



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, 21 DECEMBER 2020

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 2010 – conferences convened – directions issued.

[1] On 10 December 2020, I issued a [Statement](#) which commenced a process in relation to the following awards following the receipt of a [letter](#) from the Minister for Industrial Relations:

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

[2] 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.

[3] As I noted in my Statement of 10 December 2020, it will be a matter for the Commission to determine the process by which the issues raised in the request are considered and whether any variations to modern awards are necessary having regard to the provisions of the Act.

[4] The process commenced with conferences on 17 and 18 December. The purpose of the conferences was to:

1. Canvass the issues raised in the Minister's letter and examine (in broad terms) any proposals for variations to the key modern awards.
2. Explore whether there is any consensus about the nature of any award variations relating to loaded rates, exemption rates or classification structures.
3. Discuss whether there is any additional data or research the parties might require to properly consider these issues.
4. Discuss future programming.

Conferences—General discussion

[5] At both conferences, the parties indicated that they were not yet in a position to put forward specific proposals for award variations. However, a number of the employer organisations expressed interest in the idea of loaded rates and noted that any changes made should be short and easy to understand with a focus on administrative simplicity.¹ The union representatives generally reserved their position and would respond to any specific proposals that were advanced.

[6] There was some discussion about the form of any loaded rates and a general consensus that a series of loaded rates might be more appropriate than a single loaded rate. For example, there may be a loaded rate for weekdays and separate rates for the weekend or a series of schedules of rates based on different working patterns. There was also some discussion about what a loaded rate might incorporate, including some penalty rate provisions and possibly specified allowances in some circumstances.

[7] In terms of the safeguards that might be appropriate in a loaded rates arrangement, the general consensus favoured an opt in arrangement, whether by individual agreement or the majority of employees in a particular workplace. There also appeared to be general support for the inclusion of a mechanism to terminate a loaded rate arrangement, with notice.

[8] All comments were made on a without prejudice basis.

Conference—Hospitality, Restaurant and Clubs Awards

[9] The conference on 17 December 2020 was in relation to the Hospitality, Restaurant and Clubs Awards. A transcript of that conference is available [here](#).

[10] In relation to the Hospitality Award, the following award specific points were raised:

- The Hospitality Award covers a broad range of sub-sectors ranging from residential hotels, casinos, pubs and commercial catering. It may be that loaded rates could be determined for some, but not all of these sectors.

¹ [Transcript](#) PN34, PN43, PN163

- There may be some potential for clarifying the classification titles so that they more accurately reflect the nature of the tasks being performed by employees.
- The Hospitality Award contains two different streams for junior employees ('junior office employees' and 'other than junior office employees') which may be able to be consolidated.

[11] In relation to the Restaurant Award, the following points were raised:

- The employer parties expressed interest in the simplification of the classification structure.
- Some parties were attracted to the idea of exemption rates for senior employees.

[12] In relation to the Clubs Award, it was noted that the new 2020 award resulting from the 4 yearly review of modern awards comes into operation on 21 December 2020 and that this review had been an extensive process. It was noted that there may be some scope for 'tidying up' some classification descriptions and possibly loaded rates on an 'opt-in' basis. The Clubs Award already contains an exemption rate for managers.

[13] Parties with an interest in the Hospitality Awards are directed to file any proposals for award variations and any other relevant comments (including any general principles to guide this process) by **4 pm on Wednesday 27 January 2021**.

[14] A further conference will be convened at **9:30am on 4 February 2021**. A separate listing notice will be issued in due course.

Conference–Retail Award

[15] A conference was convened on 18 December 2020. A transcript of that conference is available [here](#).

[16] In relation to the Retail Award there was some interest in both loaded rates and exemption rates. The issue of increased flexibility for part-time employees was also raised as an issue that would be of benefit to employers in the industry. There also appeared to be a general level of consensus that the classification structure in the Retail Award is already broad banded and that it may not require further consideration as part of this process.

[17] Parties with an interest in the Retail Award are directed to file any proposals for award variations and any other relevant comments (including any general principles to guide this process) by **4 pm on Thursday 28 January 2021**.

[18] A further conference will be convened on **Friday 5 February 2021**. A separate listing notice will be issued in due course.

Data and material to be provided by the Department

[19] On 15 December 2020, I received [correspondence](#) from the Australian Government – Attorney General's Department in relation to the data and resources it may be able to provide to support this process.

[20] At the conferences the representative for the Attorney General's Department indicated that the data outlined in the letter could be provided on an iterative basis commencing from the third week of January 2021. The Department noted that the material requested from the Workplace Agreements Database would require manual analysis and will therefore take longer. The Department indicated that this material would be available later in January 2021. The material to be provided by the Department will also seek to address the following points that were raised in the 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; and
- Data on working patterns in various awards

[21] 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 dated March 2020. The issues relate to the coverage clause in the Restaurant Award and the rostering and averaging of hours provisions in the Hospitality Award.

Next steps

[22] Proposals for award variations and any other comments should be filed in accordance with the timeframes in [13] and [17] above. Any proposals should outline the nature of the issue they are seeking to resolve.

[23] Parties are encouraged to engage in discussions to see if any joint positions can be advanced.

[24] At the conferences, I invited 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

[25] 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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