

18 July 2019

The Hon. Justice Iain Ross
President
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3000

By email: amod@fwc.gov.au

Dear President Ross,

**RE: AM2017/49 – 4 yearly review of modern awards – Fast Food Industry Award 2010
Supplementary submission / amendment to submission**

We write with respect to the above matter and the submission of the National Retail Association (NRA) filed with the Fair Work Commission on 15 July 2019 (NRA's Primary Submission).

The NRA has had the benefit of being advised of the submissions intended to be made in this matter by AI Group, and in light of matters intended to be asserted by AI Group seek to amend our submission.

In particular, at paragraphs 5.1 to 5.9 of NRA's Primary Submission, we assert a need for further prescription of the circumstances in which overtime rates are to apply. The Schedule to NRA's Primary Submission provides a revised draft determination giving effect, *inter alia*, to the amendments proposed in those paragraphs.

The NRA advises that it withdraws the assertions made at paragraphs 5.1 to 5.9 (inclusive) of NRA's Primary Submissions, and also withdraws the associated revisions to the draft determination made in the Schedule to NRA's Primary Submissions.

The consequence of this is the NRA's proposed drafting of clause 12.5 of the draft determination ought now be read as follows:

- 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) if a copy of a variation made under clause ~~12.2(d)~~, 12.3 or 12.4 is not kept by the employer, the employee is to be paid overtime rates worked in excess of their regular pattern of work.

With the exception of the amendments above, the NRA otherwise repeats and relies on the NRA's Primary Submissions.



For the convenience of the Commission, a revised form of the draft determination giving effect to the remaining amendments pursued by the NRA in the NRA's Primary Submissions is **attached**.

Yours sincerely,

A handwritten signature in black ink that reads "L. Carroll". The signature is written in a cursive, flowing style.

Lindsay Carroll
Deputy CEO/Legal Practice Director
National Retail Association

A handwritten signature in blue ink that reads "Millman". The signature is written in a cursive, flowing style.

Alexander Millman
Senior Workplace Relations Advisor
National Retail Association

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 the *Fast Food Industry Award 2010* is varied as follows:

1. By deleting clause 12 and inserting:

12. Part-time employees

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 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 in relation to a particular shift ~~as follows: 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. ~~;~~ ~~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 (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. 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 12.2(d), 12.3 or 12.4 and:

~~(d) in the case of a variation agreed under clause 12.3 – provide a copy of the agreement to the employee if requested; and~~

~~(e) in all other cases – provide a copy of the agreement to the employee; and~~

~~(f) if a copy of a variation made under clause 12.3 is not kept by the employer, the employee is to be paid overtime rates worked in excess of their regular pattern of work.~~

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 12.2(d), 12.3 or 12.4 will be overtime and paid for at the rates prescribed in clause 26 – Overtime.

12.9 A variation to an agreement entered into under clause 12.2, howsoever made, may be formal or informal and may be evidenced by:

~~(a) a single written record; or~~

~~(b) a series of written records demonstrating the nature of the variation agreed to (for example, a series of SMS messages or emails).~~

2. By deleting clause 26.2 and inserting:

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) ~~B~~before an employee's rostered commencing time on any one day; or
- (c) ~~A~~after an employee's rostered ceasing time on any one day; or
- (d) ~~O~~outside the ordinary hours of work; or
- (e) ~~H~~hours worked by part-time employees in excess of:
 - (i) the hours agreed in accordance with clause 12.2; or
 - (ii) in excess of the agreed hours as varied under clause ~~12.2(d)~~, 12.3 or 12.4; or
- (f) any ~~additional~~ hours worked by a part-time employee in excess of their regular pattern of work ~~as agreed in accordance with clause 12.2~~ in circumstances where there is no written record of an agreed variation ~~in relation~~ 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 for part of the roster and are subject to any agreement reached under clause 12.2 regarding a part-time employee's regular pattern of work. An agreed variation pursuant to sub-clauses ~~12.2(d)~~, 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].