

Fair Work Act 2009
s.156—4 yearly review of modern awards
4 yearly review of modern awards—Plain language
project (AM2016/15)
Fast Food PLED

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Submitted by: Angelo Pardo
SDA National Office
Level 6
53 Queen Street
MELBOURNE VIC 3000

Telephone: (03) 8611 7000

Email: angelo@sda.org.au

INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association (SDA) notes its previous submissions of 25 November and 9 December 2020.
2. The SDA makes these further submissions in accordance with the next steps identified in paragraph 13 of the Statement of the Full Bench on 18 February 2021.

Standard Rate - Items 4 and 35

3. The *Fast Food Industry Award 2010* (FFIA) defines the standard rate as:
standard rate means the minimum weekly wage for a Fast Food Employee Level 2 in clause 17—Minimum weekly wages. Where an allowance is provided for on an hourly basis, a reference to standard rate means 1/38th of the weekly wage referred to above.
4. This definition clearly defines the standard rate as a weekly rate, while making allowance for an hourly calculation where necessary. It is clear, concise and settled.
5. The FFIA PLED proposes to alter the definition of standard rate from its current wording to refer only to an hourly rate. Such a change is unwarranted and, if accepted, would put the FFIA out of step with the *General Retail Industry Award 2020* which provides for both a weekly and an hourly rate at clause 2 definitions.
6. Furthermore, while an Award provides the minimum entitlements for an industry, it also provides a practical framework for enterprise bargaining. The provision in the Award for a weekly standard rate allows for enterprise agreements to have a clear reference point in the event that weekly allowances are negotiated for.
7. An example of this is the redefinition of the Broken Hill allowance from being calculated from the weekly standard rate, to its hourly iteration. Together with the standard rate, many enterprise agreements rely on the definition of the Broken Hill allowance. Such a change can have inadvertent consequences for companies and their payrolls.
8. It is submitted that given the considerations above and the negligible benefit, the standard rate in the PLED should make reference to a weekly and hourly rate.

Coverage - Items 7 to 13

9. Section 48(1) of the *Fair Work Act* provides that 'A modern award covers an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.'
10. As such, coverage is of pre-eminent importance in the drafting of an Award as it decides whether a particular employee, organisation or employer will be covered by that Award.
11. The wording of the coverage provision in the current FFIA is concise and settled. Both AIG and the SDA have made submissions which raise serious concerns that the re-drafting of such a fundamental provision to little or no benefit is both unsafe and

unnecessary.

12. AIG's substantive submissions on items 7 through 9 are a pertinent example of the drastic, albeit inadvertent, impact a change to the coverage provision may have.
13. An example is the change in the definition of fast-food industry at PLED clause 4.2. The current FFIA provision at FFIA clause 3 begins: "means the industry of taking orders for and/or preparation and/or sale and/or delivery of."
14. The PLED definition replaces 'and/or' with a comma: 'In this award fast food industry means the industry of taking orders for, preparing, selling or delivering any of the following...' This change renders ambiguous a previously clear statement, that is that any of the activities listed in the sentence satisfies the definition. It is submitted that the 'and/or' as in FFIA definition at clause 3 be included in the PLED.
15. Similarly, it is submitted that 'and/or' be placed at the end of each sentence of PLED 4.2(a) and (b).
16. Other changes which are of little to no benefit include the change at the first bullet point from 'consumed away from the point of sale' to 'for consumption away from the point of sale'. It is submitted that the current 'consumed away from the point of the sale' is more easily understood.
17. It is submitted that the retention of the wording in the current FFIA clauses 4.5 and 4.6 would be of greater clarity and certainty than the PLED wording at 4.3.
18. It is submitted that the exclusion of employees covered by an enterprise instrument at 4.4(b) should be amended to include the following "unless otherwise provided in that modern enterprise award or enterprise instrument". This allows for enterprise agreements which incorporate part of the Award into its own provisions.

Part-time employees - Item 15

19. The SDA objected in its submissions of 25 November 2020 to the lack of similar provision at clause 10.2 of PLED to the current FFIA 12.7. Namely, that in the FFIA the minimum daily engagement of 3 hours is not only a minimum daily engagement but a minimum rostered engagement.
20. AIG opposes the amendment of the PLED 10.2 to include a reference to minimum roster requirement on the basis that the Award does not contain substantive provisions requiring that employees must be rostered or that a roster must be prepared.
21. Such a submission does not reflect a plain reading of the Award or the PLED.

22. Clause 12.2 of the current FFIA (which is reflected in substance at PLED 10.3) requires in effect a roster for a part-time employee to be agreed at the time of first being employed. The matters to be agreed upon cover:
- (a) the number of hours worked each day;
 - (b) which days of the week the employee will work;
 - (c) the actual starting and finishing times of each day;
 - (d) that any variation will be in writing, including by any electronic means of communication (for example, by text message);
 - (e) that the daily engagement is a minimum of 3 consecutive hours; and
 - (f) the times of taking and the duration of meal breaks.
23. Furthermore, it is to be particularly noted that at 12.2(d) any variation to the above agreement must be in writing.
24. The Commission dealt with the part-time provisions of the FFIA in [2019] FWCFB 272, in responding to a claim of AIG to replace the part-time clause in the Award with a more flexible part-time clause.
25. The Full Bench rejected the claim of AIG for a more flexible part-time provision, for among other reasons:
- a. At paragraph [128] that the Full Bench was not persuaded it would encourage enterprise bargaining;
 - b. The Full Bench noted at paragraph [138] that the impact of the change sought by AIG would be that a part-time employee could be rostered at any time within their 'agreed availability' and that 'the times they could be required to work may change from week to week'.
 - c. At [140] the Full Bench noted that the employees' roster 'may change from week to week' as a result and that this was very different to the existing part-time provision [141-143].
26. It is to be noted that AIG in the abovementioned matter sought to replace the current protections afforded by FFIA 12.2 with a new rostering provision, indicating a nexus between the two.¹
27. It is to be noted the deletion of 'on any shift' and the replacement of those words with 'daily' in PLED clause 10.2 may have an inadvertent impact on employees working across different days.
28. It is clear that not only does the FFIA require the rostering of part-time employees, the Full Bench of the Commission has also decided against a variation of the Award which would minimize this. It is submitted that the proposed amendment of the SDA be made to PLED 10.2:
- 10.2 The minimum ~~daily~~ **rostered** engagement for a part-time employee is 3 consecutive hours **on any shift**.

¹ [2019] FWCFB 272 at paragraphs [94] and [95].

Part-time employees - Item 17

29. The SDA notes paragraph 11 of its submissions of 25 November 2020 where it proposed the words 'at the time of first being employed be retained. Given that AIG does not oppose this proposed change and that 'employed' is a clearer and more readily understood term than 'engaged', the SDA presses its submission.

Part-time employees - Item 18

30. The SDA notes its submissions of 25 November 2020 at paragraph 14 that PLED 10.8 be amended to make reference to penalty rates. AIG opposes this amendment on the basis that various other provisions may also be relevant to the amount payable but to reference them all would cause unnecessary complexity.
31. In reply, the SDA submits that it proposes only a reference to penalty rates (as noted in its initial submission). Such a minor amendment would serve to clarify the amount payable and ensure the practical usability of the Award.

Casual employees - Item 19

32. The SDA notes its submissions of 25 November 2020 at paragraph 16, where, consistent with its submissions regarding Item 18 above, the SDA proposes an amendment that clarifies the amounts payable to casual employees.
33. For clarity, it is to be noted that the SDA submission is that the content of Note 2 be appended to the end of PLED clause 11.3.

Classifications - Items 21 and 22

34. The SDA notes its submissions, together with the submissions of AIG regarding item 21 and PLED 12.4.
35. The SDA notes that PLED 12.4 changes some fundamental aspects of the definition of the classifications so as to render the previously clear and concise definitions ambiguous. An example is the change of 'receipt of orders' to 'taking orders for'. Receipt of orders has a clear meaning, that is an employee receives the order from the customer. Whereas 'taking orders for' can connote a more active role.
36. Similarly, the change from 'cooking' to 'preparing' could render a retail employee who places an item in a bag, or on a tray for consumption arguably within the definition.
37. It is submitted that the current Classification definitions at Schedule B of FFIA are clear, concise, settled and so should be retained.

Shiftwork and Annual Leave - Item 50

38. AIG submits that nothing in the Award refers to or provides for shiftwork and as such the definition and subsequent references to it in the annual leave provision should be deleted.
39. Such a submission misconceives the nature of the Award, together with the purpose for additional leave.
40. Section 87(3) of the Act provides:
- (3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:
- (a) the employee:
- (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and
- (ii) is regularly rostered to work those shifts; and
- (iii) regularly works on Sundays and public holidays; or
- (b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.
41. Nothing in the Award prevents an employee from being rostered in this manner. The Commission is able to take notice of the fact that many fast-food establishments operate on a 24 hours a day, 7 days a week model, which clearly facilitates shiftwork.
42. Furthermore, AIG has referred in submissions to the Commission to employees ‘working shifts’ as seen at paragraph [80] of the Full Bench decision:
- [80]** Ai Group submits that the need to provide additional remuneration for employees working unsocial hours or working shifts is a neutral consideration as:
- the insertion of the proposed facilitative provision into the Fast Food Award itself will not affect the provision of additional remuneration for employees working unsocial hours or working shifts; and
- the reduction in the penalty rate between 5.00am and 6.00am, where an agreement is made between an employer and a majority of employees concerned pursuant to the proposed facilitative provision, is a reflection of the fact that the employer and the majority of employees concerned do not regard the period of 5.00am to 6.00am to be unsocial hours or shift work hours that need to attract an evening penalty and is outweighed by other considerations affecting the employees concerned (such as the earlier finishing of ordinary hours of work).²

Classifications, Breaks, Travelling Time, Transport Reimbursement, Annual Leave - Items 30, 39, 40 and 51 to 55

² [2019] FWCFB 272.

43. The SDA notes its submissions dealing with items 20, 30, 39, 40 and 51 to 55, together with the request of AIG to make further submissions on these matters.

44. The SDA will respond to AIG when their submissions are to hand.