

Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making the application.

| | | | |
|--------------------|--|------------|------|
| Title | <input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: | | |
| First name(s) | Restaurant & Catering Industrial | | |
| Surname | | | |
| Postal address | PO BOX 121 | | |
| Suburb | Surry Hills | | |
| State or territory | NSW | Postcode | 2010 |
| Phone number | 1300 722 878 | Fax number | |
| Email address | tom@rca.asn.au | | |

If the Applicant is a company or organisation please also provide the following details

| | |
|--------------------------|----------------------------------|
| Legal name of business | Restaurant & Catering Industrial |
| Trading name of business | Restaurant & Catering Industrial |
| ABN/ACN | 31 739 604 819 |
| Contact person | Tom Green |

Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or organisation who is representing the Applicant (if any).

| | | | |
|-------------------------------|--|------------|------|
| Name of person | Nigel Ward | | |
| Firm, organisation or company | Australian Business Lawyers & Advisors | | |
| Postal address | Locked Bag 938 | | |
| Suburb | North Sydney | | |
| State or territory | NSW | Postcode | 2059 |
| Phone number | (02) 9466 4788 | Fax number | |
| Email address | nigel.ward@ablawyers.com.au | | |

Is the Applicant's representative a lawyer or paid agent?

Yes

No

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Restaurant Industry Award 2020 - MA000119

1.2 What industry is the employer in?

Restaurant and cafés

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

2.2 What are the details of your application?

The Applicant seeks a determination varying the *Restaurant Industry Award 2020* in the terms set out in the attached Determination.

The Applicant seeks to insert a new Schedule R into the *Restaurant Industry Award 2020* addressing three issues that will assist employers and employees recover from the COVID-19 Pandemic.

The issues addressed are:

- a) a simplified classification structure promoting multi skilling;
- b) limited and contained exemption rates; and
- c) the payment of an aggregated allowance in substitution for certain work and expense related allowances.

Detailed and appropriate safeguards have been included in the Application including:

- a) consultation requirements;
- b) mutual agreement requirements;
- c) limiting the Schedule to the likely recovery period for the industry; and
- d) conciliation and arbitration.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

Invitation from the Attorney-General to support distressed sectors

1. On 9 December 2020, the Hon Christian Porter MP, Attorney-General and Minister for Industrial Relations wrote to the Fair Work Commission (the **Commission**) informing the Commission that “due to the extraordinary circumstances that have been caused by the COVID pandemic that it would be in Australia’s economic best interest for the Fair Work Commission to use its powers under s.157(3)(a) of the *Fair Work Act 2009* (the Act) to undertake a process to ensure several priority modern awards in sectors hardest hit by the pandemic be amended.”
2. The Attorney-General recognised the *Restaurant Industry Award 2020* and the industry it covers as a priority given its distressed state and identified opportunities for variations in relation to simplified pay arrangements in the form of ‘exemption rates’ and streamlining classification structures to assist the industry recover from the Pandemic.

Fair Work Commission Response

3. On 10 December 2020, Justice Iain Ross, President of the Commission responded to the Attorney-General’s letter initiating the process for these priority modern awards and reiterated the direct economic impacts of the Pandemic.
4. President Ross highlighted the continuing need for flexible work arrangements to assist employers and employees to adapt to the changed condition and to support the recovery process.
5. The Commission instituted proceedings in response (*AM2020/103 – Award Flexibility – Hospitality and Retail Sectors*) to commence the process with subsequent conference proceedings attended by the Applicant and their representative on 17 December 2020, 4 February 2021, 18 February 2021 and 4 March 2021.

Applicant engagement with UWU

6. The Applicant informed the Commission that it was working with the United Workers Union (UWU) to try and arrive at a consent position in response to the Attorney-General’s initiative.
7. As the Commission has been informed, RCI officers have met with UWU representatives on numerous occasions regarding the subject matter of this Application.
8. The dialogue with the UWU has been constructive and used by the Applicant to try and address issues raised by the UWU that might assist in reaching a consent position.
9. To date, seven formal meetings have been held between officers of RCI and the UWU to discuss, refine, and give feedback on various aspects of the subject matter of this Application.

10. On all occasions these discussions have been useful and constructive, with 'improvements' to the proposals being acknowledged; at the time of filing the Application the UWU has not confirmed its position in regard to the Application.
11. RCI remains optimistic that the Application can move by consent or substantive consent.
12. While this was occurring, RCI has undertaken extensive consultations with members across Australia, including each State and Territory since January 2021.
13. The three proposals contained within the Application have been informed by ongoing member feedback relating to issues within the award that directly concern the recovery of the sector.
14. This has included briefing members on proposed changes and receiving feedback, as well as utilising member data to model some of the proposals such as the substitute allowance proposal.
15. The Application is necessary for the *Restaurant Industry Award 2020* to meet the modern awards objective within the context of recovery from the Covid-19 Pandemic.

Modern Awards Objective

16. The Application will ensure that the *Restaurant Industry Award 2020* operates as a fair and relevant minimum safety net in the context of 2021 and the recovery of the Restaurant and Café Industry from the challenges of the Pandemic.
17. In particular regard can be had to:
 - a) s134(1)(d) (to promote flexible modern work practice and the efficient and productive performance of work);
 - b) s134(1)(f) (the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regularly burden);
 - c) s134(1)(g) (the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia); and
 - d) 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).
18. The Application (with key changes to simplify classifications, exemption rates that set a guaranteed minimum rate of pay and the introduction of a substitute allowance) will promote ease of employment and materially support restaurants and cafes in Australia as they recover from the Pandemic.
19. This will promote confidence in employers to increase employment (and increase hours of employment) by further simplifying employment regulation at the enterprise level.
20. The current classification structure and definitions under the *Restaurant Industry Award 2020* fail to adequately reflect the increased need for flexibility in duties performed by staff within the restaurant and café sector, particularly in the post COVID-19 climate.

21. It does not reflect the varying nature of business structure nor make provision for employees who engage in a range of duties and tasks that are within the current, different classification streams.
22. This can be seen for employees in the food and beverage stream, the kitchen attendants stream and under levels 1 and 2 of the cooks stream. For instance, the *Restaurant Industry Award 2020* does not cater for employees whose skills and duties regularly combine multiple streams across classifications in practice.
23. The Application addresses this in a fair way allowing employers and employees to recognise and be paid for further multiskilling thus providing a highly desirable increased mutually beneficial flexibility that will be especially important in a post COVID-19 recovery environment.
24. Currently, there is no provision under the Restaurant Industry Award 2020 which allows for employers and employees to enter into an employment agreement using an exemption rate.
25. This is not an uncommon feature in the broader hospitality sector.
26. Such exemption rates are available under the *Hospitality Industry (General) Award 2020* and the *Registered and Licenced Clubs Award 2020* and have been subject to both the 2012 Transitional Award Review and the 2014 Award Review.
27. It is fair, relevant and reasonable for the *Restaurant Industry Award 2020* to include limited and contained exemption provisions applying to certain 'higher-income' classifications, such as a restaurant manager or head chef.
28. This will promote employment certainty, simplification of employment regulation and higher guaranteed income for an appropriate but limited class of employees.
29. Currently, the payment of allowances under the *Restaurant Industry Award 2020* is a significant cause of 'payroll challenge' for employers. Equally, understanding when allowances should be paid is often difficult and confusing for employees.
30. The Application seeks to simplify this by substituting a limited number of work and expense related allowances into a single hourly allowance aimed at maintaining employee 'take home' pay.
31. This substitute allowance seeks to simplify the process of paying certain allowances, but does not impact the payment of such things as penalty rates for working in the evening or on the weekend or public holidays.

Impact of the Covid-19 Pandemic

32. Restaurants and cafes in Australia were one of the hardest hit industries and sectors in the economy by the Pandemic.

33. In December 2020, the Restaurant & Catering Industry Association (R&CA) revealed in the R&CA Industry Benchmarking Report 2020 (the Report) that business confidence had dropped significantly as a result of the Pandemic, with industry outlook at an all time low over the next twelve (12) months.
34. The Report stated that 1 in 3 restaurants and cafes failed to turn any profit in the 2019-2020 financial year and most business owners expect profitability to decrease or flatline over the next 12 months.
35. At 30 June 2020 there were more than 43,000 restaurants and cafés across Australia, contributing more than \$35 billion annually to Australian GDP and employing more than 450,000 people nationally.
36. Preliminary information has indicated that as many as 10% of those business have already closed their doors permanently, with more are expected to once data following the cessation of the JobKeeper scheme is released over the coming months.
37. Analysis by Small Business Australia found that 32% of the food, hospitality and accommodation sector were still receiving JobKeeper payments in late March 2021. This provides extensive uncertainty in a post-JobKeeper context when already 441,000 jobs were affected in May 2020 within the industry.
38. The challenges of the Pandemic have continued to be unrelenting in 2021 with the abrupt opening and closing of State borders which is likely to be a feature of 2021 are obviously detrimental to the restaurant and café industry.
39. It is estimated that restaurants and cafes lost \$27 million in produce as a result of the five (5) day lockdown imposed by the Victorian Government over the 2021 Valentine's Day weekend.
40. On 1 April 2021 after the cessation of JobKeeper, lockdown restrictions were still in place for residents in Greater Brisbane in Queensland and restrictions on Byron Bay in NSW due to single digit cases of community transmission of COVID-19.
41. This resulted in the cancellation of BluesFest at an estimated cost of \$100 million to the Byron Bay economy and a \$50 million impact on the Greater Brisbane economy, highlighting the challenges of the restaurant and café industry in a post-JobKeeper environment.
42. The operational requirements of restaurant and cafe businesses have significantly and permanently changed as a result of the Pandemic. Everyday Australians who own and run businesses are now expected to be well versed in constantly evolving public health orders, adjusting to takeaway options for food delivery, the logistical burdens of enforcing check in requirements and iterative "COVID-safe" business models.
43. The continued lagging rollout of COVID-19 vaccinations throughout Australia due to logistical challenges and public safety concerns in relation to side effects for certain vaccinations have impeded and substantially delayed the expected timeline for the vaccine rollout.
44. The vaccination program was the foundation for the subsequent economic recovery which has been delayed as a consequence.

Conclusion

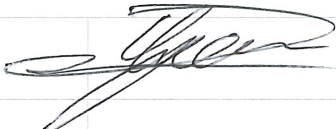
45. The challenges facing the restaurant and café industry are still very real and recovery has only just started.
46. The Application seeks to give effect to the invitation of the Attorney-General.
47. The Application plays an important part in providing employers and employees in the industry with some regulatory options that will inspire confidence to employ and provide more hours of work while adopting relevant and appropriate safeguards to ensure that employers are protected' setting a fair and relevant minimum safety net as required by section 134 of the Fair Work Act 2009.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

| | |
|-------------------|---|
| Signature |  |
| Name | Tom Green |
| Date | 22/9/2021 |
| Capacity/Position | Head of Policy, Government and Public Affairs |



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS



DETERMINATION

Fair Work Act 2009

s.157 – Application to vary a modern award to achieve the modern awards objective

Restaurant Industry Award 2020

(AM2020/103)

PRESIDENT ROSS

XXXXX

XXXXX

_____ 2021

Award Schedule – Renaming of certain classification titles and COVID-19 Pandemic Recovery

Further to the decision [_____] issued, it is determined pursuant to section 157(3)(b) of the *Fair Work Act 2009*, that the Restaurant Industry Award 2020 award be varied as follows:

1. In the Table of Contents, add a new Schedule R.
2. Add the following Schedule R to the award:

Schedule R - Award flexibility for COVID-19 Pandemic Recovery

R.1 The provisions of Schedule R are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date. Schedule R operates from XX XXX 2021 until XX XXX 2023. The period of operation can be extended on application to the Fair Work Commission.

R.2 During the operation of Schedule R, the following provisions apply:

R.3 Exemption Rates

Option 1

- (a) Subject to this clause, an employer and a full-time employee may enter into an agreement to pay the employee no less than 145% of their Grade rate each week as set out in clause 18 Minimum Rates of this award (the **Exemption Rate 1**).

- (b) Where an agreement to pay the Exemption Rate 1 has been made, the following clauses of this award shall not apply:
- (i) clauses 16.5 and 16.6 (meal break);
 - (ii) clause 21 (allowances);
 - (iii) clause 23 (overtime rates); and
 - (iv) clause 24 (penalty rates).
- (c) Where an agreement to pay the Exemption Rate 1 has been made, for each hour worked each week by the employee in excess of 45 hours per week, the employee must be paid at the rate of:
- (i) 150% of their ordinary hourly rate for the first two hours in excess of 45 hours in the week; and then
 - (ii) 200% of their ordinary hourly rate thereafter in the week.
- (d) Clause R.3(a) will only apply to those full-time employees paid at the Level 3 rate or higher and who are employed as a:
- (i) Sommelier; or
 - (ii) Restaurant Manager; or
 - (iii) Café Manager; or
 - (iv) Commi Chef (or equivalent); or
 - (v) Demi Chef (or equivalent); or
 - (vi) Chef de Partie (or equivalent).

Option 2

- (e) Despite clause R.3 (a) to (d), an employer and a full time employee may enter into an agreement to pay the employee no less than 170% of their Grade rate each week as set out in clause 18 Minimum Rates of this award (the **Exemption Rate 2**).
- (f) Where an agreement to pay the Exemption Rate 2 has been made for each hour worked each week by the employee in excess of 57 hours per week the employee must be paid at the rate of:
- (i) 150% of their ordinary hourly rate for the first two hours in excess of 57 in the week; and then
 - (ii) 200% of their ordinary hourly rate thereafter in the week.
- (g) Clause R.3 (e) to (f) will only apply to those full time employees paid at the Level 5 rate or higher and who are employed as a:
- (a) Restaurant Manager; or
 - (b) Chef de Partie (or equivalent).
- (h) For the avoidance of doubt, clause R.3 does not apply to employees classified under the administrative and general stream (Schedule A.4).

R.4 Classification Structure and Definitions

- (a) Subject to clause R.4 (b) an employer may elect to classify all relevant employees in accordance with the classifications set out in Schedule A2 in substitution for classifying the employee in accordance with Schedule A.

- (b) An employee who is classified in accordance with Schedule A2 shall be paid the minimum rate for the relevant classification in Schedule A2 as set out in the table below in substitution for the minimum rates set out in clause 18 Minimum Rates of the award that would otherwise apply:

| Column 1 Employee stream and grade | Column 2 Minimum weekly rate (full-time employee) | Column 3 Minimum hourly rate |
|---|--|---|
| | \$ | \$ |
| Grade 1 - Restaurant/Café Worker | 805.10 | 21.19 |
| Grade 2 - Restaurant/Café Worker | 832.80 | 21.92 |
| Grade 3 - Restaurant/Café Worker | 932.60 | 24.54 |

R.5 Substitute Allowance

Subject to this clause:

- (a) an employer and an employee may enter into an agreement to pay the employee a substitute allowance below (the **Substitute Allowance**):

| Column 1 Employee level | Column 2 Allowance per hour (\$) (full-time employee) |
|--|--|
| | \$ |
| Introductory | \$1.60 |
| Level 1 | \$1.60 |
| Level 2 | \$1.02 |

| Column 1 Employee level | Column 2 Allowance per hour (\$) (full-time employee) |
|--|--|
| | \$ |
| Level 3 | \$0.98 |
| Level 4 | \$0.90 |
| Level 5 | \$1.01 |
| Level 6 | \$1.08 |

- (b) an employer and at least 75% of the employees in the workplace concerned may agree to pay all of the employees in the workplace a Substitute Allowance below:

| Column 1 Employee level | Column 2 Allowance per hour (\$) (full-time employee) |
|--|--|
| | \$ |
| Introductory | \$1.60 |
| Level 1 | \$1.60 |
| Level 2 | \$1.02 |
| Level 3 | \$0.98 |
| Level 4 | \$0.90 |
| Level 5 | \$1.01 |
| Level 6 | \$1.08 |

- (c) Where an agreement to pay the Substitute Allowance has been made in accordance with clause R.5, the following clauses of this award shall not apply:

- (i) clauses 16.5 and 16.6 (meal break);
- (ii) clause 21.2 (meal allowance);
- (iii) clause 21.3 (split shift allowance);
- (iv) clause 21.4 (tool and equipment allowance);

- (v) clause 21.5 (special clothing allowance); and
- (vi) clause 21.6 (distance work allowance).

(d) The Substitute Allowance shall be paid for all purposes of this award.

R.6 Manner of Application

To avoid any doubt, clauses R.3 to R.5 inclusive operate on the following basis:

- (a) **Exemption Rates (R.3):** individual employer and full time employee agreement;
- (b) **Classification Structure and Definitions (R.4):** employer election to apply to all relevant employees in the workplace; and
- (c) **All-Purpose Substitute Allowance (R.5):** individual employer and employee agreement or all employees in the workplace collectively, if at least 75% of the employees agree.

R.7 Agreement to be in writing

Where an employer and employee enter into an agreement under clause Schedule R.3 or R.5 it must be:

- (a) in writing;
- (b) signed by the employer and the employee; and
- (c) state the date the agreement commences operation.

R.8 Termination of Agreement

- (a) Where an employer and individual employee enter into an agreement under the clause R.3 or R.5 either party may terminate that agreement by giving the other party no less than four weeks' notice in writing.
- (b) Termination of agreements made pursuant to Clause R.9 can be settled by the Fair Work Commission through arbitration in accordance with clause 34. – Dispute resolution and section 739(4) of the Act.

R.9 75% agreement to be recorded in writing

Where an employer and 75% of their employees enter into an agreement under clause R.5 it must be recorded:

- (a) in writing;
- (b) signed by at least one of the employees; and
- (c) stating the date the agreement commences operation.

R.10 Consultation about entering into an agreement

- (a) The employer must consult with all employees affected by the proposed change and their representatives (if any).
- (b) For the purpose of the consultation, the employer must:
 - (i) Provide to the employees and representatives information about the proposed change (for example, information about the nature of the change and when it is to begin); and
 - (ii) Invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also their representative (if any) to give their views about that impact.
- (c) The employer must consider any views given under clause R.10(b)(ii).

R.11 Consent Arbitration

An employer who enters into an agreement under the provisions of Schedule R provides consent to a dispute being settled by the Fair Work Commission through arbitration in accordance with clause 34. —Dispute resolution and section 739(4) of the Act.

Insert Schedule A2 into the award following Schedule A - Classification Structure and Definitions as follows:

Schedule A2—Classification Structure and Definitions

Note: To avoid any doubt, any employee at the introductory level, their duties as stipulated under the current award in Schedule A – Classification Structure and Definition will remain unchanged.

A.1 Restaurant/Café Worker Grade 1

A.1.1 Means an employee who is engaged in any of the following:

- (a) picking up glasses; or
- (b) providing general assistance to food and beverage attendants of a higher classification not including service to customers; or
- (c) removing food plates; or
- (d) setting or wiping down tables; or
- (e) cleaning and tidying associated areas; or
- (f) receiving money; or
- (g) cooking breakfasts and snacks, baking, pastry cooking or butchering; or
- (h) general cleaning duties within a kitchen or food preparation area and scullery, including cleaning cooking and general utensils used in a kitchen and restaurant; or
- (i) assisting employees who are cooking; or
- (j) assembling and preparing ingredients for cooking; or
- (k) general pantry duties.

A.1.2 In addition to the duties set out in A.1.1, means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:

- (a) supplying, dispensing or mixing liquor; or
- (b) assisting in the cellar; or
- (c) undertaking general waiting duties for food or beverages, including cleaning tables; or
- (d) receiving money; or
- (e) attending a snack bar; or
- (f) performing delivery duties; or
- (g) taking reservations and greeting and seating guests.

A.1.3 In addition to the duties set out in A.1.1 and A.1.2, means an employee who has the appropriate level of training, and who is engaged in specialised non-cooking duties in a kitchen or food preparation area.

A.2 Restaurant/Café Worker Grade 2

A.2.1 Means an employee who has the appropriate level of training and is engaged in any of the following:

- (a) supplying, dispensing or mixing liquor; or
- (b) assisting in the cellar; or
- (c) undertaking general waiting duties for both food and liquor, including cleaning tables; or
- (d) receiving money; or
- (e) assisting in the training and supervision of food and beverage attendants of a lower classification; or

- (f) delivery duties; or
- (g) taking reservations and greeting and seating guests; or
- (h) cooking duties such as baking, pastry cooking or butchering.

A.2.2 In addition to the duties set out in A.2.1, means an employee who has the appropriate level of training, which may include a supervisory course, and who has responsibility for the supervision, training and co-ordination of kitchen attendants of a lower classification.

A.3 Restaurant/Café Worker Grade 3

A.3.1 Means an employee who has the appropriate level of training, which can include a supervisory course, who:

- (a) carries out specialised skilled duties in a fine dining room or a restaurant; or
- (b) has responsibility for the supervision, training and co-ordination of food and beverage staff or for stock control for one or more bars.

Notation: To avoid any doubt an employee classified in one of the classifications set out in this Schedule shall perform all the duties of the classification as required by the employer.

4. Delete A.3 Kitchen Stream, A.3.1 to A.3.8 inclusive as set out in Schedule A - Classification Structure and Definitions, and inserting in lieu thereof the following:

A.4 Chef stream

A.4.1 Chef grade 1 (tradesperson) means a commi chef or equivalent who has completed an apprenticeship or passed the appropriate trade test or who has the appropriate level of training, and who is engaged in cooking, baking, pastry cooking or butchering duties.

A.4.2 Chef grade 2 (tradesperson) means a demi chef or equivalent who has completed an apprenticeship or passed the appropriate trade test or who has the appropriate level of training and who is engaged to perform general or specialised cooking, butchering, baking or pastry cooking duties or supervises and trains other cooks and kitchen employees.

A.4.3 Chef grade 3 (tradesperson) means a chef de partie or equivalent who has completed an apprenticeship or passed the appropriate trade test or who has the appropriate level of training in cooking, butchering or pastry cooking and who performs any of the following:

- (a) general and specialised duties, including supervision or training of kitchen employees; or
- (b) ordering and stock control; or
- (c) supervising other cooks and kitchen employees in a single kitchen establishment.

5. Delete the words “cook grade 3”, “cook grade 4” and “cook grade 5” in Table 3 of clause 18.1 and insert in lieu thereof “chef grade 1”, “chef grade 2” and “chef grade 3” respectively.

6. This determination comes into effect on _____ 2021.

PRESIDENT