



DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Plain language redrafting—*Fast Food Industry Award 2010* (AM2016/15; AM2021/72)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
COMMISSIONER O’NEILL

SYDNEY, 11 JULY 2022

4 yearly review of modern awards – plain language redrafting – Fast Food Industry Award 2010 – award coverage – definition of “fast food industry”.

[1] On 18 May 2022, we made a Statement¹ in which we expressed the *provisional* view that the definition in clause 3.1 of the *Fast Food Industry Award 2010* (Fast Food Award) of the expression “*fast food industry*” should be altered to read as follows:

fast food industry means the industry of taking orders for, preparing and selling (by direct provision to the customer and/or by delivery to the customer’s address):

- meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
- take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment.

[2] A draft determination for the variation of the Fast Food Award consistent with this *provisional* view was published in conjunction with the Statement. The Statement provided interested parties with a period of 14 days to make submissions in response to the Statement and the draft determination.

[3] Submissions were subsequently received from the Australian Industry Group (Ai Group), the Shop, Distributive and Allied Employees’ Association (SDA) and the Retail and

¹ [2022] FWCFB 76

Fast Food Workers Union Incorporated (RFFWUI). The only submission filed within the 14-day period came from RFFWUI. RFFWUI's submission expressed a concern that the variation would have the effect of requiring an employer to take orders *and* prepare items *and* sell items in the circumstances described in order to fall within the definition. This might, it was submitted, exclude employer that do not take orders but (for example) rather use a third-party web platform for this purpose, and only produce and sell fast food.

[4] The Shop, Distributive and Allied Employees' Association (SDA) and the Australian Industry Group (Ai Group) subsequently sought an extension of time to make submissions to take into account the issue raised by RFFWUI. The SDA submitted that it considered that the *provisional* view and the draft determination are consistent with the ambit of existing coverage of the Fast Food Award and clarifies that third party entities which deliver fast food under contract to a fast food operator are not covered by the award. The SDA submitted that RFFWUI's "concern" was misconceived because the use by a fast food vendor of a third party by which orders may be placed by the public or food delivered does not derogate from the fact that the chosen vendor is nonetheless commissioned (i.e. takes an order) to produce a fast food product which it then sells to a consumer. The SDA submitted that "[i]t may be accepted that the preparation and retail sale of fast food products is the integral components by which coverage in the fast food industry falls to be determined but interposing a mechanism for order placement and delivery will not change this key determinant for coverage".

[5] The Ai Group submitted that the chapeau to the proposed definition of "*fast food industry*" should be altered to read:

fast food industry means the industry of taking orders for, preparing and selling (~~by direct provision to the customer and/or by delivery to the customer's address~~ either directly to a customer or through a third party):

[6] The Ai Group submitted that its proposed variation would deal with the issue raised by RFFWUI and provide that:

- (i) The Fast Food Award would cover the employer provided that it is taking orders "*for*" the relevant types of food and beverages (Fast Food), including circumstances in which such orders are taken from a third-party provider. This is because the coverage clause would not prescribe whom the order must be taken from. It would merely state that an employer must be taking orders "*for*" Fast Food.
- (ii) The Fast Food Award would cover the employer provided that it is selling Fast Food either directly to the customer or through a third-party provider.

[7] We agree with the SDA that the "concern" raised by RFFWUI is misconceived. An employer in the fast food industry will take an order for the preparation and sale of a fast food meal whether it does so directly or via a third-party web platform. The amendment proposed by the Ai Group is unnecessary because the definition proposed in the *provisional* view does not specify the mode of delivery.

[8] As we made clear in our earlier Statement, the purpose of the proposed amendment is to clarify that businesses (such as Menulog) which market fast food (as well as restaurant meals) prepared by others, and/or engage in the delivery of such items to customers addresses are *not* covered by the Fast Food Award. The core requirement for coverage of an employer is that the employer is engaged in taking orders for, preparing and selling fast food. Businesses such as Menulog do not engage in this activity.

[9] We confirm the *provisional* view. We consider that the variation to the definition of “*fast food industry*” is necessary to meet the modern awards objective in s 134(1), having regard in particular to the consideration in paragraph (g) of the subsection. The other considerations in the subsection are not relevant to this matter.

[10] The plain language redrafting of the Fast Food Award generally has been the subject of a separate process. As part of that process, the proposed definition of “*fast food industry*” the subject of the *provisional* view was incorporated (as clause 4.2) into a plain language exposure draft (PLED) for the Fast Food Award published on 8 June 2022. The plain language redrafting of the Fast Food Award has now been finalised by way of a decision² published in conjunction with this decision. As stated in paragraph [5] of that other decision, a determination will be published in conjunction with that decision to give effect to the PLED incorporating the matters determined in both decisions.



VICE PRESIDENT

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² [2022] FWC 1722