



Restaurant  
& Catering

SAVOUR  
AUSTRALIA



12 October 2016

Fair Work Commission  
Level 10, Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2011  
**Attention: Associate to The President**

**By email:** [Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au)  
**Cc:** [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

Dear Associate,

**4 Yearly Review of Modern Awards—Group 4 awards – *Restaurant Industry Award 2010***

Please see enclosed for filing submissions and draft determination on behalf of Restaurant and Catering Industrial.

In relation to the draft determination attached to the submissions, please note that we have not provided our proposed provisions and schedules in respect of our claims to amend clause 20, Schedule B and our new proposed clause as outlined in paragraph 27 of our submissions. We are currently in the process of completing these and will endeavour to provide these as soon as practicable.

Yours sincerely,

**Restaurant & Catering Industrial**



**RESTAURANT & CATERING INDUSTRY ASSOCIATION**

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Restaurant  
& Catering

**IN THE FAIR WORK COMMISSION**

**FOUR YEARLY REVIEW OF MODERN AWARDS**

**RESTAURANT INDUSTRY AWARD 2010  
MATTER NO.: AM2014/284**

**OUTLINE OF SUBMISSIONS**

**12 OCTOBER 2016**

1. These submissions are made in response to the Fair Work Commission’s statement and directions dated 26 August 2016.
2. Restaurant & Catering Industrial (RCI) rely on its submissions filed on 2 March 2015 and confirms that it seeks to pursue the variations in the *Restaurant Industry Award 2010* (“**Restaurant Award**”) as outlined in its 2 March 2015 submissions, save for paragraph 11 of the submissions, relating to the annualised salaries provision, as this claim has now been referred to a separate Full Bench to be dealt with as a common matter.
3. Annexed herein is the proposed draft determination encompassing all of the variations sought.
4. Restaurant & Catering Industrial is a Registered Organisation under the Fair Work (Registered Organisations) Act 2009 and represents the industrial interests of restaurants, cafes, food and catering businesses across Australia.
5. The industry turns over some twenty-four billion per annum and anticipates further employment growth of in the next twelve months. Approximately sixty-three percent of the industry earns an average two percent after tax and the overall average is only four percent. The industry has not seen an improvement in profit in recent times.
6. The restaurant industry comprises fifty-eight percent of the hospitality industry and some sixty-two percent of employment in the industry. The average number of employees per business is approximately eight.

### **Legislative Context**

7. Section 156(2)-(5) of the *Fair Work Act 2010* (**FW Act**) prescribes the steps to be followed by the Commission in conducting a 4 yearly review of modern awards, thus:

“(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.

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

*Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).*

*Note 2: For reviews of default fund terms of modern awards, see Division 4A.*

*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.”*

8. Section 134 of the FW Act requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net taking into account, *inter alia*, the need to promote social inclusion through increased workforce participation (s.134(1)(c)); the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); the principle of equal remuneration for work of equal or comparable value (s.134(1)(e)); and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g)); and the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

## Previous decisions

9. In the Commission's decision of the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues<sup>1</sup> the review process was outlined as follows:

*[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act.<sup>14</sup> In the Review 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.' <sup>15</sup><sup>2</sup>*

10. RCI submits that the Commission should not detract from the precedent set by its predecessor in reviewing the Restaurant Award. In particular, it should have particular regard to the operational requirements of the restaurant and catering industry.
11. It is important to note that in creating the Restaurant Award, the AIRC adopted the direction from the Minister as outlined in s27A. See also paragraph 10 below.

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<sup>1</sup> [2014] FWCFB 1788.

<sup>2</sup> Ibid [24].

## Award History

12. The creation of the Restaurant Award was completed during the award modernisation stage in 2009 by this Commission's predecessor, the Australian Industrial Relations Commission (AIRC). Prior to the inception of the Restaurant Award, the restaurant and catering industry was covered by the *Hospitality Industry (General) Award 2010* (“**Hospitality Award**”) which came into effect on 1 January 2010, pursuant to an award modernisation request from the Minister for Employment and Workplace Relations in accordance with s.576C(1) of the *Workplace Relations Act 1996* on 28 March 2008.<sup>3</sup>
13. The Minister's request was on 28 May 2008, directing the Commission to create a separate modern award for the 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 in [sic] the industry's core trading times.”<sup>4</sup>*

14. In creating the restaurant award, the AIRC was guided by the pre-reform restaurant awards, NAPSAs, the *Hospitality Industry (General) Award 2010*, as well as the varied consolidated request from the Minister (see above).
15. In creating the Restaurant Award, the AIRC determined to follow the Minister's amended request

*“[193] 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.**”* Emphasis added.

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<sup>3</sup> [\[2009\] AIRCFB 555.](#)

<sup>4</sup> [Variation of Award Modernisation Request Under Section 576C\(4\).](#)

16. In addition to the matters which have already been dealt with or are currently being dealt with by this Commission, which do not form part these claims, RCI considers that the claims outlined in these submissions are necessary to achieve the aforementioned legislative requirements. Further, RCI's proposed changes to the Restaurant Award are necessary, having regard to the significant changes within the environment in which the industry operates, which have evolved over time since the creation of the Restaurant Award. RCI submits that a review of the Restaurant Award is imperative in light of the requirements under section 134 FW Act, as outlined in paragraph 5 above. RCI accordingly proposes the following changes to the Restaurant Award.
  
17. **Clause 1 (Award Title)** – RCI submits that it is appropriate to amend the title of the award to read: “*Restaurant, Café and Catering Industry Award 2010*” as this would accurately reflect the variation RCI is seeking in clause 4 relating to coverage (see paragraph 15 below). RCI submits that the variation is appropriate as restaurants and caterers can be classified in the same category in terms of the type of services they provide, as both are in the business of selling food. In contrast, the hotels and clubs are in the business of selling liquor and offering gaming services.
  
18. Further, the operational requirements that apply to the restaurant industry equally apply to the catering industry, and can similarly be distinguished from the operational requirements of the hospitality, clubs and gaming industries.
  
19. **Clause 3 (Definitions)** – the definitions section of the Award, in particular “*appropriate level of training*” should be varied to reflect the classification levels and requirements as determined by the appropriate training and educational bodies, which incorporates any changes made by these training and education bodies from time to time.

RCI will adduce reports and witness statements from representatives of relevant training and educational bodies.

20. **Clause 4 (Coverage)** – RCI submits that it is necessary to include in the coverage provision of the Restaurant Award, the term ‘stand-alone caterers’ who represent a sizeable number of RCI membership. In considering the coverage provision at the 2009 award modernisation stage, the AIRC noted:

*“[185] In its Stage 4 submission of 24 July 2009 the Australian Government clarified the intention of the variation to the request in these terms:*

*“Scope of the modern award*

*10 The Minister’s variation to the request that ‘restaurant and catering’ be removed from coverage under the HIGA (the Hospitality Award) is intended to refer to those restaurants and catering activities that are operated as part of a restaurant business.*

*11 The variation is not aimed at stand-alone catering businesses such as those operating on a contract basis in the airline, defence or mining industries. Nor is it directed towards eateries established within licensed clubs, hotels or other similar premises.*

*12 The Government considers that these types of restaurant and catering businesses have a very different operating base to restaurants and should remain covered by the broader Hospitality Award.”<sup>5</sup>*

RCI submits that it is not necessary to limit the coverage of ‘catering activities’ to only those types of activities that are associated with or operated as part of a restaurant. Further the definition ascribed to ‘stand-alone catering’ are too restrictive, as other types of catering services are provided, which do not necessarily come within the confines of the examples given in subparagraph 11 above.

There are many variations to the types of services that catering businesses offer. One which is nowadays very common include catering services coupled, which may include venue hire. Typically, the types of businesses RCI’s members are engaged in include providing catering services for weddings, birthdays, anniversaries and other special occasions. The type of activities these businesses engage in would be appropriately described as ‘stand-alone caterers’ or ‘contract caterers’.

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<sup>5</sup> [\[2009\] AIRCFB 865](#).



RCI therefore submits that ‘contract caterers’ should be removed as an exempted activity in clause 4.8(a) of the Restaurant Award.

RCI will adduce lay witness statements to support its claim.

21. **Clause 15 (Junior employees)** – AIRC relied upon Federal award and two Queensland NAPSAs in creating this provision:

*“[206] We have included the requirement to pay adult wages to juniors engaged in the service of liquor by juniors in the exposure draft, reflecting Federal award provisions and the provisions of the two Queensland NAPSAs.”<sup>6</sup>*

RCI submits that in light of significant changes within the industry, it is appropriate to remove the requirement in the provision to pay junior employees who serve alcohol at the full adult rate. In doing so, a revision of the whether the type of service and activity being undertaken by junior employees who are currently captured under this provision are properly classified as constituting the service of alcohol. RCI submits that junior employees who would be appropriately covered under this provision are those employees who receive orders and payment for alcohol. Typically, due to the change in practices of the industry and the duties assumed by junior employees, these employees occasionally deliver alcohol to customers, without receiving orders or payment. As such, these junior employees should be classified as properly engaging in the service of liquor, as prescribed by the provision and should not be paid at the full adult rate.

RCI will adduce lay witness evidence to support its claim to amend this provision.

22. **Clause 20 and Schedule B (Classification structure and wage levels)** – RCI submits that due to the changing environment and operational requirements of the industry, it is imperative to amend the classification structure to properly reflect current work activities, as well as identify any work activities which no longer apply and should therefore be removed. In order to achieve this, RCI proposes reducing the current six levels of classification structure to four levels of classification structure.

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<sup>6</sup> [Ibid](#) at paragraph 206.

RCI will adduce lay witness evidence to support its claim to amend this provision.

23. **Clause 27 (Payment of wages)** – It is submitted that this provision was created at a time when the main form of payment of wages was by either cash or cheque payment. As such, RCI submits that this provision is outdated and restrictive in a modern world where payment of wages can be made in many forms, such as by cash, cheque, electronic funds transfer (EFT) via computer or other electronic devices on any day of the week. It is necessary therefore to remove the restriction that wages and other entitlements must be paid on any day except on Friday, Saturday, or Sunday. This would alleviate the administrative burden currently experienced by employers in this industry. RCI further submits that an appropriate alternative provision would be similar to the payment of wages provision in the *General Retail Industry Award 2010*.

RCI will adduce expert evidence to support its claim to amend this provision.

24. **Clause 31 (Hours of work)** – RCI no longer presses this claim.
25. **Clause 32 (Meal breaks)** – this provision was derived from the *Hospitality Industry (General) Award 2010*. RCI submits that hotels and accommodation industries have operational requirements that are very different to the operational requirements of the restaurant and catering industry. For example, in a restaurant environment on any given day, staff typically commence their work hour at 5:00pm to set up and prepare for dinner service for approximately one hour. Staff will then take a thirty-minute break prior to serving customers at 6:30pm. Staff generally continue dinner service from 6:30pm and will have a fifteen-minute break at 10:30pm, before undertaking their final duties and finishing for the evening. RCI therefore submits that it is necessary to delete subclauses 32.3 and 32.4.

RCI will adduce lay witness evidence to support its claim to amend this provision.

26. **Clause 33 (Overtime)** – the AIRC in their 25 September 2009 Statement determined that there was no requirement to include any provisions relating to ‘rostered days off’ (RDOs) on the basis that there was no occurrence of this type of provision in the industry and is therefore unnecessary:

*“[222] We have not included any provisions dealing with rostered days off (RDOs) in the exposure draft. We are unaware of the incidence of RDOs in the industry and the necessity, or otherwise, for the retention of these provisions. We invite further information on the question.”<sup>7</sup>*

It is noted that the provision was borrowed from the *Mining Industry Award 2010*. RCI submits that to avoid any inconsistency within the Restaurant Award, the meaning of the term ‘rostered days off’ should be amended to mean ‘non-working day’, as the current interpretation of RDO has the general industrial meaning a ‘paid day off’, which causes significant confusion.

RCI will adduce lay witness evidence to support its claim to amend this provision.

27. **New clause (Deductions for accommodation and meals)** – RCI seeks to insert a new provision in the Restaurant Award to deal with giving employers the opportunity to account for non-monetary benefits provided to staff. The practical application of this proposed provision would enable employers to deduct an amount (at market rate) from employees’ wages for any provision of meals and accommodation to employees.

RCI will adduce lay witness evidence to support its claim to amend this provision.

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<sup>7</sup> [\[2009\] AIRCFB 865](#).



FAIR WORK  
COMMISSION

## DRAFT DETERMINATION

### RESTAURANT INDUSTRY AWARD 2010

[MA000119]

Restaurant Industry

4 YEARLY REVIEW OF MODERN AWARDS – GROUP 4

SYDNEY, 2016

- A. Further to the decision [ ] FWCFB ] issued by the Fair Work Commission on ,  
the  
*Restaurant Industry Award 2010* is varied as follows:
1. By deleting the current title of the award and replacing with the following:  
  
**Restaurant, Café and Catering Industry Award 2010**
  2. By amending clause 3 of the award as follows:
    - (a) Delete the current definition of “*appropriate level of training*” in clause 3.1 and replace with the following:  
  
*“appropriate level of training means classification levels as prescribed by the Travel, Tourism and Hospitality Industry Reference Committee of the Australian Industry and Skills Committee.”*
    - (b) Delete the definition of “*restaurant industry*” in clause 3.1 and insert the following:

**“restaurant industry** means restaurants, stand-alone or contract caterers, reception centres, night clubs, cafes and roadhouses, and includes any tea room, café, and catering by a restaurant business but does not include a restaurant operated in or in connection with premises owned or operated by employers covered by any of the following awards:

- (a) *Hospitality Industry (General) Award 2010*
- (b) *Registered and Licensed Clubs Award 2010*; or
- (c) *Fast Food Industry Award 2010*”

3. By deleting subclause 4.8(a) and replacing with the following:

*“(a) Accommodation services on a contract or fee-for-service basis;”*

4. By deleting the following wording from sub-clause 15.1:

*“Junior employees working as liquor service employees must be paid at the adult rate of pay in clause 20.1 for the classification for the work being performed.”*

5. By deleting the existing clause 27 and replacing with:

*“All wages including overtime and other entitlements may be paid on any day of the week.”*

6. By deleting sub-clauses 32.3 and 32.4.

7. By deleting the words “rostered day off” in sub-clause 27.3 and replacing with:

*“non-working day”*

8. By deleting the words “rostered day off” in sub-clause 31.6(b) and replacing with:

*“non-working day”*

9. By deleting the words “rostered day off” in sub-clause 33.2(d) and replacing with:

*“non-working day”*

10. By deleting the words “rostered day off” in sub-clause 38.2 and replacing with:  
*“non-working day”*

11. By deleting the words “rostered day off” in sub-clause F.1(d) and replacing with:  
*“non-working day”*

B. The variations to commence on [ ].

PRESIDENT