



Restaurant
& Catering

IN THE FAIR WORK COMMISSION

FOUR YEARLY REVIEW OF MODERN AWARDS

**RESTAURANT INDUSTRY AWARD 2010
ANNUALISED WAGE ARRANGEMENTS - MATTER NO.: AM2016/13**

SUBMISSIONS IN REPLY

23 March 2018

1. These submissions are made in response to the decision of the Full Bench dated 20 February 2018 (**‘Decision’**) in particular the matters to be addressed in numbers 1, 2 and 4 in paragraph 134 of the Decision.
2. RCI appreciates the Commission’s acceptance of its claim in these proceedings, to amend clause 28.2 of the *Restaurant Industry Award 2010* to include annual leave loading as part of the annualised salary arrangement. The changes will allow employers to better manage their finances, create certainty in labour costs, as well as enabling administrative simplicity for employers. Importantly, employees will benefit from having certainty that all of their entitlements under the award are paid.

Adoption of model clause/variation to existing annualised salaries provision

3. As noted by the Full Bench in its Decision, the Restaurant Award is one of only 19 awards out of 122 modern awards that currently have an annualised salary provision.¹ The provision remain unchanged since the creation of the award as part of the Award Modernisation process and has been successfully used by employers in the industry, who elect to remunerate their employees through the annualised salary mechanism. The only change to the existing clause, which RCI considers would further benefit employers and employees alike, is the inclusion of annual leave loading as part of the annualised salaries arrangement, as outlined in the draft determination filed by RCI.² Other than this change, RCI submits that the existing provision should remain the same.
4. Section 138 of the Act requires that *‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective...’* RCI submits that replacing the existing annualised salaries provision in clause 28 of the Restaurant Award with any of the model clauses proposed by the Full Bench, is not necessary to achieve the modern awards objective.

¹[2018] FWCFB 154 at [106].

² AM2016/13 – RCI Submission dated 17 October 2016.

5. Further, as noted by the Full Bench, they *'do not consider that any current annualised wage arrangements provision fails to comply with the requirements in s 139(1)(f)(i) and (ii), and no party contended otherwise.'* The only issue that arises is whether s139(1)(f)(iii) is satisfied to the extent that sufficient safeguards are included to ensure that employees are not disadvantaged.³ The available mechanism in the annualised salaries provision in the Restaurant Award that deals with this issue is the weekly record-keeping and reconciliation requirements to be undertaken by the employer after a twelve-month period, pursuant to clause 28.2 of the award. Notwithstanding the two possible issues identified by the Full Bench that may arise in respect of this clause⁴, compared to other awards, the Full Bench noted throughout its decision that the requirements in clause 28.2 of the Restaurant Award are more stringent, in the sense that the provision would more easily satisfy the requirements under s139(1)(f)(iii).⁵

6. A further safeguard for employees can be found in clause 28.1(a) and (b):

'...provided that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.'

7. RCI accordingly submits that there are sufficient safeguards already in place in the existing annualised salaries provision of the Restaurant Award, which takes away the need to amend the clause to the extent proposed by the Full Bench.

8. RCI acknowledges issues of non-compliance within the industry and is continuing to address this, particularly with respect to its own members. In relation to non-compliance, it should however be noted that of the two witnesses called by United Voice, only one witness was employed under the Restaurant Award, with the other witness (Mr Yuan) being employed under the *Hospitality Industry (General) Award 2010*. As such, with respect, the Commission should not have relied upon his evidence in making the observation that no reconciliation was completed by the business in accordance with the requirements under

³ Ibid [117].

⁴ Ibid [119], [120].

⁵ Ibid {121}, [123], [125], [126].

clause 28.2 of the Restaurant Award. Similarly, although the other witness was employed under the Restaurant Award, as the witness was only employed for a period of six months, it would not be a fair assumption that the business failed to meet its obligation to undertake a reconciliation, as this is not required to be undertaken by the business until after the twelve month period.

9. RCI submits that adopting any of the model clauses, which requires additional information to be provided by employers, than what is currently required under the existing provision, would impose significant regulatory burden on business owners in the restaurant, café and catering industry, who largely consist of small operators with limited resources.
10. The additional information (as outlined below) which employers would be required to provide if any of the model clauses were implemented, would be particularly problematic, in circumstances where the operations of a business are subject to seasonal fluctuations and the hours and days worked by an employee are subject to change week to week:

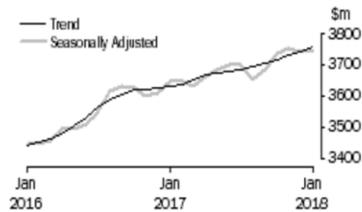
‘(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).’

11. As noted in our previous submissions⁶ filed in these proceedings, as far as the restaurant, catering and café industry are concerned, there are certain months of the year when businesses are more busy, compared to other quieter months, as illustrated in the updated Australian Bureau of Statistic data below:

⁶ AM2016/13 – RCI Submission dated 24 November 2016.

CAFES, RESTAURANTS AND TAKEAWAY FOOD SERVICES

In current prices, the trend estimate for Cafes, restaurants and takeaway food services rose 0.3% in January 2018. The seasonally adjusted estimate rose 0.1%. By industry subgroup, the trend estimate rose for Cafes, restaurants and catering services (0.4%) and was relatively unchanged for Takeaway food services (0.0%). The seasonally adjusted estimate rose for Cafes, restaurants and catering services (0.5%) and fell for Takeaway food services (-0.6%).



This page last updated 5 March 2018

SOURCE: ABS 8501.0 Retail Trade, Australia

12. The seasonal nature and fluctuations in demand relating to the hospitality and tourism industry was also captured in a study conducted by Deloitte, which showed that fifty-nine percent of businesses were identified as being seasonal.⁷
13. Section 134(1)(f) of the Act require the FWC to *'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account: 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.'*
14. Further, subsection 134(1)(g) requires *'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards'*.
15. RCI considers that the complexity of the terms proposed in the model clauses would not only negatively affect the productivity, employment costs and regulatory burden of businesses, it would also do little to assist employers to comply with their obligations under the Award.

⁷ Deloitte Access Economics: Australian Tourism Labour Force Report: 2015-2020, Australian Trade Commission, Austrade, October 2015, p. 63.

16. RCI acknowledges that there may be some similarities between different industries that would justify harmonising the annualised salaries provision in the awards. However, RCI considers that there is an even greater need to assess each award in its own right, having regard to the operational requirements of the particular industry and the terms of its award, as required pursuant to s139(f)(i) of the Act. This proposition was also contemplated in the National Retail Association case:

“...The purpose of the requirement to review a modern award “in its own right” is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations. It is not directed to the manner in which intra-award considerations are to be dealt with.”⁸

Application of annualised wage arrangement with part-time employees

17. The existing provision in clause 28 of the Restaurant Award is applicable to all permanent employees. For the reasons set out above, this further supports the need to maintain the existing provision.

Conclusion

18. For the reasons outlined above and in the absence of any evidence that the current annualised salaries provision in the Restaurant Award fails to comply with s139(1)(f)(i)-(iii) of the Act, RCI submits that save for the inclusion of annual leave loading, as outlined in the draft determination filed by RCI in these proceedings,⁹ there is no good reason to amend the current provision in the Award. Given that sufficient safeguards are already in place in the existing Award, pursuant to s139(1)(f)(iii), the industry would be better served and there is a greater chance of compliance with the existing clause than any of the proposed model clause.

Restaurant & Catering Industrial

⁸ *National Retail Association v Fair Work Commission* [2014] FCAFC 85.

⁹ AM2016/13 – RCI Submission dated 17 October 2016.