

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](#).

Applicant



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

Title	<input checked="" type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Level 3, 154 Pacific Hwy		
Suburb	St Leonards		
State or territory	NSW	Postcode	2065
Phone number	(02) 9493 8002	Fax number	1300 722 396
Email address	victor@rca.asn.au		

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

Legal name of business	Restaurant & Catering Industrial (RCI)
Trading name of business	Restaurant & Catering Industrial
ABN	73 080 269 905
Contact person	Victor Song, victor@rca.asn.au

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 either 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 – RCI's representative's details are below.

No.

RCI's representative



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

Name of person	Luis Izzo, Managing Director - Sydney Workplace		
Firm, organisation or company	Australian Business Lawyers & Advisors		
Postal address	Level 15, 140 Arthur Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	(02) 9458 7005	Fax number	
Email address	luis.izzo@ablawyers.com.au		

Is the First 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?

Not applicable

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?

See Annexure A.

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.

See Annexure B.

Attach additional pages, if necessary.

Signatures



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	Luis Izzo
Date	26 June 2020
Capacity/Position	Solicitor

MA000119 PR717978

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.157—Application to vary or revoke a modern award

Restaurant & Catering Industry Association of Australia T/A Restaurant & Catering Australia

(AM2020/_____)

RESTAURANT INDUSTRY AWARD 2010

[\[MA000119\]](#)

Restaurant industry

JUSTICE ROSS, PRESIDENT

XXXXXX

XXXXXX

MELBOURNE, X DATE X

Application to vary the Restaurant Industry Award 2010.

A. Further to the decision [[_____](#)] issued by the Full Bench on _____, the above award is varied as follows:

1. By deleting Schedule I and inserting as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 The provisions of Schedule I 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.

I.2 Schedule I operates from 1 July 2020 until 27 September 2020. The period of operation can be extended on application.

I.3 A direction under this Schedule ceases to have effect when it is withdrawn, revoked or replaced by the employer, or on 27 September 2020, whichever is earlier.

I.4 Schedule I does not apply to any employee employed:

(a) by an employer that qualifies for the JobKeeper Scheme if the employee is an ‘eligible employee’ as defined in s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

I.5 If an employer or employee becomes entitled to Jobkeeper payments for an employee, the terms of Schedule I will not apply in relation to that employer and that employee.

I.6 Any dispute regarding the operation of Schedule I may be referred to the Fair Work Commission in accordance with Clause 34 – Dispute Resolution.

I.7 Any direction given by an employer under this Schedule is not valid unless the employee is advised in writing that the employer consents to a dispute arising from the direction being settled by the Fair Work Commission through arbitration in accordance with Clause 9 – Dispute resolution and section 739(4) of the Act.

I.8 During the operation of Schedule I, the following provisions apply:

I.9.1 Classifications and duties

(a) As directed by their employer, where necessary employees will perform any duties that are within their skill and competency regardless of their classification under clause 14—Classifications and Schedule A—Classification Structure and Definitions, provided that the duties are safe and the employee is licensed and qualified to perform them.

(b) Clause 18.8—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

I.9.2 Hours of Work—Full-time and part-time employees

(a) Subject to clause I.9.2(c), and despite clause 9—Full-time employment and requirements for notice in clause 15.3 (Roster), an employer may direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week. The employee will be paid on a pro-rata basis. The arrangements for working ordinary hours in clause 15—Ordinary hours of work and rostering arrangements will apply on a pro-rata basis.

(b) Subject to clause I.9.2(c), and despite clause 10.4(a) (Part-time employment), and the requirements for notice in clause 15.3 (Roster), an employer may direct a part-time employee to work an average of between 60% and 100% of their guaranteed hours per week, or an average of between 60% and 100% of the guaranteed hours per week over the roster cycle.

(c) A direction under clause I.9.2(a) or (b) may only be given if:

(i) the employee cannot usefully be employed for the employee’s normal days or hours during the period of the direction because of changes to the business attributable to:

(A) the COVID-19 pandemic; or

(B) government initiatives to slow the transmission of COVID-19; and

(ii) the direction is reasonable in all the circumstances; and

(iii) the direction is given in writing.

(d) Prior to any employer issuing any direction under clause I.9.2(a) or (b) an employer must:

(i) consult with the affected employee/s in accordance with clause 33 — Consultation about changes to rosters or hours of work and provide as much notice as practicable; and

(ii) if the affected employee/s are members of the United Workers Union, notify the United Workers Union of its intention to implement these arrangements.

(e) An employee given a direction under clause I.9.2(a) or (b) will continue to accrue annual leave and personal leave, and any other applicable accruals under this Award, based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule I.

(f) If an employee given a direction under clause I.9.2(a) or (b) takes a period of paid annual leave or personal leave, the payment for that leave will be based on the full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule I.

(g) An employee given a direction under clause I.9.2(a) or (b) may make any of the following requests, and the employer must consider the request and must not unreasonably refuse the request:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training; or

(iii) a request for professional development.

I.9.3 Annual leave

(a) Subject to clause I.9.3(c) and I.9.3(f) and despite clauses 25.4, 25.5 and 25.6 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave.

(b) 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.

(c) An employer may only make a request under clause L.9.3(a) where it is reasonable in all the circumstances.

(d) A period of leave must start before 13 September 2020 but may end after that date.

(e) 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 is necessary to assist the employer to avoid or minimise the loss of employment.

(f) During the period of operation of Schedule I, instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*, an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave.

(g) Clause I.9.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.

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

B. This determination comes into effect on 1 July 2020.

PRESIDENT

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Annexure B

General

1. Restaurant and Catering Industrial (**RCI**) seeks a determination to vary the Restaurant Industry Award 2020 (the **Award**), to mitigate the current impacts COVID-19 is having on employees and employers covered by the Award, who operate in the restaurant and catering industry (**Industry**).
2. The application seeks to extend, with some modifications, the operation of Schedule I-Award flexibility during the COVID-19 Pandemic of the Award for a limited period, until 27 September 2020. The modified Schedule I will maintain some of the flexibilities for employers and employees available under the existing Schedule I, and include greater protections for employees.
3. The extension of the variations to the Award are necessary to achieve the Modern Awards Objective (**MAO**) in the circumstances created by the COVID-19 virus and government responses to it worldwide.
4. The United Workers Union (**UWU**) supports the application and has been involved in the negotiations surrounding the Draft Determination.

COVID-19

5. In December 2019/January 2020, an outbreak of a new coronavirus and disease began in Wuhan, China, which was subsequently identified as a new type of coronavirus (**COVID-19**).¹
6. On 11 March 2020, the WHO Director-General characterized COVID-19 as a pandemic (**Pandemic**).
7. In Australia, as at 25 June 2020 there have been 7,558 confirmed cases of COVID-19 since 22 January 2020, with 37 new cases in the preceding 24 hours. Of the confirmed cases, 104 have died from COVID-19 and 6,942 recovered.²
8. To deal with the Pandemic, governments in Australia through numerous legislative determinations and public health orders restricted economic activity, including the operations of cafes and

¹ [World Health Organisation.](#)

² <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>

restaurants, and personal movement. In recognition of the significant effects on the economy of these measures and in order to reduce the severity of those effects, governments introduced numerous stimulus packages.

9. One of these measures was the ‘JobKeeper’ scheme, which enables qualifying employers to receive a wage subsidy from the Australian Tax Office, in order to ameliorate the effects of the Pandemic on business and help maintain employment continuity. Not all entities qualify, however, for, and therefore benefit from, JobKeeper, according to the qualifying and eligibility criteria set out in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

Full Bench Decision

10. In response to the deterioration in the economy, to preserve ongoing business viability and employment continuity, the RCI sought, with the consent of unions, the inclusion of Schedule I in the Award via application dated 30 March 2020.
11. On 31 March 2020, a Full Bench of the Fair Work Commission (**Commission**) granted the application and varied the Award according to the revised draft determination accompanying the application ([2020] FWC 1741).
12. In the context of the material effects of COVID-19 on the Industry, the Commission found, in light of the statutory criteria set down in s 134 of the Fair Work Act (**Act**), that the Determination it ordered achieved the MAO to “provide a fair and relevant minimum safety net of terms and conditions”. The variations sought in the initial application were designed to maintain income-generating work for employees, who might not otherwise have been offered work. It noted the difficult decisions confronting employers and employees, who seek to balance viability and employment continuity. It stated that “retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority” (at [39]).

Ongoing Crisis

13. The underlying economic conditions and challenges facing the Industry, which provided the context of the Full Bench decision, continue. Despite an easing of restrictions by governments and associated signs of improvement, the Industry experiences acute challenges.
14. Australian Bureau of Statistics (ABS) analysis released on 3 June 2020 suggested that in the March Quarter of 2020, the Australian economy contracted by 0.3% in seasonally adjusted chain volume terms.³ The analysis does not cover the June Quarter, when many of restrictions on business activity were in place. The ABS observed that the Pandemic and restrictions on the free movement of people and other restrictions, including restrictions on international travel from 1 February, gathering restrictions and non-essential business closures, “generated an unprecedented shock to the global economy”.⁴ In response to these figures, the Commonwealth Treasurer acknowledged that Australia was in recession.⁵ Expectation is that the June Quarter will reveal greater decline in economic activity.
15. The International Monetary Fund, in its World Economic Outlook Update for June 2020, projects a 4.9% contraction in 2020, a projection greater than previously anticipated.⁶
16. Analysis of the Australian Bureau of Statistics reveals the material negative impact of COVID-19 on the Industry. In particular, 84% of businesses in the Accommodation and Food Services sector reported decreased revenue compared to the same time last year. It was the second-highest reporting sector.⁷

³ 5206.0 - Australian National Accounts: National Income, Expenditure and Product, Mar 2020: <https://www.abs.gov.au/ausstats/abs@.nsf/mf/5206.0>

⁴ 5206.0 - Australian National Accounts: National Income, Expenditure and Product, Mar 2020: <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5206.0Main%20Features10Mar%202020?opendocument&tabname=Summary&prodno=5206.0&issue=Mar%202020&num=&view=>

⁵ Michael Janda, “Australia in its first recession in 29 years as March quarter GDP shrinks”, *ABC News*, 3 June 2020: <https://www.abc.net.au/news/2020-06-03/australian-economy-gdp-recession-march-quarter-2020/12315140>.

⁶ <https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020>

⁷ 5676.0.55.003 - Business Indicators, Business Impacts of COVID-19, June 2020: <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features4June%202020?opendocument&tabname=Summary&prodno=5676.0.55.003&issue=June%202020&num=&view=>; <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features7June%202020?opendocument&tabname=Summary&prodno=5676.0.55.003&issue=June%202020&num=&view=>

17. Overall, two-thirds of businesses reported a decrease in revenue from the previous year and almost a third of these reported a decrease of over 50%. In the Accommodation and Food Services Sector, of the businesses which suffered decreased revenue, 63% reported a reduction of 50% or more.⁸
18. Three-quarters of businesses trade with modifications.⁹ Although restrictions on the operation of restaurants and cafes have eased, upper customer limits and social distancing requirements remain in place.

Variation Sought

19. The application seeks an extension, with some modifications, of Schedule I of the Award, with limited duration.
20. The Full Bench decision noted that any extension of Schedule I beyond 30 June would only occur if three conditions were met: first, the extension would only be for a limited period; secondly the adverse conditions relating to the Pandemic would continue to exist; and thirdly, the industrial parties consented to the application.
21. The current application seeks to extend the operation of Schedule I for a limited period. The materially negative effects of the Pandemic continue, despite an easing of restrictions, especially in the Industry. The application also moves with the consent of the relevant industrial parties.
22. The considerations, which justified the Full Bench's conclusion that the variations met the MAO, remain relevant. Those considerations support the draft determination to this application.
23. The draft determination seeks to retain the flexibilities and protections contained within Schedule I.
24. The proposed clauses in the draft determination will assist employers in the Industry to maintain a level of viability and employment retention. The applicants respectfully submit that the application to vary the Award be granted.

⁸ 5676.0.55.003 - Business Indicators, Business Impacts of COVID-19, June 2020:

<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features4June%202020?open=document&tabname=Summary&prodno=5676.0.55.003&issue=June%202020&num=&view=>

⁹ 5676.0.55.003 - Business Indicators, Business Impacts of COVID-19, June 2020:

<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features7June%202020?open=document&tabname=Summary&prodno=5676.0.55.003&issue=June%202020&num=&view=>