

Summary of Decision

25 March 2020



Application to vary an award — Hospitality Industry (General) Award 2010– Award flexibility during the COVID-19 Pandemic

AM2020/8

[\[2020\] FWCFB 1574](#)

[1] Late yesterday afternoon the Commission granted an application made by the Australian Hotels Association (AHA) to vary the *Hospitality Industry (General) Award 2010* (the Hospitality award). The application was supported by the United Workers Union (UWU) and reflected an agreement between the AHA and UWU.

[2] The application was lodged using the Commission’s process for [urgent applications](#) to deal with the consequences of COVID-19. The parties asked that the application be expedited. After consulting with the AHA and the UWU, the matter was listed for hearing at 4 pm yesterday.

[3] Before the hearing, the Commission published an information note providing data on the Hospitality award, which can be accessed [here](#) and an information note detailing the Government responses to the COVID-19 pandemic, which can be accessed [here](#).

[4] The AHA and the UWU reached an agreed position in relation to a proposed set of amendments to the Hospitality Award in response to the COVID-19 pandemic and the associated public health orders.

[5] The application arose from the unique set of circumstances pertaining to the current COVID-19 pandemic and sought to include a new Schedule L to provide for award flexibility on a temporary basis.

[6] The Full Bench approved the application in an ex tempore decision at the conclusion of the hearing on Tuesday, 24 March 2020. The Full Bench published its reasons for decision on 25 March 2020.

[7] The resulting award variation commenced operation on 24 March 2020 and will operate until 30 June 2020.

[8] In its decision granting the application the Commission noted that ‘the notice provided to interested parties [was] much shorter than the Commission’s standard practice.’ The Commission also observed that the application and content of the doctrine of procedural fairness is determined by the context and said that the key contextual considerations in the matter before it were:

- the statutory framework;
- the consent of the key interested parties;
- the parties' joint request for expedition; and
- the need to respond quickly to a rapidly changing industrial environment.

[9] The Full Bench said:

‘In this instance, the consent of the key industrial parties’ is the central consideration.

In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.’

[10] The variations proposed by the AHA and UWU were directed at providing targeted flexibility in relation to;

- the range of duties employees can be required to perform;
- the hours of work of full-time and part-time employees; and
- the taking of annual leave.

[11] The Full Bench concluded that it was satisfied that the variation proposed was necessary to achieve the modern awards objective (s.157). Further, once varied the Hospitality award will only include terms to the extent necessary to achieve the modern awards objective (s.138). In deciding that the variation proposed is necessary to achieve the modern awards objective the Full Bench took into account the considerations in s.134(1)(a) to (h) insofar as they are relevant.’

[12] The Full Bench concluded it’s decision as follows:

‘The measures encompassed in the variation strike an appropriate balance between the provision of additional flexibility and treating affected employees fairly. We commend the parties on the balanced nature of the agreed package. As demonstrated by the actions of the AHA and the UWU, this is a time for co-operation, not conflict.’

[13] The determination came into operation yesterday. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after the day the determination comes into operation. A copy of the variation determination is attached.

This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.

- ENDS -



DETERMINATION

Fair Work Act 2009 (Cth)

s.157—Application to vary or revoke a modern award

Australian Hotels Association

(AM2020/8)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010

[MA000009]

Hospitality industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 24 MARCH 2020

Application to vary the Hospitality Industry (General) Award 2010.

A. Further to the ex-tempore decision handed down during the hearing before the Full Bench on 24 March 2020, the above award is varied as follows:

1. By inserting Schedule L as follows:

Schedule L—Award Flexibility During the COVID-19 Pandemic

L.1 Schedule L operates from 24 March 2020 until 30 June 2020. The period of operation can be extended on application.

L.2 During the operation of Schedule L, the following provisions apply:

L.2.1 Classifications and duties

- (a) As directed by their employer, where necessary employees will perform any duties that are within their skill and competency regardless of their classification under clause 19—Classification and Schedule D—Classification Definitions, provided that the duties are safe and the employee is licensed and qualified to perform them.
- (b) Clause 25—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

L.2.2 Hours of Work—Full-time and part-time employees

- (a) Subject to clause L.2.2(c), and despite clause 11—Full-time employment and requirements for notice in clause 30.2 (Rostering), an employer may direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week. The employee will be paid on a pro-rata basis. The arrangements for working ordinary hours in clause 29—Ordinary hours of work (Full-time and part-time employees) will apply on a pro-rata basis.
- (b) Subject to clause L.2.2(c), and despite clause 12.3(a) (Part-time employment), and the requirements for notice in clause 30.2 (Rostering), an employer may direct a part-time employee to work an average of between 60% and 100% of their guaranteed hours per week, or an average of between 60% and 100% of the guaranteed hours per week over the roster cycle.
- (c) Prior to any employer issuing any direction under clause L.2.2(a) or (b) an employer must:

 - (i) consult with the affected employee/s in accordance with clause 8A— Consultation about changes to rosters or hours of work and provide as much notice as practicable; and
 - (ii) if the affected employee/s are members of the United Workers Union, notify the United Workers Union of its intention to implement these arrangements.
- (d) An employee given a direction under clause L.2.2(a) or (b) will continue to accrue annual leave and personal leave, and any other applicable accruals under this Award, based on each full-time or part-time employee’s ordinary hours of work prior to the commencement of Schedule L.
- (e) If an employee given a direction under clause L.2.2(a) or (b) takes a period of paid annual leave or personal leave, the payment for that leave will be based on the full-time or part-time employee’s ordinary hours of work prior to the commencement of Schedule L.

L.2.3 Annual leave

- (a) Despite clauses 34.3, 34.7, 34.8 and 34.9 (Annual leave), an employer may, subject to considering an employees’ personal circumstances, direct the employee to take annual leave with 24 hours’ notice.

- (b) Clause L.2.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
- (c) During the period of operation of Schedule L, instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*, an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave.

L.2.4 Dispute Resolution

Any dispute regarding the operation of Schedule L may be referred to the Fair Work Commission in accordance with Clause 9—Dispute Resolution.

- 2. By updating the table of contents and cross-references accordingly.
- B. This determination comes into effect on 24 March 2020.

PRESIDENT

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