

IN THE FAIR WORK COMMISSION

SUBMISSION IN REPLY

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

2 JULY 2021

1. Restaurant and Catering Industrial (**RCI**) was provided an opportunity to provide a submission in reply in response to submissions that were received in relation to the matter.
2. Subject to these submissions the RCI submit that the preliminary view of the Fair Work Commission expressed in its Statement of 3 June 2021 should be confirmed and the Restaurant Industry Award 2020 (the Award) should be varied to include Schedule R.
3. In fact, the current increased level of impact of the COVID-19 pandemic respectfully warrants this even more than was the case when the Statement was made.

NSW Business Chamber and Australian Business Industrial

4. We note the submission on behalf of the NSW Business Chamber and Australian Business Industrial.
5. We note that the NSW Business Chamber and Australian Business Industrial reiterates that the proposed variation is necessary to meet the modern award objectives, particularly in the context of the COVID-19 pandemic and its impact on the restaurant and catering industry.

United Workers Union

6. On 29 June 2021, the United Workers Union (**the UWU**) filed a submission in relation to this matter (**the submission**).
7. In paragraph [15] of the submission, the UWU noted that the economic circumstances facing the hospitality industry were significantly more acute on 9 December 2020 when the Minister for Industrial Relations asked the Fair Work Commission to commence the process for exploring award flexibility.
8. Since RCI's initial submission of 2 June 2021, nationally the COVID-19 pandemic is more acute than at any other time in terms of its impact on the restaurant and catering industry (**the Industry**).
9. Up until 31 March 2021, snap lockdowns throughout Australia were cushioned by the existence of JobKeeper, rent moratoriums and broad government stimulus.
10. At the time of writing, due to community transmission of the Delta variant of COVID-19, new restrictions and/or lockdowns and/or border closures in Victoria, NSW, Northern Territory, Queensland, Western Australia and South Australia are at a level not nationally seen since the pandemic started.
11. All of this has largely occurred without the support and stimulus packages that were in place before March 2021. In addition, this has occurred during the 'winter school break' period that disproportionately impacts the Industry.

12. In short, the COVID-19 pandemic is very much with us and more than ever impacting the Industry.

Classification Response

13. In paragraph [31(b)] of the submission, the UWU notes concerns about the Classification proposal that the increase of the Level 4 rate to Level 5 rate would disincentivise employers from promoting employees from Level 3, where they would have ordinarily been promoted to Level 4. However, the *Restaurant Industry Award 2020 (the Award)* already stipulates that:

“The minimum classification level for an employee who has completed AQF Certificate III or higher qualifications relevant to the classification in which they are employed and who makes use of skills and knowledge derived from Certificate III competencies relevant to the work undertaken is Level 4.”

14. This demonstrates that the Award provides a provision that a Level 4 is automatically triggered when an employee has completed an AQF Certificate III or higher qualification and therefore, cannot be ‘stuck’ on a Level 3 as is contended by the UWU.
15. Respectfully this matter should not move the Fair Work Commission to change its preliminary view as expressed in the Statement.

Committee

16. RCI notes that in paragraph [34] of the submission, the UWU submits that:

“If FWC is minded to grant the variation sought, the concerns identified by UWU justify the adoption of further protective measures as follows:

a. A committee should be formed to monitor the operation of this and any other variation FWC is minded to make in relation to this application. The committee should comprise at least two representatives nominated by RCI, and two nominated by UWU (and such additional representatives as these two parties may agree to). The Committee should meet bi-monthly and consider matters relevant to whether this proposal (and others contemplated by this application) are working fairly, efficiently and appropriately. The formation of this committee need not be a clause of the award, but FWC should recommend that it be constituted and function along the lines suggested in any decision it makes about this matter.

b. The review in relation to the operation of this variation to the Award (and others, if any) should commence no later than nine months after the commencement of its operation. The review should consider, among other

things, whether the concerns identified by UWU members and outlined at [31] of this Outline of Submissions have come to fruition.”

17. Subject to drafting that the Fair Work Commission is satisfied with, this represents a practical proposal and will provide a new plenary safeguard that should materially assuage any concerns about “caution” or any mis-use of the proposed Schedule R.
18. The clause can be considered as permissible pursuant to section 139 (1) (j).
19. RCI consents to such a clause being including in Schedule R is willing and able to engage in the committee and review process as noted in paragraph [34] of the submission by the UWU.

Substitute Allowance Response

20. In paragraph [38(a)] of the submission, the UWU noted that the Fair Work Commission should not make this variation to the award for the substitute allowance based solely on improving compliance with the award.
21. RCI reiterates that the substitute allowance meets the Modern Award Objectives as it will lift the headline rate of pay for an employee and will provide a more secure payment to the employee instead of the ad hoc limited number of instances that would have been triggered individually.
22. The RCI reinforces that the substitute allowance will assist in the recovery process of the COVID-19 pandemic as it:
 - (a) reduces the compliance costs and administrative burden borne by employer who would calculate each allowance separately for each employee;
 - (b) allows for a more consistent and better estimate for the cost of wages for cashflow purposes instead of ad hoc allowances that may not be triggered in a given week; and
 - (c) increases the ease of employment by providing a greater headline rate in order to attract supply of labour which is in a critical shortage in the industry.
23. These considerations attract force from section 134 (1) (f), (g) and (h).
24. In paragraph [38(b)] of the submission, the UWU noted employees should be informed of their right to withdraw from an agreement to adopt the substitute allowance and their right to do so.
25. RCI consents to this proposal to inform employees of their right to withdraw and submits that this will be yet a further protective measure for employees as outlined in paragraph [40(b)] of the submission by the UWU.

26. In paragraph [38(c)] and [40(c)] of the submission, the UWU notes and recommends that amendments should be included to clearly stipulate the authority of the Fair Work Commission to require payment if the employee would have been paid more under any previous arrangement.
27. The RCI does not object to this should the Fair Work Commission see it as desirable.

Exemption Rate Response

28. In paragraph [52] of the submission, the UWU has proposed that the Grade 4 Cook be excluded from an exemption rate agreement.
29. Respectfully there is no probative basis advanced by the UWU for the Fair Work Commission to depart from its preliminary view as expressed in its Statement.
30. No criticism has been made of the method of calculating the exemption rate for this Grade Cook nor any special circumstances advanced to disentitle them.
31. All Level 5 and Level 6 employees should be entitled to enter into a voluntary exemption rate arrangement under this Award if they wish to at the rate of 170% which is acknowledged by the UWU as a higher rate than exists in any other modern award it has an interest in.
32. RCI reinforces that the exemption rate proposal should be aligned with the Level 5 and Level 6 pay grades and not the Classification Levels for consistency.
33. A Food and Beverage Supervisor who is a Level 5 and a Cook Grade 4 who is also being paid a Level 5 have the same pay levels. Therefore, they should both be entitled to the voluntary exemption rate proposal and demonstrates that the criteria for eligibility should be based on pay grade levels.
34. RCI highlights that the Fair Work Commission has expressed a provisional view in favour of this proposal and requests that the Fair Work Commission maintains this position.

Work Value

35. At paragraph [31(a)] the UWU raise some issues associated with potential work value.
36. It should be uncontroversial that employee working in a stream under the Award in a higher level are expected to perform all of the required duties of lower levels. As such broad banding two classifications in a stream and paying the higher level rate does not suggest any work value consideration arises.

37. There is nothing preventing an employee performing work across streams and across different pay levels. An employer can already request an employee to do this. While such an employee might in-person be of some greater value to an employer, this is distinct from whether the work they are performing attracts a different work value. The work would still only be the work being performed at the time for which the Award already sets a proper minimum rate.
38. This may be somewhat academic in any event as the issue may only practically arise if the Schedule R classification was operating on an on-going basis rather than as currently proposed.

Operative Date

39. This requires some sensitivity. Schedule R is needed now. This said and consistent with the UWU seeking caution, a prospective operative date would allow the RCI and the UWU to properly prepare its members to understand and utilise Schedule R most effectively.
40. This requires a real balance of competing considerations and accordingly, the RCI submits that the Determination should come into operation four weeks from the date of final decision.

Conclusion

41. The preliminary view expressed in the Statement was consistent with section 134 of the Fair Work Act 2009.
42. Schedule R as it stood when the Statement was made contained many material safeguards.
43. The RCI has consented to or not opposed several additional safeguards and accordingly the Fair Work Commission should be more than satisfied that Schedule R can be made in the terms proposed/supported by RCI and that (along with the section 134 being met) this approach fulfils the UWUs desire for caution.

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