



Restaurant  
& Catering

**FAIR WORK COMMISSION  
PART-TIME & CASUAL EMPLOYMENT FULL BENCH  
AM2014/196 &AM2014/197**

**SUBMISSION**

**22 FEBRUARY 2016**

Restaurant & Catering Industrial  
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## **Restaurant & Catering Industrial**

- 1) Restaurant & Catering Industrial is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*.
- 2) The Association has a national membership with offices in Sydney, Melbourne, Brisbane, Canberra, Adelaide and Perth.

## **About the Industry**

- 3) The industry turns over some \$24 billion<sup>1</sup> per annum and has a projected five year employment growth rate of 8.5 per cent<sup>2</sup> to November 2018. This growth is on top of a sizeable attrition from the industry due to the large number of casual employees engaged.
- 4) Approximately 93.1 per cent of café, restaurant and catering businesses are small businesses<sup>3</sup>. The average employment per business is 8 employees.
- 5) The average turnover of a small businesses in the restaurant and café sector is \$1 million<sup>4</sup>. The average net profit for a restaurant or café business is 3.6 per cent<sup>5</sup>.
- 6) As the Australian services industry moves to a 24/7 trading environment it is consumers that demand restaurants and cafes are trading hours that meet the modern society.
- 7) The restaurant industry operates at low margins and high costs with relatively high rates of business failure.
- 8) Businesses that are restricted in trading conditions by outdated industrial awards or restrictive legislative regimes by federal, state and local governments will naturally fail to realise their full potential.

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<sup>1</sup> Australian Bureau of Statistics (2015) 8501.0 Retail Trade, Australia; State by Industry Subgroup, Original

<sup>2</sup> Department of Employment (2014) *Industry Outlook : Accommodation and Food Services - December 2014*

<sup>3</sup> Australian Bureau of Statistics (2014) 8165.0 *Counts of Australian Businesses, including Entries and Exits, Jun 2009 to Jun 2013*

<sup>4</sup> Restaurant & Catering Australia (2014) *Industry Benchmarking Report, 2012-2013 Financial Year Results*

<sup>5</sup> Australian Bureau of Statistics 8655.0, Café and Restaurant Series

## Legislative Framework

- 9) The legislative parameters of the 4 yearly review of Moderns Awards are set out in s.156 of the *Fair Work Act 2009* as set out below:

### ***“156 4 yearly reviews of modern awards to be conducted***

#### *Timing of 4 yearly reviews*

(1) The FWC must conduct a **4 yearly review of modern awards** starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

#### *What has to be done in a 4 yearly review?*

(2) In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

#### *Variation of modern award minimum wages must be justified by work value reasons*

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

*Each modern award to be reviewed in its own right*

**(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right.** However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.” **[Emphasis Added]**

- 10) In conducting the 4 yearly review the Commission has included the Australian Council of Trade Unions (ACTU) application to vary multiple Modern Awards as a Common Issues matter. However, Restaurant & Catering Industrial argue the Commission must guard against applying common outcomes across multiple Modern Awards as each Modern Award stands alone and must be reviewed in its own right.
- 11) The above point is further supported by the Decision of the Fair Work Commission Full Bench on 17 March 2014 [2014] FWCFB 1788 which set out in summary form the scope of the 4 yearly review process as follows:

*“On the basis of the foregoing we would make the following general observations about the Review:*

*1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156(2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156(2) is limited by other provisions of the FW Act.*

*In exercising its powers in a Review the Commission is exercising ‘modern award powers’ (s.134(2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. In particular, the modern awards objective in s.134 applies to the Review.*

*2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission’s functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).*

*3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant*

*legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.*

*4. The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.*

*5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.*

*6. There may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.*

*7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.*

*8. Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other provisions of the FW Act may be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).*

*9. Division 5 of Part 2-3 (ss.157-161) of the FW Act deals with the exercise of powers outside 4 yearly reviews and annual wage reviews. These provisions are not relevant to the conduct of the Review but the Review process is not of itself a barrier to an application or determination being made under Division 5, provided the Commission is satisfied that the requirements of Division 5 have been met. In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Interested parties will be provided with an opportunity to comment on any such proposed variation.*

10. Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers. These provisions apply to the Review. If the Commission were to make a modern award or change the coverage of an existing modern award in the Review, then the requirements set out in s. 163 must be satisfied.

*Determinations varying modern awards arising from the Review will generally operate prospectively and in relation to a particular employee the determination will take effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. A variation can only operate retrospectively if the variation is made under s. 160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) and there are exceptional circumstances that justify retrospectivity.*

*Section 166 deals with the operative date of variation and determinations which vary modern award minimum wages and it also applies to the Review.<sup>6</sup>*

## **Directions & Statement**

- 12) This submission is made in accordance with the Directions issued by the Fair Work Commission, Casual and Part-time Employment Full Bench on 29 June 2015 requiring at para 5 that:

*"Any interested party which wishes to adduce evidence and/or make submissions in reply to any of the evidence and submissions filed in accordance with direction [3] shall file such evidence and/or submissions in the Commission by 5.00pm on Monday 22 February 2016."*

## **Submissions**

- 13) Restaurant & Catering Industrial opposes the claims made by the Australian Council of Trade Unions (ACTU) and United Voice in respect to the Restaurant Industry Award 2010 and Hospitality Industry (General) Award 2010.
- 14) The claims by the ACTU seek to reverse the flexibility in casual and part-time employment acquired progressively over many years in the hospitality sector.
- 15) The Australian Industrial Relations Commission (**AIRC**), which was allocated the task of undertaking the award modernisation process, made the Restaurant Industry Award 2010 following a Ministerial Request under legislative amendments to the *Workplace Relations Act 1996* from the Minister for Employment and Workplace Relations. An amendment to the Ministerial Request dated 28 May 2009 stated as follows:

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<sup>6</sup> [2014] FWCFB 1788 @ Para 60

*Restaurant and catering industry*

*27A. The Commission should create a modern award covering the Restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the Restaurant and catering industry, **including the labour intensive nature of the industry** and the industry's core trading times. [Emphasis added]*

16) The AIRC Full Bench then observed that:

*We understand the 28 May 2009 variation to the consolidated request to require the Commission to make a modern award which takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times, particularly in considering the penalty rate and overtime regime. Our task is to establish a modern award with appropriate terms and conditions for the industry, having regard to the terms of the consolidated request as varied, and having regard to the content of relevant pre-reform awards and NAPSAs and the weight of coverage of those industrial instruments.<sup>7</sup>*

17) In respect to pre modern award instruments the AIRC Full Bench took into account that the majority of pre-modern award instruments contained a 2 hour minimum engagement period for casual employees and 3 hour minimum engagement period for part-time employees. Appendix 1 attached illustrates the pre modern award instruments and the particulars in respect to casual and part-time employment provisions.

18) In recognising the labour intensive nature of the industry many cafes, restaurants and catering businesses find peak periods of service that require additional casual labour to be engaged for 2 hours. This is sufficient to attract staff and in many cases suits students and irregular casual workers seeking such paid work.

19) If the ACTU claim was successful many operators would think twice before engaging irregular casual workers given the 4 hour minimum payment would be paid where only 2 hours work is actually performed. The sector is not in a position to find other duties to keep casual staff occupied with alternate duties when peak service periods dissipate. This would then become a disincentive to engage casual labour and increase labour costs significantly in the sector.

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<sup>7</sup> [2009] AIRCFB 865 @ Para 193

20) The Fair Work Commission Research “Accommodation and Food Services Industry Profile” December 2015 provides the following table indicating that some 24.2% of award reliant enterprises and some 32.7% would reduce workforce/hours as a long term strategy to a substantial increase in labour costs if demand for their major products and/or services had not changed.

**Table 7.6: Potential long-term responses to a substantial increase in labour costs, Accommodation and food services, 2014**

Award-reliant enterprises (%)		Other enterprises (%)	
Adjust pricing	13.0		17.3
Cease operations	18.6		13.6
Increase profitability/efficiencies	35.7		40.5
Lower pay rates/benefits/change employment status	8.1		np
Outsource	np		np
Reduce workforce/hours	24.2		32.7
Hire/only retain cheaper/younger/less experienced staff	5.6		7.0
Streamline/rationalise technology/automation	3.7		8.8
Other	12.9		1.5
None	np		np

Source: Fair Work Commission Australian Workplace Relations Study, 2014.

21) The ACTU relies on the *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006) to support its claim for a standardised casual conversion provision.

22) However, the evidence in the *Secure Employment Test Case* provided by Professor Lewis and Professor Wooden still remain relevant today where at para 175 and 176 the Full Bench stated:

*“175 Mr McDonald put that there is substantial evidence that casual employment leads to higher paying permanent employment although not necessarily in the same vocation. As Professor Wooden described it:*

*This, however, does not mean that casual jobs are also dead-end jobs which not only offer little by way of immediate promotion prospects, but also inhibit the development of careers with other firms. This is most obvious with respect to students (as recognised by Richard Hall at paragraph 53 of his affidavit) who fill casual jobs while studying. Their jobs while studying are usually unrelated to the careers they will pursue after completing study. Furthermore, research of student employment has generally concluded that such employment has been beneficial for future employment prospects. These benefits, however, accrue mainly in the form of general skills arising*

from the “process of socialising youth into the workforce” (Woolmer and Hill 1990, p 34) rather than as improved firm-specific skills.

176 Mr McDonald also relied upon evidence from Professor Philip Lewis, Professor of Economics and Director of the Centre for Labour Market Research at the University of Canberra, that:

- a substantial number of low paid job seekers do move to higher paying jobs over time;

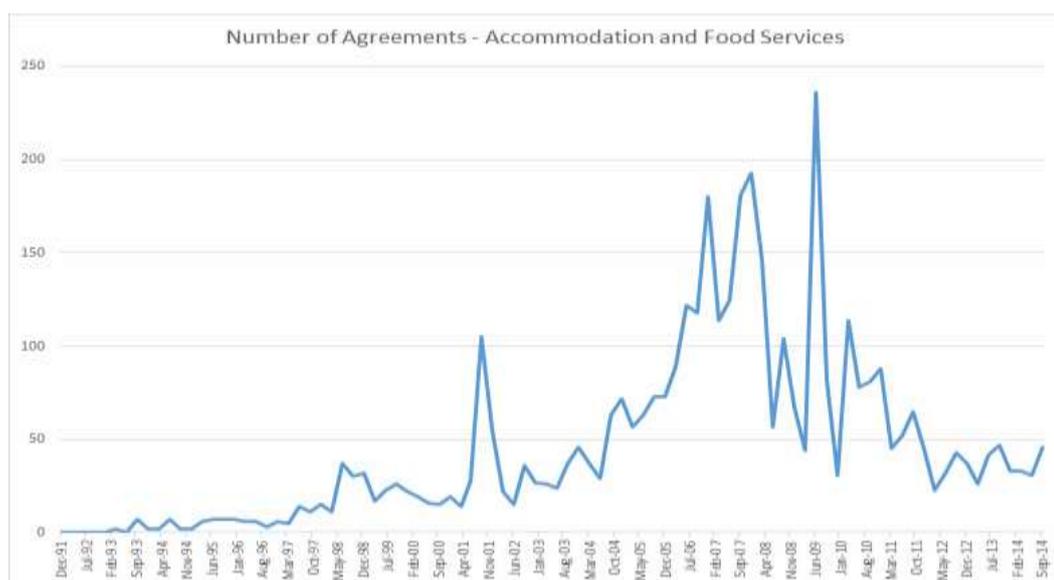
- movement from low pay to higher pay is often associated with transitions from part-time to full-time work; and

- a substantial number of job seekers in low skilled jobs move to higher skilled jobs over time (DEWR 2004).

*This phenomenon, of moving away from low skilled, low paid employment to higher paid, higher skills, better wages and hours of employment, is called the “Stepping Stone” hypothesis.”*

23) Casual conversion clauses should be negotiated on an enterprise by enterprise basis because the variants are large between what is acceptable to each business model at the enterprise level. For example a casual conversion clause for a single Restaurant may be very different to fast food business franchise chain.

24) Furthermore, enterprise bargaining is continuing to decline in the sector because Modern Award provisions are becoming paid award instruments rather than minimum award provisions because there is little scope to tailor enterprise specific provisions.



NOTE: The majority of agreements since 2007 have been in the accommodation sector.  
Source AWRS 2014 Employee Relations Survey

## **Conclusion**

25) Restaurant & Catering Industrial opposes the claims by the ACTU and United Voice and asks the Full Bench to reject the claims accordingly.

Restaurant and Catering Industry - Restaurants - Comparison - Federal Awards and NAPSAs - Type of Employment

<b>AM s.576(1)(b) Type of employment</b>	<a href="#">AP783479CRV - Fed</a> <b>The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998</b>	<a href="#">AP787213CRV - Fed</a> Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998	<a href="#">AN120468 - NSW</a> Restaurants, &c., Employees (State) Award	<a href="#">AN140144 - Qld</a> Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2002	<a href="#">AN150025 - SA</a> Cafes & Restaurants (SA) Award	<a href="#">AN150170 - SA</a> Delicatessens, Canteens, Unlicensed Cafes And Restaurants Etc. Award	<a href="#">AN160276 - WA</a> Restaurant, Tearoom and Catering Workers' Award, 1979	<a href="#">AN170086 - Tas</a> Restaurant Keepers Award
<b>Casual loading</b>	<a href="#">cl 15.2.2</a> 25%	<a href="#">cl 13.2.2</a> 25%	<a href="#">cl 9.3</a> 20%	<a href="#">cl 4.3</a> 23%	<a href="#">cl 4.3</a> 20%	<a href="#">cl 4.3</a> 20%	<a href="#">cl 11</a> 25%	<a href="#">cl 14</a> 25%
<b>Employment categories</b>	<a href="#">cl 15</a> Average of 38 hrs	<a href="#">cl 13</a> -						
<b>full-time employment</b>	Works less than 38hrs per week, has reasonably predictable hours of work and receives pro rata pay and conditions	As per AP783479CRV						
<b>part-time</b>	<ul style="list-style-type: none"> <li>•Minimum 3 hours per shift</li> <li>•Employer and employee must agree in writing at time of engagement as to regular pattern of hours - overtime applies outside these hours</li> <li>•Paid at 1/38th of weekly rate</li> </ul>							Work in licensed establishments: 10% loading not cumulative with penalty rates (cl 27(b)(ii)) No 10% loading if employed for a specific number of hours per week according to cl 27(b)(iii)
<b>casual</b>	Employed and engaged as such, minimum payment 2 hours per shift.	Engaged as such, paid per hr at 1/38 of weekly rate, plus loading; min payment 2 hrs	Min payment 3 hrs (cl 8.3)	Min payment 2 hrs	Min 3 hour engagement per day (cl 4.3.2.3)	Min 3 hour engagement (cl 4.3.5)	Min. engagement 2 consecutive hours per shift (cl 11(2))	Min. engagement 2 hrs (cl 14(a))
<b>casual - other</b>	An employee who does not meet the definition of a regular part-time employee and who is not a full-time employee will be paid as a casual employee.	As per AP783479CRV						
<b>Probationary employment</b>	No mention	No mention						
<b>Apprentices</b>	Minimum wages set out for cooking apprentices, except in NSW, Vic & Tas in respect of cooking trade awards/regulations made by any state apprenticeship board applies to any section of the trade to which such awards/regulations are expressed to apply duration max 5 years paid a percentage of adult wage.	Shall not be required to work overtime or shift work (cl 25.7) employed under a registered Training Contract leading to a relevant qualification <b>Proficiency pay:</b> apprentices receive rate of qualified cook during part of their 4th year according to the number of times they received proficiency in their schooling as follows: •1 proficiency - paid as qualified cook for final 3 months of apprenticeship •2 " - " for final 6 months " •3 " - paid as qualified cook for entire 4th year (cl 17.11.2)						

Restaurant and Catering Industry - Restaurants - Comparison - Federal Awards and NAPSAs - Type of Employment

<b>AM s.576(1)(b) Type of employment</b>	<a href="#">AP783479CRV - Fed</a> <b>The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998</b>	<a href="#">AP787213CRV - Fed</a> Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998	<a href="#">AN120468 - NSW</a> Restaurants, &c., Employees (State) Award	<a href="#">AN140144 - Qld</a> Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2002	<a href="#">AN150025 - SA</a> Cafes & Restaurants (SA) Award	<a href="#">AN150170 - SA</a> Delicatessens, Canteens, Unlicensed Cafes And Restaurants Etc. Award	<a href="#">AN160276 - WA</a> Restaurant, Tearoom and Catering Workers' Award, 1979	<a href="#">AN170086 - Tas</a> Restaurant Keepers Award
School-based apprentices	an employee who is engaged under a Training Agreement registered by the relevant State or Territory Training Authority, allowed the same time to attend off-the-job training as full time apprentices See <a href="#">Appendix D</a>	<ul style="list-style-type: none"> <li>•Apprenticeship not to exceed 5 years</li> <li>•Hourly rates for apprentices apply for time worked including off-the-job training</li> <li>•Time spent in off-the-job training deemed to be 25% of actual hours worked each week (averaged over a semester or year)</li> <li>•In year 11 and 12, school-based apprentice wages rise to the next level only every 2 years (cl 17.11.6(e))</li> <li>•Not required to work overtime or shift work if under 18</li> </ul>						
Trainees Juniors	No mention Percentage of the adult wage depending on age, employer may require production of birth certificate to verify age In addition, juniors 18 years and over serving alcohol must be paid full adult rate.	-	As per AP783479CRV If under 18, not required to work more than 10 hrs in a shift					
Employee and employer duties	Employees must undertake duties as directed within the limits of their competence.	As per AP783479CRV						
Requirement to inform employee	At the time of engagement an employer will inform each employee of the terms of their engagement and whether they are to be full-time, regular part-time or casual.	As per AP783479CRV						
Employment for a specified task or period Types of employment - other	No mention No mention	No mention No mention				Catering employees - min 3 hr payment. Or if no work performed, min 1 hr payment (cl 4.11.4)		