

**IN THE FAIR WORK COMMISSION**

**SUBMISSION**

**Application to vary the Restaurant Award for award flexibility**

**AM2021/58**

**An application to vary the Restaurant Industry Award 2020 (AM2021/58) to include a new  
Schedule R – Award flexibility for COVID-19 pandemic recovery**

**FILED ON BEHALF OF RESTAURANT AND CATERING INDUSTRIAL**

**31 MAY 2021**

## **BACKGROUND**

1. This submission is made on behalf of Restaurant and Catering Industrial (**RCI**).

### **The Pandemic**

2. It is uncontroversial that the restaurant and catering industry (the **industry**) has been one of the hardest hit industries by the COVID-19 Pandemic (**Pandemic**). So much was acknowledged in the Annual Wage Review 2019-20 Decision of 19 June 2020 (2020 FWCFB 3500).
3. While the Pandemic has eased from a health perspective:
  - (a) government policy responding to potential outbreaks makes the pre-Pandemic operation of the industry unlikely for some time;
  - (b) the recovery from the worst of the Pandemic is not uniform;
  - (c) the industry while recovering from the worst demand side challenge it has faced in recent times is now challenged by a supply side challenge in that the closed Australian border is hampering the ability to find and retain staff as the industry works to recover from the Pandemic.
4. The FWC has previously varied the Restaurant Industry Award 2010/20 (the **Award**) inserting various Schedules to assist the industry and employees in it to respond to the Pandemic:
  - (a) Schedule I - Award Flexibility During the COVID-19 Pandemic; and
  - (b) Schedule X - Additional Measures During the COVID-19 Pandemic.

### **Ministerial Communication**

5. On the 9 December 2020 the Minister for Industrial Relations communicated with the Fair Work Commission (**FWC**) asking them to explore how specific industries that were materially challenged by the Pandemic could be further assisted in the recovery from the Pandemic.
6. The restaurant and catering industry was identified in this communication for attention.

### **RCI Response**

7. The FWC convened proceedings to consider the communication from the Minister for Industrial Relations. The RCI filed a draft determination seeking to amend the Award to deal with a limited number of targeted matters that had been identified by its membership as being of assistance during the recovery from the Pandemic.
8. On 23 September 2020 the RCI filed an application pursuant to s 157 of the Fair Work Act 2009 to vary the Award reflecting the evolving discussions with the Uniter Workers Union (the **UWU**).

9. Throughout this period, the RCI has:
  - (a) engaged with the UWU privately at various levels;
  - (b) participated in the on-going conferences before the FWC: and
  - (c) on 14 May 2021 participated in a private conference between the RCI and UWU convened by Justice Ross, President of the FWC.
10. The dialogue with the UWU assisted by the FWC has been constructive and engaging. The outcome of this dialogue has been an on-going process to reduce differences between the parties and to try and arrive at a position that balances outcomes for employers with safeguards and benefits for employees within the context of the recovery from the Pandemic.
11. On 31 May 2021 the RCI filed an amended application in this matter following the private conference on the 14 May 2021 and further discussions with the UWU.

#### **Amended Application**

12. The amended application seeks to vary the Award by introducing three new flexibilities:
  - (a) an exemption rate;
  - (b) a revised classification structure; and
  - (c) an allowance substituting for a series of allowances.
13. We deal with these matters separately below.

#### **Exemption Rate**

14. The proposed exemption rate has the following features:
  - (a) it only applies to persons otherwise paid at the level 5 or 6 rate in the Award thus limiting its application to senior or specialist roles in the industry;
  - (b) it operates by agreement with an individual employee;
  - (c) where such agreement is made it must be reduced to writing;
  - (d) any such agreement can be unilaterally terminated on four weeks' notice;
  - (e) while subject of an agreement the employee must be paid for each hour worked at the rate of 170% of their ordinary hourly rate;
  - (f) this rate is paid for the first 57 hours worked in a week;
  - (g) after 57 hours the employee is paid at overtime rates based on the 170% hourly rate;
  - (h) the employee receives the 170% rate for the purposes of annual leave and personal leave;

- (j) an exemption rate agreement results in the following clause of the Award not being applied:
    - (i) 16.5 and 16.6 (meal break);
    - (ii) 21 (allowances);
    - (iii) 23 (overtime rates) but not clause 23.2; and
    - (iv) 24 (penalty rates).
  - (k) all other provisions of the Award continue to apply such as hours of work etc; and
  - (l) the National Employment Standards apply.
15. The exemption rate is designed to address the following practical issues in the industry that are being experienced during the Pandemic recovery:
- (a) The permanent movement of domestic supply of labour away from the industry due to the prevalence of sudden snap lockdowns resulting in a lack of certainty about guaranteed hours because of government public health orders in response to the Pandemic.
  - (b) Senior management in the industry transferring their management skills to other industries less affected by the Pandemic or having the ability to find work where they can work from home.
  - (c) Skill shortage and reduced supply of labour due to the lack of international students or working holiday makers who are not coming to Australia.
  - (d) The shortage of staff resulting in greater flexibility required from existing staff to perform their duties.
  - (e) Increase in overall compliance costs caused by government directives related to the Pandemic, work, health and safety, lockdowns and restrictions.
16. The exemption rate will assist employers in the industry during the recovery from the Pandemic because:
- (a) It removes excessive administration required from employers who already face increasing compliance measures from Pandemic related government directives and restrictions.
  - (b) Provides for a minimum guaranteed rate of pay for employees which can be utilised to incentivise staff and applicants during the recruitment process.
  - (c) It is attractive for potential applicants and existing employees because it provides a realistic and tangible cap of 57 hours instead of relying on “reasonable overtime” for an annualised salary arrangement which was ambiguous, uncertain and reconciled in arrears.

- (d) Promotes business confidence and encourages employment with assurance of hours and expectations of pay while reducing the administrative burden and compliance costs required from employers and employees.

### **Safeguards**

17. There are a number of safeguards built into the amended application conditioning the exemption rate. These are:
- (a) an employer is required to consult with an employee before seeking to reach an agreement on the exemption rate;
  - (b) the exemption rate can only operate by agreement;
  - (c) the FWC is empowered to conciliate and arbitrate disputes about the application of the exemption rate and can:
    - (i) terminate an agreement made under Schedule R if it determines that it was not entered into genuinely;
    - (ii) terminate an agreement made under Schedule R if it determines that the employer failed to consult as required;
    - (iii) require an employer to pay an employee the difference between what they were paid under this Schedule and what they would otherwise have received under this award if the FWC determines that any agreement entered into was unfair for an employee; and
    - (iv) terminate an agreement for an employee if the FWC determines that any agreement entered into was unfair for that employee.
  - (d) the employee or employer can withdraw from an agreement to apply the exemption rate on relatively short notice; and
  - (e) Schedule R is time limited subject to further application.

### **Evidence**

18. The evidence allows the FWC to make the following relevant findings:
- (a) The industry has been materially impacted by the Pandemic.
  - (b) The industry faces both a supply side and demand side challenge in recovering from the Pandemic.
  - (c) The impact of the Pandemic is on-going as governments continue to adopt a zero tolerance to outbreaks and potential outbreaks.

- (d) There is no indication that Australian international borders will open any time soon.
- (e) Business confidence is a key motivator of business recovery and the inclusions of the exemption rate will stimulate this.
- (f) The exemption rate will have contained application.
- (g) The exemption rate will have utility and provide some employers and employees with the ability to structure remuneration in a manner that is mutually beneficial, simple, fair and will promote compliance.
- (h) The exemption rate has been appropriately and reasonably calculated. It is rare for employees in the industry to consistently work 57 hours a week. Overwhelmingly the standard hours for anyone who may contemplate the use of an exemption rate would be far lower than the outer limit of 57 hours, barring exception circumstances. The overwhelming majority of employees who operate on the exemption rate will work less than 57 thus providing them with a remuneration benefit regarding how the 170% is calculated.

#### **Fair Work Act**

- 19. The FWC is required to consider section 139, 134 and 157 of the Fair Work Act 2009 in this matter.
- 20. For the application to succeed the FWC is required to be satisfied that what is sought:
  - (a) can be included in a modern award (s 139); and
  - (b) should be included (s 134 and 157).

#### **Section 139**

- 21. It should be noted that exemption provisions while not common are a feature of the modern award system already, refer for instance Registered and Licensed Clubs Award 2020.
- 22. The practical effect of an exemption provision is that certain award benefits are not provided but substituted by the payment of an amount expressed as a % above the minimum rate.
- 23. Such awards have been the subject of detailed consideration in the 2012 Transitional Award Review and also the 2014 4 Yearly Award review without challenge to these exemption provisions.
- 24. As such the FWC may form the view that it does not need to consider this issue any further (s 139) in the context of the amended application.

25. This said, in practical terms an exemption rate is not a new minimum rate but can instead considered in one of two contexts:
- (i) simply it is a condition on the operation (non-operation) of certain clauses and as such is ancillary to their operation (or in this case non operation) and as such is permitted by force of section 142; or in the alternative
  - (ii) it can be considered as an allowance applied to the minimum rate in substitution for other award provisions having application and as such is permitted by section 139 (1) (g).

#### **Section 157 and 134**

26. In regard to section 157 and 134 we adopt the reasoning in paragraph 65 to 72 of Application to vary the Clerks - Private Sector Award 2020 [2020] FWCFB 5199 (6 October 2020).

#### **Section 134 - Modern Awards Objective**

27. The purpose of the exemption provision positively attracts elements of the Modern Awards Objective as follows:

Section 134 (1):

- (a) (relative living standards and the needs of the low paid):
  - (i) The ability for an employee to determine that it is advantageous to enter into an agreement to secure a guaranteed up lift in hourly rate by 170% in substitution for a limited number of award benefits can be properly considered as positively impacting the living standards and needs of the low paid were the employee making the agreement so classed.
  - (ii) It is relevant to consider that the rate at which the exemption allowance is set (170%) is designed to effectively offset the substituted award benefits. In this regard it can be noted that the exemption rate is material and more beneficial than other like rates already accepted by the FWC as meeting the Modern Awards Objective.
- (b) (the need to encourage collective bargaining)
  - (i) The industry has limited experience of bargaining and is mainly award reliant. This is a neutral consideration.
- (c) (promote social inclusion through increased workforce participation)

- (i) The industry currently operates with a diverse workforce composition in terms of age, nationality and gender. The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to increased workforce participation.
- (d) (need to promote flexible modern work practices and the efficient and productive performance of work)
  - (i) The exemption rate proposal will not in itself change work practices and as such neutral consideration.
- (da) (the need to provide additional remuneration for overtime etc)
  - (i) It is relevant to consider that the rate at which the exemption allowance is set (170%) is designed to effectively offset the substituted award benefits such as overtime. In this regard it can be noted that the exemption rate is material and more beneficial than other like rates already accepted by the FWC as meeting the Modern Awards Objective.
  - (ii) It should also be noted that the operation of the exemption rate does not affect the operation of late night penalties.
- (e) (principle of equal remuneration for work of equal or comparable value)
  - (i) This consideration is not impacted by the amended application and as such is a neutral consideration.
- (f) (likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden)
  - (i) This weighs heavily in favour of the amended application succeeding.
  - (ii) The exemption rate will dramatically reduce administrative burden for those using it.
  - (iii) The exemption rate will promote a more flexible attitude to work operating in the context of an employee being guaranteed a materially improved hourly rate.
  - (iv) The exemption rate will allow an employer to better manage labour costs given the predictability that the arrangement provides.
- (g) (need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards)

- (i) This weighs heavily in favour of the amended application succeeding.
  - (ii) The exemption rate is simple in its formulation and operation and is easy for an employee and employer to operationally understand and apply.
  - (iii) In addition, as some of the evidence suggests the exemption rate may also draw more employers back to operating fully under the Award rather than working on the basis of common law set off provisions which reinforces the sustainability of the Award and its part in the modern award system.
- (h) (likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy)
- (i) This weighs in favour of the amended application succeeding.
  - (ii) The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to promote employment growth in a key employing sector.

#### **Fair and Relevant Safety Net**

28. The proposed exemption rate sits comfortably in the Award which in aggregate provides a fair and relevant safety net. Relevantly:
- (a) what is fair and relevant is contextual and needs to be considered in the context of the Pandemic and the industry's recovery from it;
  - (b) Exemption rates (in various forms) are currently part of the safety net of modern awards;
  - (c) the proposed exemption rate is considerably more generous for employees than is currently the case in other modern awards; and
  - (d) the exemption rate operates with a detailed set of safeguards to ensure fairness in application.

#### **Classification Structure**

29. The proposed classification structure has the following features:
- (a) it applies to a limited number of streams and classifications;
  - (b) it operates to broad band certain work tasks that currently are classified into separate classifications and streams;

- (c) this broad banding seeks to reflect the practical way employees often work especially in cafes and in smaller businesses covered by the Award;
  - (d) no employee can be worse off under the proposal which ensures that an employee either continues to receive their current rate (where there is no practical change) or a higher rate (where the employee is to perform a broader range of tasks); and
  - (e) for obvious reasons the operation of the classification structure is determined by the employer to ensure simplicity across their establishment workforce.
30. The proposed classification structure is designed to address the following practical issues in the industry that are being experienced during the Pandemic recovery:
- (a) The dual impact of demand and supply side challenges brought about by the Pandemic has necessitated a more flexible approach to working roles in the industry especially in cafes and smaller businesses covered by the Award.
  - (b) This shortage of staff resulting in existing employees being trained to complete other tasks in other streams, such as a waitstaff assisting with kitchenhand duties.
  - (c) The need for flexibility in duties performed by staff in the restaurant and café sector.
  - (d) Requirement to have a quicker turnaround for the recruitment process due to the skill shortage which is delayed by complexity and ambiguity of the classification structure.
  - (e) Increase in overall compliance costs caused by government directives related to the Pandemic, work, health and safety, lockdowns and restrictions.
31. The proposed classification structure will assist employers in the industry during the recovery from the Pandemic because:
- (a) It removes the complexity to classify employees by reducing 6 arbitrary and overlapping levels to 3 easy-to-understand tiers.
  - (b) It consolidates the restaurant/café worker by combining the Kitchen Stream and Food and Beverage Attendant Stream, providing confidence and assurance that employees are being classified correctly even when they are required to help out with broader general duties; which is an increasingly common feature of the industry through the Pandemic and the recovery.
  - (c) Promotes multi-skilling and training of employees to be able to execute a broader range of tasks that are currently found in other streams.
  - (d) Provides flexibility for employers and increases productivity levels by employees who are multi-skilled.
  - (e) It reflects the manner in which many smaller businesses in the industry work in practice.

### **Safeguards**

32. There are a number of safeguards built into the amended application conditioning the exemption rate. These are:
- (a) an employer is required to consult with an employee before implementing the proposed classification structure; and
  - (b) Schedule R is time limited subject to further application.

#### **Evidence**

33. The evidence allows the FWC to make the following relevant findings, refer paragraph 18 (a) to (e) and:
- (a) The proposed classification ensures that no employee is worse off.
  - (b) The proposed classification structure has real utility during the recovery from the Pandemic.
  - (c) Many employees will receive pay increases from adoption of the proposed classification structure.

#### **Fair Work Act**

34. The FWC is required to consider section 139, 134 and 157 of the Fair Work Act 2009 in this matter.
35. For the application to succeed the FWC is required to be satisfied that what is sought:
- (a) can be included in a modern award (s 139); and
  - (b) should be included (s 134 and 157).

#### **Section 139**

36. Section 139 provides for classifications; s 139 (1) (a) (i).

#### **Section 157 and 134**

37. Refer paragraph 26.

#### **Section 134 - Modern Awards Objective**

38. The proposed classification structure positively attracts elements of the Modern Awards Objective as follows:

Section 134 (1):

- (a) (relative living standards and the needs of the low paid):
  - (i) The proposed classification structure provides an opportunity for an employee to increase their minimum rate of pay by performing a broader

range of tasks which can be properly considered as positively impacting the living standards and needs of the low paid were the employee concerned so classed.

- (b) (the need to encourage collective bargaining)
  - (i) The industry has limited experience of bargaining and is mainly award reliant. This is a neutral consideration.
- (c) (promote social inclusion through increased workforce participation)
  - (i) The industry currently operates with a diverse workforce composition in terms of age, nationality and gender. The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to increased workforce participation.
  - (ii) The proposed classification structure provides an opportunity for an employee to increase their minimum rate of pay by performing a broader range of tasks which will provide some employees with higher minimum rates of pay which could positively impact workforce participation.
  - (iii) The operation of the proposed classification structure will assist an employer in the supply side challenge that the Pandemic has created in the industry allowing an employer to provide increased minimum wages in return for greater working flexibility which will likely make working in the industry more attractive for some prospective employees.
- (d) (need to promote flexible modern work practices and the efficient and productive performance of work)
  - (i) This consideration weighs heavily in favour of the amended application.
  - (ii) The proposed classification promotes an employee to undertake a broader set of tasks reflecting the ordinary and practical operation of many businesses in the industry which will promote flexible modern work practices and the efficient and productive performance of work.
- (da) (the need to provide additional remuneration for overtime etc)
  - (i) This consideration is not impacted by the amended application and is neutral.
- (e) (principle of equal remuneration for work of equal or comparable value)

- (i) This consideration is not impacted by the amended application and as such is neutral.
- (f) (likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden)
  - (i) This weighs heavily in favour of the amended application succeeding.
  - (ii) The proposed classification structure reflects a more realistic and practical organisation of labour especially in a café or small business in the industry; promoting the more effective and efficient performance of work.
  - (iii) Broad banding implicitly reduces administrative complexity.
- (g) (need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards)
  - (i) This weighs heavily in favour of the amended application succeeding.
  - (ii) The proposed classification structure is simple in its formulation and is easy for an employee and employer to operationally understand and apply.
  - (iii) In addition, the proposed classification structure better reflects actual operating arrangements in cafes and small businesses covered by the Award which will reinforce the goal of compliance inherent in the notion of this limb of the Modern Awards Objective.
- (h) (likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy)
  - (i) This weighs in favour of the amended application succeeding.
  - (ii) The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to promote employment growth in a key employing sector.

### **Fair and Relevant Safety Net**

39. The proposed classification structure sits comfortably in the Award which in aggregate provides a fair and relevant safety net. Relevantly:
- (a) what is fair and relevant is contextual and needs to be considered in the context of the Pandemic and the industry's recovery from it;

- (b) Broad banding classifications has been supported by the FWC and its predecessors since the introduction of the Restructuring and Efficiency Wage Fixation Principle and the Structural Efficiency Wage Fixation Principle in 1987 and 1988 respectively;
- (c) the proposed classification structure operates to ensure no employee is worse off and many will be better off in terms of minimum rates of pay;
- (d) No work value consideration is 'required' in regard to the proposed classification structure for the following reasons:
  - (i) employees who are already paid at the top of a new broad banded classifications are not changing their minimum rate of pay but are retaining their minimum rate of pay with the already existent expectation that they perform all of the duties in lower classifications;
  - (ii) an employee working below the top of a new broad banded classification will now be paid the top rate applied to this broad banded classification on the basis that, if capable, they will perform all of the duties in the broad banded classification;
  - (iii) the employees in (i) and (ii) will in effect be in the same situation and while the employee in (ii) will receive an actual increase in their minimum rate it will be to the level of an existing higher rate for being ready to perform the tasks already aligned to that rate; and
  - (iv) nothing proposed seeks to change the minimum rate aligned to current tasks and existing classifications, and
- (e) the proposed classification structure operates with a detailed set of safeguards to ensure fairness in application.

### **Substitute Allowance**

40. The substitute allowance has the following features:
- (a) it provides for a single all-purpose payment per hour worked in substitution for several work and expense related allowances;
  - (b) it operates by agreement with an individual employee or to the establishment workforce as a whole on a 75% vote of employees;
  - (c) where such agreement is made it must be reduced to writing;
  - (d) any such agreement can be unilaterally terminated on four weeks' notice with an individual or 50% plus one where the 75% rule was applied;

- (e) while subject of an agreement the employee must be paid for each hour worked the substitute allowance;
  - (f) the substitute allowance is paid for all purposes of the Award; and
  - (g) this rate is different for different classifications given the modelling used to arrive at it and the higher prevalence of paying the allowances that are substituted at the lower classification levels of the Award in the industry.
41. The substitute allowance is designed to address the following practical issues in the industry that are being experienced during the Pandemic recovery:
- (a) The industry has confronted unique impositions in terms of increased regulatory burden during the Pandemic and now in the recovery phase and any capacity to simplify regulation will be taken as positive within the industry during the recovery.
42. The substitute allowance will assist employers in the industry during the recovery from the Pandemic because:
- (a) It encourages employment with a higher headline rate of pay to attract labour during the recruitment process when the industry is dealing with both demand and supply side challenges during the recovery.
  - (b) It reduces the compliance costs and administrative burden borne by employers from calculating each allowance separately for each employee.
  - (c) It allows for a more consistent and better estimation about the cost of wages for cashflow purposes rather than adhoc allowances that may or may not apply in a given week.
  - (d) It promotes the compliance process by allowing for a single reference point as a substitute allowance, thereby reducing the costs of compliance employers who already face increasing compliance measures from Pandemic related government directives and restrictions.
  - (e) It increases ease of employment by providing peace of mind and assurance for compliance purposes, allowing employers to focus on other functions in the business.

### **Safeguards**

43. There are a number of safeguards built into the amended application conditioning the substitute allowance. These are:
- (a) an employer is required to consult with an employee before seeking to reach an agreement on using the substitute allowance;

- (b) the number of employees required to withdraw from a collective application of the substitute allowance is materially lower than the number required to apply it in the first place;
- (c) the FWC is empowered to conciliate and arbitrate disputes about the application of the substitute allowance and has broad remedial powers set out above;
- (c) an individual employee or employer can withdraw from an agreement on relatively short notice; and
- (d) Schedule R is time limited subject to further application.

### **Evidence**

44. The evidence allows the FWC to make the following relevant findings, refer paragraph 18 (a) to (e) and:
- (a) The substitute allowance has real utility during the recovery from the Pandemic.
  - (b) The substitute allowance has been appropriately and reasonably calculated.
  - (c) The substitute allowance will have utility and provide some employers and employees with the ability to structure remuneration in a manner that is mutually beneficial, simple, fair and will promote compliance.

### **Fair Work Act**

45. The FWC is required to consider section 139, 134 and 157 of the Fair Work Act 2009 in this matter.
46. For the application to succeed the FWC is required to be satisfied that what is sought:
- (a) can be included in a modern award (s 139); and
  - (b) should be included (s 134 and 157).

### **Section 139**

47. Section 139 (1) (g) allows modern awards to include allowances and it is relevant to note that the section is inclusive in nature and not limited and is broad enough to include the substitute allowance.

### **Section 157 and 134**

48. Refer paragraph 26.

### Section 134 - Modern Awards Objective

49. The purpose of the substitute allowance positively attracts elements of the Modern Awards Objective as follows:

Section 134 (1):

- (a) (relative living standards and the needs of the low paid):
  - (i) The operation of the substitute allowance will lift the headline rate of pay for an employee in substitution for a limited number of allowances otherwise paid on an incident basis. This can be properly considered as positively impacting the living standards and needs of the low paid were the employee concerned so classed as it provides more secure payment to the employee.
- (b) (the need to encourage collective bargaining)
  - (i) The industry has limited experience of bargaining and is mainly award reliant. This is a neutral consideration.
- (c) (promote social inclusion through increased workforce participation)
  - (i) The industry currently operates with a diverse workforce composition in terms of age, nationality and gender. The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to increased workforce participation.
- (d) (need to promote flexible modern work practices and the efficient and productive performance of work)
  - (i) The substitute allowance proposal will not in itself change work practices and as such is a neutral consideration.
- (da) (the need to provide additional remuneration for overtime etc)
  - (i) The substitute allowance proposal will not in itself impact these matters in the Award and as such is a neutral consideration.
- (e) (principle of equal remuneration for work of equal or comparable value)
  - (i) This consideration is not impacted by the amended application and as such is neutral.
- (f) (likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden)
  - (i) This weighs heavily in favour of the amended application succeeding.

- (ii) The substitute allowance will dramatically reduce administrative payroll and compliance burden for those using it.
  - (iii) The substitute allowance will promote greater certainty of Award compliance for those using it.
  - (iv) The substitute allowance will allow an employer to better manage labour costs given the predictability that the arrangement provides.
- (g) (need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards)
- (i) This weighs heavily in favour of the amended application succeeding.
  - (ii) The substitute allowance is simple in its formulation and in operation is easy for an employee and employer to understand and apply.
- (h) (likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy)
- (i) This weighs in favour of the amended application succeeding.
  - (ii) The provisions in Schedule R individually and collectively are designed to promote further business confidence and flexibility during the Pandemic recovery which will have an ambient benefit to promote employment growth in a key employing sector.

### **Fair and Relevant Safety Net**

50. The proposed substitute allowance sits comfortably in the Award which in aggregate provides a fair and relevant safety net. Relevantly:
- (a) what is fair and relevant is contextual and needs to be considered in the context of the Pandemic and the industry's recovery from it;
  - (b) the substitute allowance is novel but compelling in its simplicity for both an employer and employee;
  - (c) the substitute allowance will assist employers deal with the supply side challenge created by the Pandemic allowing them to offer more attractive head line rates while still operating within the current ambit of labour cost arising from the Award; and
  - (d) the exemption rate operates with a detailed set of safeguards to ensure fairness in application.

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