FAIR WORK COMMISSION
AM 49 of 2017

2014 FOUR YEARLY REVIEW
STAGE 4
FAST FOOD INDUSTRY AWARD

SUBMISSION OF THE AUSTRALIAN INDUSTRY GROUP
ON DRAFT DETERMINATION TO VARY THE FAST FOOD INDUSTRY AWARD

1. The Australian Industry Group (**Ai Group**) is representing employers in the fast food industry in relation to the review being conducted by the Fair Work Commission (**Commission**) of the *Fast Food Industry Award* 2010 (**Fast Food Award**) pursuant to section 156 of the *Fair Work Act* 2009 (Cth) (**FW Act**).

2. On 4 July 2019, the Full Bench issued a Decision in relation to the review of the Fast Food Award, and specifically, the determination of claims relating to substantive issues in the Fast Food Award (see *Re Fast Food Industry Award 2010* [2019] FWCFB 4679) (the **July Decision**).

3. The July Decision contained as Attachment A, a Draft Determination to vary Clause 12 of the Fast Food Award, together with additional amendments of a consequential nature to clauses 26.2 and 27.1(d) of the Fast Food Award (the **Draft Determination**).

4. The July Decision provided (at [79]) interested parties with a final opportunity to comment on the Draft Determination, and in particular, the variations to the Fast Food Award proposed at [55] and [56] of the July Decision.

5. This submission sets out the submission of Ai Group in relation to the Draft Determination.

6. A submission in relation to the Draft Determination was filed by the National Retail Association (**NRA**) on 15 July 2019 (the **NRA Submission**). This submission also sets out the response of Ai Group to the NRA Submission.

Background

7. The July Decision and Draft Determination were preceded by an earlier decision of the Full Bench on 20 February 2019 (see *Re Fast Food Industry Award 2010* [2019] FWCFB 272) (the **February Decision**), and two conferences before Deputy President Masson (on 21 March 2019 and 12 April 2019) to discuss issues arising out of the February Decision, with the positions taken by the parties during the conferences recorded in a Report issued by Deputy President Masson on 27 May 2019 (the **Report**).

Submission of Ai Group in relation to Draft Determination

Clause 12.3 – Multiple agreements in respect of a single shift

8. It is not clear under proposed clause 12.3 whether an employer and an employee may agree to multiple changes to a single shift (and if this were to be done, whether all changes could be recorded in a single record). It is conceivable that multiple agreements may be struck in respect of a single shift – for example, an employee may be asked and agree to start a shift early, and then throughout the course of the shift be asked and agree to remain at work beyond the end of the original shift finish time due to requirements unforeseen at the commencement of the shift.

9. Ai Group submits that it is appropriate for clause 12.3 to clearly accommodate such a scenario and further, for the collection of agreements arrived at to only need to be recorded in a single written record (at or by the end of the shift).

Clause 26.2 – Overtime

10. Ai Group has also identified a concern with respect to Item 2 of the Draft Determination, pursuant to which existing Clause 26.2 of the Fast Food Award will be deleted and replaced by the following:

> **26.2** A full-time **or part-time employee** shall be paid overtime for all work as follows:
>
> (a) In excess of:
>
> (i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or
>
> (ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or
>
> (iii) eleven hours on any one day; or
>
> (b) **Before an employee's rostered commencing time on any one day; or**
>
> (c**) After an employee's rostered ceasing time on any one day; or**
>
> (d) **Outside the ordinary hours of work**; or
>
> (e) Hours worked by part-time employees in excess of:
>
> (i) the agreed hours in clause 12.2; or
>
> (ii) in excess of the agreed hours as varied under clause 12.3 or 12.4.
>
> (f) Any additional hours worked by a part-time employee in excess of their regular pattern of work in circumstances where there is no written record of an agreed variation to a particular rostered shift. (**emphasis added**)

11. Ai Group is concerned that the terms of sub-clauses 26.2(b), (c) and (d) and their application to part-time employees may create uncertainty in the context of the ability for part-time employees to 'flex up' without the payment of overtime as contemplated in 26.2(e). Such a result would be inconsistent with s.134(1)(g) of the FW Act.

12. Ai Group submits that 26.2(b), (c) and (d) should be limited to full-time employees only to maintain the ability for part-time employees to 'flex up' without paying overtime, as contemplated in 26.2(e).

13. In addition to this potential uncertainty, it is also Ai Group's contention that the sub-clauses are unnecessary in respect to part-time employees because the effect of sub-clause 26.2(b), (c) and (d) is already captured by sub-clause 26.2(e)(i) when it is read in conjunction with clause 12.2. In particular, proposed clauses 12.3 and 12.4 in the Draft Determination enable an employer and an employee to vary an agreement made under clause 12.2 of the Fast Food Award. Such variation may extend to the number of hours to be worked on that particular day (12.2(a)), the day on which the shift will be worked (12.2(b)), the start time of the shift (12.2(c)) and the finish time of the shift (12.2(c)).

14. The effect of proposed sub-clause 26.2(e)(i) is (by virtue of the cross-reference to sub-clause 12.2) to replicate the effect of sub-clauses 26.2(b), (c) and (d). Therefore, it is unnecessary (and potentially, a source of confusion) to apply both clauses 26.2(b) – (d) and 26.2(e)(i) to part-time employees.

15. We further suggest that it would be useful for sub-clause 26.2(e)(i) to be amended to clarify that overtime is only payable for hours worked by part-time employees in excess of the agreed hours in clause 12.2, in the absence of a variation under clause 12.3 or 12.4.

16. The amendments proposed by Ai Group appear in a marked-up version of the Draft Determination attached to this submission.

17. For completeness, we note that Ai Group remains opposed to the inclusion of sub-clause 26.2(f) for the reasons previously articulated during the hearing of this matter.

Clause 27.1 - Breaks during work periods

18. Separately to the above, the Full Bench has specifically identified the opportunity for final comment at the variation proposed at [55] and [56] of the July Decision, which pertains to breaks during work periods as set out in clause 27.1 of the Fast Food Award.

19. Ai Group does not object to the form of words proposed, but does note consistent with its submissions at [8] above that any agreement regarding changed timing to taking meal breaks may not necessarily (and, in our submission, does not need to) coincide with the agreement to vary other aspects of the regular pattern of work. For example, agreement may be reached for an employee to work an additional three hours on a shift, without agreeing at that time to any change to the meal break. Then later, at the point in time when the meal break was originally scheduled to occur, the employer and employee agree at that point that it is preferable to move the meal break. In those circumstances, the collection of verbal agreements made during the course of a particular shift should then be documented at or by the end of the affected shift (as required under proposed sub-clause 12.3(a)). In order to accommodate such a scenario, we have proposed a change to sub-clause 12.3 (as set out, above) such that it contemplates one or more agreements being struck throughout the course of a particular shift.

Response to NRA Submission

20. The NRA Submission identifies three broad areas of concern:
    (a) the concept of a "pattern of work" (section 3 of the NRA Submission);
    (b) redundant specification of electronic forms of writing (section 4 of the NRA Submission); and
    (c) other consequential amendments (section 5 of the NRA Submission), which is divided into three sub-categories:
        (i) prescription of circumstances in which overtime arises;
        (ii) treatment of meal breaks; and
        (iii) restructure of provisions with respect to variation agreement.

21. We address each of these areas in turn below.

The concept of a "pattern of work"

22. The NRA submits (see NRA Submission at 3.7 – 3.10 and 3.13) that there is a lack of clarity in relation to how the expression "regular pattern of work" should be interpreted.

23. Ai Group submits that the meaning of the expression "regular pattern of work" in clause 12.2, as currently set out in item 1 of the Draft Determination, is clear.

24. Proposed clause 12.2 sets out the minimum requirements for a written agreement between an employer and a part-time employee in relation to a regular pattern of work. It provides, "*At the time of first being employed, the employer and the part-time employee will agree, in writing, <u>on a regular pattern of work, specifying at least</u>…*".

25. The minimum requirements are then articulated in sub-clauses (a) to (f) of proposed clause 12.2.

26. Having regard to the phrase "regular pattern of work" and its context within clause 12.2, the meaning is clear in that it is any or all of the items in clause 12.2(a) to (f), with the exception of (d) which is a machinery term with respect to how a variation of that pattern of work is to be recorded.

27. It follows that the regular pattern of work encompasses the matters contained in sub-clauses (a) to (f) of proposed clause 12.2 (excluding sub-clause 12.2(d), as noted above).

28. Accordingly, it is not necessary for proposed clauses 12.3 and 12.4 to be amended as proposed by the NRA.

Redundant specification of electronic forms of writing

29. The NRA submits that it is not necessary to specify electronic communication as a method of recording a variation in accordance with clause 12.3 or 12.4 (see NRA Submission, at paragraphs 4.6 – 4.8), and expresses concerns regarding the reference to electronic communications in the Draft Determination (see NRA Submission, at paragraphs 4.9 – 4.13).

30. The NRA submissions appear to proceed on a basis that the Full Bench has proposed this variation to *"make it clear that there is no particular formality required in order to make or vary an agreement.[1]"* and to *"validate the informality which comes with such communications.[2]"*

31. The NRA advance no basis upon which they have made this presumption and Ai Group submits that in any event its presumption is misplaced.

32. Ai Group submits that the Full Bench has in including reference to "electronic means of communication (for example, by text message)" appropriately had regard to:

    (a) The conclusions of the Part time/Casuals Decision[3] that this form of communication reflected s.134(1)(d) – *"the need to promote flexible modern work practices"*;
    (b) The evidentiary findings that Ai Group sought for the Full Bench to make, including:
        (i) The regularity of employees changing their own availability[4]; and
        (ii) The requirements of the current clause posing an administrative burden[5].

33. Ai group further notes that during earlier proceedings in this matter, Ai Group and the Shop, Distributive and Allied Employees Association (**SDA**) supported a variation of clause 12 to clarify that the recording of a variation to agreed regular hours may occur by electronic means (July Decision, paragraph [44]). The Draft Determination reflects this agreement.

34. The Commission also noted in paragraph 46 of the July Decision, "*The inclusion of an example after the expression 'electronic means of communication' was not opposed by any party; we propose to adopt that course and insert '(for example, by text message),' after the expression 'electronic means of communication*."

[1] At 4.10
[2] At 4.13
[3] The February Decision at [155], citing [2017] FWCFB 3541 at
[4] Findings sought by Ai Group: 9 July 2018; at [24]
[5] Ibid; at [25]

35. Ai Group submits that the matters that are the subject of section 4 of the NRA Submission have already been dealt with adequately by the Commission and in addition to there being no cogent reasons advanced by the NRA to depart from the July Decision, the assumptions which underpin their submissions are misplaced.

Other consequential provisions

Prescription of circumstances in which overtime arises; treatment of meal breaks

36. The NRA has proposed an amendment to sub-clause 12.8 (and consequential amendment to proposed new sub-clause 26.2(e)(iii)) (See NRA Submission at paragraphs 5.1 – 5.10).

37. Ai Group submits that there is little utility in the amendments proposed by the NRA. Clause 12.8 as set out in the Draft Determination is sufficiently clear. These matters were ventilated during previous hearings.

Restructure of provisions with respect to variation agreement

38. Paragraphs 5.12 to 5.16 of the NRA Submission contain a number of further suggestions as to how the drafting of proposed clause 12 of the Fast Food Award could be improved.

39. Ai Group opposes the NRA's proposed variations, in full. The drafting of clause 12 of the Fast Food Award has been the subject of extensive discussion and consideration by the parties and the Commission. Ai Group submits that the NRA Submissions do not establish any reasonably arguable basis on which the Commission could be satisfied that the proposed variations are necessary.

40. Ai Group is particularly concerned by the amendment proposed at paragraph 5.14 of the NRA Submission. If the NRA Submission on this point was accepted by the Commission, clauses 12.3, 12.4 and 12.5 would read as follows:

> **12.3** The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular shift provided that any agreement to vary the regular pattern of work (including the total number of hours) for a rostered shift must be recorded in writing at or by the end of the affected shift.
>
> **12.4** The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work (including the total number of hours), on an ongoing basis or for a specified period of time, provided that any such agreement is recorded in writing before the variation occurs.
>
> **12.5** The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clause 12.2(d), 12.3 or 12.4 and:
>
> (a) in the case of a variation agreed under clause 12.3 – provide a copy of the agreement to the employee if requested; and
>
> (b) in all other cases – provide a copy of the agreement to the employee; and
>
> (c) <u>if a copy of a variation made under clause</u> 12.2(d), 12.3 or <u>12.4 is not kept by the employer, the employee is to be paid overtime rates worked</u> [sic] <u>in excess of their regular pattern of work.</u>
>
> (Emphasis added.)

41. The NRA proposal does not distinguish between an employer's obligations in relation to records of agreements to vary the regular pattern of work for a particular shift, and obligations in relation to records of agreements made in respect of the regular pattern of work on an ongoing basis or for a specified period of time. In both cases, the NRA's proposal would require an employer to pay

overtime rates for time worked by an employee in excess of their regular pattern of work where no record of an agreed variation is retained.

42. Ai Group submits that the Commission should reject the inclusion of clause 12.5(c) as proposed by the NRA in the Fast Food Award, for the following reasons:
    (a) the clause is not necessary to meet the modern awards objective set out in section 134 of the FW Act. The NRA has provided no submissions as to why the conclusions reached in the July Decision by the Full Bench that the Draft Determination appropriately promoted *"flexible modern work practices*[6]*"*, reduced *"employment costs and regulatory burden*[7]*"* and provided a *"fair and relevant minimum safety net of terms and conditions*[8]*"* are ill-founded.

    (b) as noted above, throughout these proceedings, extensive consideration has been given by the parties and the Commission to the manner in which flexible part-time arrangements should be expressed. At no stage in these proceedings has it been submitted by any of the parties or proposed by the Commission that overtime rates should apply in the manner proposed by the NRA.

Request for Oral Hearing

43. For completeness, we note that the July Decision stated (at [79]) that any outstanding issues with respect to the Draft Determination will be determined based on the written material filed, unless a request for an oral hearing is received by 18 July 2019.

44. Ai Group does not request an oral hearing, and is happy for final determination of outstanding issues to be conducted on the papers.

Ai Group
18 July 2019

[6] [2019] FWCFB 4679; at [73]
[7] Ibid
[8] Ibid; at [78]

ATTACHMENT A

DRAFT DETERMINATION

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

4 yearly review of modern awards

(AM2017/49)

FAST FOOD INDUSTRY AWARD 2010

[MA000003]

Fast food industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, *** 2019

4 yearly review of modern awards – Fast Food Award 2010 (MA000003).

A. Further to the Full Bench decision issued on 4 July 2019 31 the *Fast Food Industry Award 2010*32 is varied as follows:

1. By deleting clause 12 and inserting:

12.1 A part-time employee is an employee who:

(a) works less than 38 hours per week; and

(b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

(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.

12.3 The employer and employee may agree to vary an agreement made under clause 12.2 on one or more occasion in relation to a particular rostered shift as follows:

(a) any agreement (or, where there is more than one agreement, all agreements) to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and

(b) the employer must keep a copy of the agreed variation, in writing, including by any electronic means of communication and provide a copy to the employee, if requested to do so.

(c) In the event that no record of an agreed variation to a particular rostered shift is retained the employee is to be paid at overtime rates for any hours worked in excess of their regular pattern of work.

12.4 The employer and employee may agree to vary an agreement made under clause 12.2, in respect of the regular pattern of work, on an ongoing basis or for a specified period of time, as follows:

(a) any agreement to vary the regular pattern of work on an ongoing basis or for a specified period of time must be recorded before the variation occurs; and

(b) the agreed variation must be recorded in writing, including by any electronic means of communication.

12.5 The employer must keep a copy of any agreement made under clause 12.2 and any agreed variation made under clause 12.4 and provide a copy to the employee.

12.6 An employer is required to roster a part-time employee for a minimum of 3 consecutive hours on any shift.

12.7 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.

12.8 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26—Overtime.

2. By deleting clause 26.2 and inserting:

26.2 ~~A full-time or part-time employee~~ Overtime shall be paid ~~overtime~~ for all work as follows:

(a) For full time and part time employees, work ~~I~~in excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) For full time employees only, work:

(i) Before an employee's rostered commencing time on any one day; or

~~(c)~~ (ii) After an employee's rostered ceasing time on any one day; or

~~(d)~~ (iii) Outside the ordinary hours of work; ~~or~~

~~(e)~~ (c) For part time employees only, additional ~~H~~hours worked ~~by part-time employees in excess of~~:

(i) where there is no variation under clause 12.3 or 12.4, in excess of the agreed hours in clause 12.2; or

(ii) in excess of the agreed hours as varied under clause 12.3 or 12.4; or

~~(f) Any additional hours worked by a part-time employee~~ (iii) in excess of their regular pattern of work in circumstances where there is no written record of an agreed variation to a particular rostered shift.

3. By deleting clause 27.1(d) and inserting:

'(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster and are subject to any agreement reached under clause 12.2 regarding a part-time employees' regular pattern of work. An agreed variation pursuant to sub-clauses 12.3 or 12.4 may include a variation to the time of taking rest and meal breaks.'

B. This determination comes into operation on [insert date]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT

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