



Restaurant  
& Catering

SAVOUR  
AUSTRALIA



26 August 2016

Fair Work Commission  
Level 10, Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2011  
**Attention: Associate to Vice President Hatcher**

By email: [Chambers.Hatcher.VP@fwc.gov.au](mailto:Chambers.Hatcher.VP@fwc.gov.au)  
cc: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

Dear Associate,

**Part-time Employment and Casual Employment Matters – Matter No. AM2014/196 & AM2014/197**

We refer to the above matters and to the hearing before the Full Bench on 19 August 2016.

Restaurant & Catering Industrial (**RCI**) wish to clarify three matters arising out of the hearing, in particular, the enquiry raised by Vice President Hatcher, as follows:

1. During oral submissions of Ms Wells, it was submitted, at PN4583, that in respect of any changes sought in the *Restaurant Industry Award (2010)*:

*“PN4583 ... the full bench should have particular regard to any changes sought in the restaurant industry award in light of the ministerial directive and the resulting decision by the AIRC during the award modernization process which stated at **paragraph 27(a)** of that decision...”*

Emphasis added.

2. RCI wish to clarify that the correct paragraph number of the 2009 decision is paragraph 182<sup>1</sup>, which properly outlines the Ministerial directive:

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<sup>1</sup> [2009] AIRCFB 865.



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*"[182] On 28 May 2009 the Minister issued a variation to the consolidated request, which dealt specifically with the restaurant and catering industry. It varied the consolidated request by adding the following paragraph:*

*"Restaurant and catering industry*

*27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times."*

3. At PN4585, the Vice President questioned Ms Wells as to whether the Full Bench did in fact follow the approach as directed by the Minister. RCI wish to clarify that the Full Bench of the AIRC did follow the Minister's request as varied:

*[193] We understand the 28 May 2009 variation to the consolidated request to require the Commission to make a modern award which takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times, particularly in considering the penalty rate and overtime regime. **Our task is to establish a modern award with appropriate terms and conditions for the industry, having regard to the terms of the consolidated request as varied, and having regard to the content of relevant pre-reform awards and NAPSA's and the weight of coverage of those industrial instruments.**"*

Emphasis added.

4. At PN4589 and PN4591, the Vice President enquired regarding the different approaches taken by the AIRC in the making of the *Hospitality (General) Industry Award 2010* and the *Restaurant Industry Award 2010*, in particular, the reasons why a casual conversion provision was included in the hospitality award, and not in the restaurant award. We outline below our response to the Vice President's enquiry.

### ***Hospitality (General) Industry Award 2010***

5. The *Hospitality (General) Industry Award 2010* [exposure draft dated 12 September 2008](#) included a casual conversion provision at clause 12.5 and the substance of the provision remained unchanged at clause 13.4 in the [Draft residual variation dated 21 January 2010](#). The casual conversion provision in the current award at clause 13.4 reflects the same provision in the Draft residual variation of 21 January 2010 in substance and form.

## **Restaurant Industry Award 2010**

6. As outlined in the [Award Modernisation decision](#) of the AIRC on 25 September 2009<sup>2</sup>, the process adopted by the Commission in the making of the *Restaurant Industry Award 2010* was influenced by the Ministerial request as varied on 28 May 2009, which sought to include the following paragraph:

*“Restaurant and catering industry*

*27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry’s core trading times.”*

7. The variation to the request was further clarified by the Australian Government in its 24 July 2009 submissions:

***“Scope of the modern award***

*10 The Minister’s variation to the request that ‘restaurant and catering’ be removed from coverage under the HIGA (the Hospitality Award) is intended to refer to those restaurants and catering activities that are operated as part of a restaurant business.*

*11 The variation is not aimed at stand-alone catering businesses such as those operating on a contract basis in the airline, defence or mining industries. Nor is it directed towards eateries established within licensed clubs, hotels or other similar premises.*

*12 The Government considers that these types of restaurant and catering businesses have a very different operating base to restaurants and should remain covered by the broader Hospitality Award.*

*....”*

8. In light of the Ministerial request, it was at this particular time that the restaurant award came into its own and was deemed separate from the *Hospitality (General) Industry Award 2010* (identified in the decision as the Hospitality Modern Award):

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<sup>2</sup> Ibid.

### Scope of the award

*“[188] The 28 May 2009 variation to the consolidated request requires the Commission to create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The intent of that variation, as explained by the Government’s 24 July 2009 submissions, was to require the making of a modern award covering those restaurants and catering activities that are operated as part of a restaurant business. It follows that such an award should not cover restaurants which are operated as part of another business, such as a hotel or a catering operation.*

*[189] The coverage clause of the exposure draft has been developed to achieve that end. Dealing first with restaurants, the clause defines restaurant by reference to a restaurant within a restaurant business. The effect will be to include all restaurants other than those operated in or in connection with premises owned or operated by employers covered by the Hospitality Modern Award; the Registered and Licensed Clubs Award 2010 [66](#) and the Fast Food Industry Award 2010.[67](#) **The coverage clause of the Hospitality Modern Award will be varied to exclude restaurants, save to the extent that restaurants are operated in or in connection with premises owned or operated by employers otherwise covered by that award.** In relation to catering the coverage of the catering industry will be limited to catering by a restaurant business which is defined as the provision by a restaurant of catering services for any social or business function where such services are incidental to the major business of the restaurant. Otherwise the catering industry will continue to be covered by the Hospitality Modern Award. We have also included in the coverage clause in the exposure draft an exclusion for contract caterers, whose principal and substantial business activity is that of providing catering services and/or accommodation services on a contract or fee for service basis. In light of this general exclusion, it is unnecessary to include a specific exclusion in respect of airport catering or catering under contract to the Department of Defence. The coverage clause of the Hospitality Modern Award will be varied to exclude catering by a restaurant business.*

*[190] The scope clauses in the exposure draft and the Hospitality Modern Award, as it will be amended, are consistent with the intent of the first part of clause 27A of the consolidated request, as clarified by the Australian Government in its 24 July submission. It is also consistent with the scope of most existing awards and NAPSAs regulating restaurants, as set out in Attachment B of the 24 July 2009 submission of the LHMU.*

*[191] As indicated already, **we have called the exposure draft the Restaurant Industry Award 2010.** Although the award will cover catering activities that are operated as part of a restaurant business, the broader catering industry will remain covered by the Hospitality Modern Award and it would be misleading to include catering in the title.”*

Emphasis added.

9. As previously mentioned, the scope of the restaurant award was considered by the Commission, having regard to the Ministerial request and the content of

relevant pre-reform awards and NAPSAs and the weight of coverage of those industrial instruments:

*“Content of the award*

*[193] We understand the 28 May 2009 variation to the consolidated request to require the Commission to make a modern award which takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry’s core trading times, particularly in considering the penalty rate and overtime regime. Our task is to establish a modern award with appropriate terms and conditions for the industry, having regard to the terms of the consolidated request as varied, and having regard to the content of relevant pre-reform awards and NAPSAs and the weight of coverage of those industrial instruments.”*

10. Importantly, in respect of the inclusion of a casual conversion provision in the *Restaurant Industry Award 2010*, the Commission noted at paragraph 204 of its decision, the reason it did not include such a provision in the award:

*“[204] There is no casual conversion provision in current federal awards covering restaurants, the Queensland non-SEQ Restaurant Award, the SA Restaurant Award, the WA Restaurant Award or the Tasmanian Restaurant Award. There is such a provision in NAPSAs in other States and in the SEQ Restaurant Award. Having regard to the weight of current coverage, we have not included a casual conversion provision in the exposure draft.”*

Yours sincerely,

**Restaurant & Catering Industrial**