

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.157 – Application to vary the Fast Food Industry Award 2010

AM2020/20

SUBMISSIONS OF THE Shop Distributive and Allied Employees' Association

Introduction

1. This submission addresses the Ai Group's submissions dated 15 May 2020 regarding the proposed close-down provision in the Draft Determination attached to the SDA's submission dated 14 May.
2. In explaining an unwillingness to adopt the SDA's proposal to extend the notice period in the close-down provisions at Clause H.10 from 48 hours to 1 week, the Ai Group submission states at [6] that:

We are instructed in response to the SDA Draft Determination that the proposed close down clause may be sought to be relied upon in circumstances that require a rapid response, such as a confirmed diagnosis of a COVID-19 case requiring that the store / restaurant be closed for a 'deep clean' and / or an investigation into relevant operational issues.

3. Discussions with the Ai Group in relation to the Fast Food Award have to date focused solely on declining or changing consumer demand, resulting in a reduced or changed need for labour and giving rise to the potential for job losses or reduced or changed working hours. As submitted on 14 May, the SDA has engaged in discussions with employers with the sole aim of trying to ensure as much secure paid employment for as many workers as possible, where JobKeeper support is not available.
4. It is deeply concerning to the SDA to learn that the close-down provisions are also intended to respond to Workplace Health and Safety (WHS) incidents related to the COVID-19 pandemic, rather than solely downturns in trade resulting in a need to cease operations. The SDA has been campaigning alongside other unions for the introduction of a universal entitlement to paid pandemic leave for all workers, including casuals, to ensure that workers are not financially

disadvantaged due to exposure to the virus. Utilisation of the close-down clause in the circumstances identified by the Ai Group would not be reasonable or appropriate.

5. The SDA also notes that the situation in relation to COVID-19 is rapidly changing, and recent announcements have been made by a number of jurisdictions to ease restrictions.¹ These announcements reduce the prospect of fast food outlets having to close-down due to downturns in trade.
6. In light of the new information provided by the employers, the SDA is not willing to consent to the inclusion of the close-down clause in the draft determination. A further revised determination is attached (**Annexure A**).

15 May 2020

¹ Fair Work Commission, 'Information note – Government responses to COVID-19 pandemic', updated 13 May 2020



DRAFT DETERMINATION

Fair Work Act 2009

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

Application by the Australian Industry Group

([insert matter number])

FAST FOOD INDUSTRY AWARD 2010

[MA000003]

[COMMISSION MEMBER(S)]

[INSERT LOCATION AND DATE]

Application to vary the Fast Food Industry Award 2010

A. Further to the decision [insert citation] issued by the Full Bench on [insert date], the above award is varied as follows:

1. By inserting the following Schedule H:

Schedule H - Award flexibility during the COVID-19 Pandemic

H.1 The provisions of Schedule H 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.

H.2 Schedule H operates from [insert date] (**Date of Operation**) until [insert date 3 months from the date of operation]. The period of operation can be extended on application to the Fair Work Commission.

H.3 Schedule H applies to:

(a) employers who do not qualify for Jobkeeper payments and their employees;
and

(b) employees who do not qualify for Jobkeeper payments and their employers in relation to those employees.

H.4 If an employer or employee become eligible for Jobkeeper payments, the terms of Schedule H will not apply.

H.5 Schedule H is intended to assist in the continuing employment of employees.

H.6 During the operation of Schedule H, the following provisions apply.

H.7 Any requirement issued by an employer under Schedule H does not apply to the employee if the requirement is unreasonable.

H.8 Flexible part-time employment

While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.8.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until [insert date 3 months from the Date of Operation]:

H.8.1 A part time employee is an employee who:

- (a) Works at least 8 but less than 38 hours per week;
- (b) Has reasonably predictable hours of work; and
- (c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

H.8.2 The employer and the part-time employee will agree in writing upon:

- (a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and
- (b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

H.8.3 The employer and the employee must have genuinely made the agreement mentioned in clause H.8.2 without coercion or duress.

H.8.4 An agreement made under clause H.8.2 is not valid unless the employee is also advised in writing that the employer consents to a dispute about whether the agreement was genuinely made being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.8.5 The employee must not be rostered to work less than 3 consecutive hours in any shift.

H.8.6 The guaranteed minimum hours shall not be less than 8 hours per week.

H.8.7 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

H.8.8 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

- (a) The additional hours are offered in accordance with clause 25 – Hours of work and clause 26 – Overtime;
- (b) The employee may not be rostered for work outside of the employee’s agreed availability;
- (c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);
- (d) An employee will accrue entitlements such as annual leave and personal/carer’s leave on agreed additional hours worked;
- (e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;
- (f) The employee can refuse to work additional hours when offered on any occasion;
- (g) Additional hours worked in accordance with this clause are not overtime; and
- (h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

H.8.9 A part-time employee who immediately prior to the Date of Operation has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause H.8.2. If a part-time employee agrees to such a change, they shall, beyond Schedule H ceasing operation, revert to the previously agreed regular pattern of hours.

H.8.10 If an employee is first employed as a part-time employee during the operation of Schedule H, their employment beyond Schedule H ceasing operation will be on a casual basis unless:

- (a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and
- (b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

H.9 Annual leave

H.9.1 Subject to clause H.9.3 and H.9.7 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee’s personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

H.9.2 If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance

of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

H.9.3 An employer may only make a request under clause H.9.1 where it is reasonable in all the circumstances.

H.9.4 An employee is not required to take leave under clause H.9 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.9.5 A period of leave under clause H.9 must start before [insert date 4 weeks from the Date of Operation] but may end after that date.

H.9.6 Clause H.9.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.

H.9.7 An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.

H.10 Dispute resolution

Any dispute regarding the operation of Schedule H may be referred to the Fair Work Commission in accordance with clause 9 – Dispute resolution.

2. Insert the following in clause 3.1:

Jobkeeper payment means a jobkeeper payment payable to an entity under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

3. By updating the table of contents and cross-references accordingly.
- 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].

COMMISSION MEMBER