek an 'all in' loaded rate for Monday to Friday (including meal break and late/early work penalties) and an 'all in' loaded rate for Saturday, Sunday and Public Holidays (including penalty rates and meal break penalties).⁹

⁵ Pharmacy Guild of Australia submission, 18 December 2020 at pp.1-2

⁶ Australian Hotels Association submission, 27 January 2021

⁷ Clubs Australia Industrial submission, 27 January 2021

⁸ Restaurant and Catering Industrial submission, 27 January 2021

⁹ Clubs Australia Industrial submission, 27 January 2021 at paras 4-5

[13] CAI also stated that it is seeking three changes regarding salary exemption rates contained in the Clubs Award as follows:

1. A drafting change to clause 18.4(a) (that the term ‘club managers’ be removed and replaced with ‘any managerial classification role level 6 to 13 inclusive as set out in clause 18.3’)
2. The inclusion of an exemption salary rate clause for trade qualified chefs
3. The addition of an exemption salary rate clause for level 1-5 employees.¹⁰

[14] Restaurant and Catering Industrial (RCI) filed a submission proposing an exemption rate in the Restaurant Award for an employee who is at least a grade 3 employee¹¹ and also proposing to simplify the classification structure into 4 classification levels, rather than the current 6 levels.¹² RCI also propose the insertion of an ‘all purpose allowance’ which would replace all current allowances payable under the award.¹³

2.3 Submissions - Retail Award

[15] In the December Statement, parties with an interest in the Retail Award were directed to file any proposals for award variations and any other relevant comments (including any general principles to guide the process) by **4 pm on Thursday 28 January 2021**.

[16] Submissions in relation to the Retail Award were received from:

- [Australian Business Industrial and the NSW Business Chamber](#)
- [National Retail Association and the Australian Retailers Association](#)¹⁴
- [Master Grocers Australia](#)¹⁵
- [Australian Industry Group](#)¹⁶.

[17] ABI and the NSW Business Chamber (ABI) filed a draft determination seeking variations and additional flexibilities under the part-time employment clauses in the Retail award. The variations sought seek to define a part-time employee as someone who is engaged to work at least 8 hours per week (but fewer than 38) and provides that part-time employees will have guaranteed hours of work but will also be able to be rostered for additional hours of work, and employers and employees will be able to alter existing rostering and ordinary hours arrangements by agreement. A number of safeguards exist in the ABI proposal.

¹⁰ Clubs Australia Industrial submission, 27 January 2021 at paras 6-22

¹¹ Restaurant and Catering Industrial submission, 27 January 2021 at para 5

¹² Restaurant and Catering Industrial submission, 27 January 2021 at paras 6-8

¹³ Restaurant and Catering Industrial submission, 27 January 2021 at paras 14-16

¹⁴ National Retail Association and the Australian Retailers Association submission, 27 January 2021

¹⁵ Master Grocers Australia submission, 27 January 2021

¹⁶ Australian Industry Group submission, 27 January 2021

[18] ABI also indicate that it supports the draft determination filed by the ARA, NRA and Ai Group relating to exemption rates in the General Retail Award. These proposals are dealt with in further detail below.

[19] The ARA and the NRA filed a draft determination outlining variations to the Retail Award to include an exemption rate for managerial and higher level staff, and also additional flexibilities under the part-time employment clauses, which is in the same terms as the ABI proposal.

[20] Ai Group proposes a variation to the Retail Award to include an exemption rate, that 'seeks to remove some of the complex and restrictive elements of the Award in the context of certain higher level and managerial classifications provided that the employee agrees to this arrangement and is being paid an annual salary that is much higher than minimum wage rates contemplated by the Award.'¹⁷ The proposal includes two different exemption rates, the first for employees at classification levels 4 and 5, and a second exemption rate for employees at classification levels 6, 7 and 8.¹⁸ The Ai Group proposal contains a number of safeguards including record keeping requirements, agreement to the application of the proposed clause, that the employee must be paid an annual salary higher than the minimum wage rates under the Award and provides the Commission power to arbitrate disputes arising under the provision.¹⁹

[21] Master Grocers Australia and the Timber Merchants Australia propose three loaded rate arrangements in the Retail Award for permanent and casual employees: day rates, evening rates and weekend rates. The loaded weekend rate contains two options, the first combining Saturday and Sunday rates and the second separating Saturday and Sunday rates.²⁰

3 DATA AND MATERIAL PUBLISHED

3.1.1 Australian Government - Attorney General's Department

[22] Further to their [correspondence](#) of 15 December 2020, data has been received from the Australian Government - Attorney-General's Department. The data seeks to address the following points that were raised in the December 2020 conferences:

- The extent of agreements in the relevant sectors that have loaded rates and how many employees are covered by them
- Data on employment size in the particular sectors of the hospitality industry
- Data on working patterns in various awards

¹⁷ Australian Industry Group submission, 27 January 2021 at para 6

¹⁸ Australian Industry Group submission, 27 January 2021 at paras 6-7

¹⁹ Australian Industry Group submission, 27 January 2021 at paras 9

²⁰ Master Grocers Australia submission, 27 January 2021 at para 14

[23] The following documents will be published concurrently with this Statement:

- A [spreadsheet](#) containing a list of enterprise agreements that contain loaded rates (including details on undertakings, allowances/penalties absorbed, ordinary hours and shift penalties)
- An explanatory document titled '[loaded wage rates in enterprise agreements](#)' to accompany and support the above spreadsheet
- A document titled '[Employment size and working patterns of particular sectors of the hospitality and retail industries](#)'

[24] In the December Statement, the Department was also asked to assist in providing a potential solution to the issues identified in its submission to the Senate Economics References Committee Inquiry into the Unlawful Underpayment of Employees Remuneration. [Correspondence](#)²¹ was received from the Attorney-General's Department on 28 January 2021, noting that the Department is of the view that the current issues identified by the Commission in relation to the hospitality and retail sectors have the strongest prospect of supporting economic recovery in the short-term and that 'other issues may be better considered as part of the Fair Work Commission's ongoing work to enable AM2020/103 to be progressed expeditiously'.

3.1.2 Request from the Australian Hotels Association

[25] At the conference on 18 December 2020, a specific point was raised relating to the two different streams for junior employees ('junior office employees' and 'other than junior office employees') contained in the Hospitality Award. It was noted that these two streams may be able to be consolidated. On 13 January 2021 the Commission received [correspondence from the Australian Hotels Association](#) (AHA) seeking information that provides background or rationale for the different percentages between junior employees (other than junior office employees) and junior office employees.

[26] Staff of the Commission have prepared an information note on the [history of the junior rates clause in the Hospitality Award](#), specifically in relation to the two streams of juniors contained in the award.

3.1.3 Additional material

[27] Two additional documents will be published concurrently with this Statement:

- An information note prepared by staff of the Commission regarding [the number of usual hours worked per week for full-time employees in Retail trade](#); and
- A document from the Fair Work Ombudsman titled '[Hospitality and Retail Trade industries](#)' which provides data on non-compliance rates in the Accommodation and Food Services and Retail Trade industries.

²¹ Attorney-Generals Department Correspondence, 27 January 2021

4 NEXT STEPS

[28] A conference is listed for the Hospitality, Restaurant and Clubs Awards at **9:30am** on **Thursday 4 February 2021** and a conference for the Retail Award is listed at **9:30am** on **Friday 5 February 2021**. Any party who wishes to attend the conferences should send an email to chambers.ross.j@fwc.gov.au specifying a name, organisation and contact telephone number by **2.00pm** on **Wednesday 3 February 2021**.

[29] At the conferences parties will be asked to provide the following:

1. Draft directions for the filing of submissions and evidence in relation to each proposal; and
2. Draft variation determinations for each proposal, if such draft determinations have not yet been filed.

[30] I continue to encourage parties to engage in discussions throughout this process to see if any joint positions can be advanced. I invite parties to contact my chambers at any time with requests for information that may assist in this matter. Parties can email requests to chambers.ross.j@fwc.gov.au.

[31] Parties are reminded that the Commission's award subscription service will be used to notify interested parties of updates during this matter such as deadlines for the filing of submissions and evidence, notices of listing and when any decisions or statements are issued. A dedicated subscription service called 'Award flexibility–Hospitality and Retail Sectors' has been established. Interested parties are encouraged to subscribe to receive notifications on the subscription services page on our website. Any questions about the subscription service can be sent to amod@fwc.gov.au.

PRESIDENT

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