



Restaurant  
& Catering

SAVOUR  
AUSTRALIA



11 May 2016

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

Dear Associate,

#### **4 Yearly Review of Modern Awards—Penalty Rates – Matter No. AM2014/305**

We refer to the Directions Hearing before President Ross on 29 April 2016. Restaurant and Catering Industrial (**RCI**). RCI understands that, arising out of the Directions Hearing, its response has been requested in respect of two matters.

Firstly, RCI has been requested to provide an amended draft Determination reflecting its varied position.

A draft Determination is **enclosed**. In summary, RCI has deleted its claims relating to the time in lieu provisions, namely subclauses 34.4(c) and (d) in the *Restaurant Industry Award 2010* and subclause 30.3 in the *Fast Food Industry Award 2010*. Those claims are no longer pressed.

Secondly, at PN 26896 to PN 26902, a discussion occurred relating to the decision of the Full Bench in *Restaurant Industry Award – Transitional Review* [2014] FWCFB 1996.

In particular, during the oral submissions of counsel for RCI, it was submitted that the decision of the majority adopting a two tiered approach in respect of the Sunday penalty rate for casual workers was not consistent with the disruption and/or inconvenience caused to casual workers at the different levels in practical terms. Therefore, such a differentiation in the Sunday penalty rate was not supported by the rationale for such a penalty rate.

Rather, a consistent approach ought to be adopted in respect of all of the levels of casual workers for work performed on a Sunday. That is, the Sunday penalty rate and casual loading should not exceed 50% for all casual workers. (The above referred to as the **Consistency Argument**.)

During the oral submissions, counsel for RCI was questioned about whether the Consistency Argument had been raised in the earlier proceedings. At a later stage during the proceedings on 12 April 2016 at PN 27073 to PN 27074, counsel responded to confirm his instructions that:

- The possibility of the majority adopting a two tiered approach to the Sunday penalty rate for casual workers was not foreshadowed during the hearing;



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- Accordingly, it was not the subject of any argument or debate;
- RCI also did not raise the Consistency Argument, not appreciating that the majority may adopt an approach of distinguishing between Level 1 and 2 casual workers on the one hand and Levels 3 to 6 casual workers on the other hand for the purposes of determining the Sunday penalty rate.

RCI now confirms the above position in response to the enquiry of the President.

Please let us know if there are any further questions arising from the above explanations.

Yours sincerely,



**Restaurant & Catering Industrial**



FAIR WORK  
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# DRAFT DETERMINATION

## RESTAURANT INDUSTRY AWARD 2010

[MA000119]

Restaurant Industry

PENALTY RATE FULL BENCH

SYDNEY, 2016

A. Further to the decision [ ] FWCFB ] issued by the Full Bench of the Fair Work Commission on , the *Restaurant Industry Award 2010* is varied as follows:

1. By deleting clause 34.1 and 34.1A and inserting the following new clause 34.1 in lieu thereof:

### **34.1 Penalty rates for work on weekends and public holidays**

An employee working ordinary time hours on the following days will be paid the following percentage of the minimum wage in clause 20 – Minimum wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	125	150
Casual employees	125	150	150	150

2. By deleting 34.2 and inserting the following new clause 34.2 as follows in lieu thereof:

### **34.2 Additional payment for work done between the hours of Midnight and 5.00 am Monday to Friday**

(a) An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked.

(b) For the purposes of this clause midnight will include midnight Sunday.

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B. The variations to commence on [ ].

PRESIDENT



FAIR WORK  
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# DRAFT DETERMINATION

## FAST FOOD INDUSTRY AWARD 2010

[MA000003]

Fast Food Industry

PENALTY RATE FULL BENCH

SYDNEY, 2014

- B. Further to the decision [ ] FWCFB ] issued by the Full Bench of the Fair Work Commission on , the *Fast Food Industry Award 2010* is varied as follows:
3. By deleting clause 25.5 and inserting the following new clause 25.5 in lieu thereof:

### 25.5 Penalty rates

#### (a) Penalty rates for work on weekends and public holidays

An employee working ordinary hours of work on the following days will be paid the following percentage of the minimum wage in clause 17 – Minimum weekly wages for the relevant classification:

Type of employment	Monday to Friday	Saturday	Sunday	Public holidays
	%	%	%	%
Full-time and part-time	100	125	125	150
Casual employees	125	150	150	150

#### (b) Additional payment for work done between the hours of Midnight and 5.00 am Monday to Friday

An employee, including a casual, who is required to work any of their ordinary hours between the hours between midnight and 5.00 am Monday to Friday inclusive, must be paid an additional shift allowance of 5% per hour worked. For the purposes of this clause midnight will include midnight Sunday.

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B. The variations to commence on [date].

PRESIDENT