
S 157 of Fair Work Act 2009 (Cth)

AM2020/11

JOINT SUBMISSION

**APPLICATION TO VARY RESTAURANT INDUSTRY
AWARD 2010**

- and -

31 MARCH 2020

Background

1. This joint submission is made by Restaurant & Catering Industrial (**RCI**) and the United Workers Union (**UWU**) in support of the Application by RCI filed on 30 March 2020 (**Application**) to vary the *Restaurant Industry Award 2010* (**the Award**).
2. The Application is supported by the UWU and the ACTU.
3. In addition to these submissions, the Application has provided detailed grounds and reasons (Annexure B) in support of the Application.

The Context of the Application

4. In *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [34]-[39] (**the Clerks COVID-19 Decision**), the Full Bench outlined the statutory context relevant to a s 157 variation application.
5. Without seeking to repeat these passages, the parties acknowledge and agree that the above decision outlines the relevant formulation of the statutory context for this Application.
6. The factual context of this Application and the prevailing circumstances of the COVID-19 global pandemic giving rise to it are specifically addressed in Annexure B to the Application.
7. This context is also addressed by the Full Bench in [2020] FWCFB 1574 at [16]-[30] (**the HIGA COVID-19 Decision**) in relation to the Hospitality Industry. Relevantly identical challenges are currently faced by employees and employees in the Restaurant Industry.

Principal Features of the Application

8. The Application seeks variations to the Award in relation to:
 - (a) the range of duties an employee can be required to perform, with this

scope being limited by safety considerations and an employee's skill and competency, license or qualification (see I.2.1);

(b) the hours of work required to be provided to full-time and part-time employees. Any such variation is subject to certain safeguards including a requirement to consult and an obligation to accrue, calculate and pay leave entitlements on the basis of the employee's hours of work that prevailed prior to variation (see I.2.2);

(c) flexibility in relation to the taking of leave with:

(i) employers being afforded the flexibility to direct the taking of annual leave on 24 hours' notice; and

(ii) employees being afforded the flexibility to take accrued leave at 'half-pay' (this will double an employee's leave entitlement);
(see I.2.3); and

(d) close down provisions of the Award, increasing the ability for an employer to require an employee to take annual or unpaid leave during a period of close-down (see I.2.5).

9. In broad terms, the Application provides employers in the Restaurant Industry with a measured level of flexibility during a period of unprecedented crisis. This may facilitate employers being able to offer workers paid work in circumstances where, if the Award was not varied, they would be unable to do so. At the same time, the Application seeks to preserve the fundamental basics of restaurant industry wage structures under the Award. The parties submit that it is a measured and appropriate modification to deal with an extraordinary situation facing the Restaurant Industry.

10. As noted above, there have now been two Fair Work Commission decisions varying modern awards in response to COVID-19; the Clerks COVID-19 Decision

and the HIGA COVID-19 Decision (**the Decisions**).

11. The provisions sought by the Application mirror provisions already accepted in the Decisions. Specifically:
 - (a) Clause I.2.1 mirrors clause L.2.2 which was inserted into the *Hospitality Industry (General) Award 2010*;
 - (b) Clause I.2.2 mirrors clause L.2.2 which was inserted into the *Hospitality Industry (General) Award 2010*;
 - (c) Clause I.2.3 mirrors clause L.2.3 which was inserted into the *Hospitality Industry (General) Award 2010*;
 - (d) Clause I.2.4 mirrors clause L.2.4 which was inserted into the *Hospitality Industry (General) Award 2010*; and
 - (e) Clause I.2.5 mirrors clause I.2.7 which was inserted into the *Clerks - Private Sector Award 2010*.
12. The parties respectfully submit that the identical nature of the provisions sought by the Application when compared with those considered and accepted in the Decisions should provide the Commission with some comfort that the provisions sought are necessary to achieve the Modern Awards Objective.
13. Four aspects of the Application warrant emphasis.

The Application is made by Consent

14. Both RCI and UWU advance the Application by consent and agree that the variations sought are permissible pursuant to section 139 of the *Fair Work Act 2009* (Cth) and necessary pursuant to section 157 to meet the requirements of section 134.
15. The Application is also supported by the ACTU.

The Variation is Temporary

16. Secondly, the proposed variations are intended to be short-term variations, justified only by the unique and unprecedented nature of the current crisis facing the Restaurant Industry. Accordingly, prima facie, the variations are only intended to operate until 30 June 2020.
17. The Application does contemplate that the proposed variations may be extended on application.
18. Discussions between the parties envisage that any extension of the proposed arrangements beyond 30 June 2020 would:
 - (a) only be for a further temporary period;
 - (b) only be justified where adverse conditions relating to the COVID-19 pandemic continued; and
 - (c) proceed with the consent of the parties.
19. All parties reserve their rights to agree or oppose any future attempt to extend the variations sought by the Application beyond 30 June 2020.

Requirement to Consult

20. Thirdly, the Application envisages that where flexible work arrangements sought by the Application are pursued, consultation with affected employees must occur and, where appropriate, this also must occur with the UWU.

Employees should not be disadvantaged in respect of Leave entitlements

21. Finally, the intention of the parties in pursuing the Application is to ensure that employees whose hours are varied under new arrangements are not disadvantaged with respect to the accumulation or payment of their leave entitlements. The Application envisages that following the cessation of the temporary variation to the Award, employees will be in the same position in

respect of leave accrual and payment as they would have been if the variation had not been made. This means:

- (a) leave entitlements will continue to accrue based on an employee's ordinary hours of work which existed prior to the variation;
- (b) where leave occurs during the period in which a variation is in place, it will be paid based on the employee's ordinary hours of work which existed prior to the variation; and
- (c) entitlements based on period of service, if they arise during the period, will be calculated based on an employee's ordinary hours of work which existed prior to the variation.

The Modern Awards Objective

22. For reasons similar to those expressed in the Decisions, the variation proposed is necessary to achieve the modern awards objective (s 157).

134(1) (a) relative needs of the low paid

23. The variations proposed by the Application will facilitate the maintenance of income-generating work in circumstances where, in the absence of the variations, such work would be unlikely. The circumstances noted in the HIGA COVID-19 Decision at [59] are equally relevant to the Restaurant Industry and its employees:

[59] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. ...'. The retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority. We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining leave and other accruals based on existing hours.

s 134(1)(c) the need to promote social inclusion through increased workforce participation

24. The parties submit that the variations will facilitate the parties' shared objective of retaining as many employees in employment as practicable in the current crisis.

s 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

25. The parties submit that the variations proposed will have a positive impact on business. It will promote flexibility and the 'efficient and productive performance of work' and will reduce the regulatory burden on business.

s134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

26. Likewise, given that the Restaurant Industry is a significant component of the national economy, the variations sought by the Application will have a positive impact on 'the sustainability, performance and competitiveness of the national economy'.

Conduct of the Application

27. RCI and the UWU wish to note the constructive and highly collaborative approach taken by all relevant parties (including the ACTU, ACCI and Ai Group) in working together over the preceding week to ensure this variation can be pursued urgently and in the interests of maintaining employment as much as possible.
28. The parties likewise acknowledge and appreciate the Commission's urgent consideration of the Application.

Files on behalf of Restaurant & Catering Industrial and the United Workers Union

31 March 2020