[2020] FWCFB 1693

The attached document replaces the document previously issued with the above code on 9 April 2020.

Correction of document reference number in catchwords and footnote 1.

Associate to Vice President Hatcher

Dated 15 April 2020

DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Retail and Fast Food Workers Union Incorporated
v
Hungry Jack's Australia Pty Ltd t/a Hungry Jack's
(C2020/41)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT BOOTH
DEPUTY PRESIDENT COLMAN

SYDNEY, 9 APRIL 2020

Appeal against decision [2019] FWCA 8492 of Deputy President Boyce at Sydney on 16 December 2019 in matter number AG2019/1291.

Introduction and background

[1] The Retail and Fast Food Workers Union Incorporated (RFFWUI) has lodged an appeal, for which permission is required, against a decision issued by Deputy President Boyce on 16 December 2019[1] (decision) in which he approved the *Hungry Jack's National Enterprise Agreement 2019* (Agreement). In its notice of appeal lodged on 6 January 2020, the RFFWUI contends that the Deputy President erred in approving the Agreement because the requirements of ss 186, 188 and 190 of the *Fair Work Act 2009* (FW Act) were not met and because the Deputy President erred in reaching a state of satisfaction that the Agreement passed the better off overall test (BOOT) and had genuinely been agreed to by the employees covered by it. It also contends that the Deputy President denied procedural fairness to employees who would be covered by the Agreement and to the bargaining representatives by failing to provide "further reasons' for his decision. On 4 March 2020 the RFFWUI applied for leave to amend its notice of appeal to add an additional appeal ground, namely that there was never any enterprise agreement before the Commission capable of approval. The employer covered by the Agreement (the identity of which will be elucidated later in this decision), and the Shop, Distributive and Allied Employees' Union (SDA), a bargaining representative of employees covered by the Agreement, oppose leave being granted to amend the notice of appeal, oppose the grant of permission to appeal and oppose the appeal being upheld.

[2] The circumstances which have led to this appeal are unusual, to say the least, and require some preliminary explanation. Hungry Jack's Pty Ltd[2] (Hungry Jack's) is the employer of approximately 16,000 persons working in a chain of well-known fast food

[1] [2019] FWCA 8492

[2] ACN 008 747 073

restaurants in Australia. Hungry Jack's is a subsidiary of Hungry Jack's Australia Pty Ltd[3] (HJA). Prior to the Agreement taking effect, the employees of Hungry Jack's had been covered on a state-by-state basis by a number of collective agreements made under the *Workplace Relations Act 1996* and preserved in effect by the FW Act. On or about 24 August 2016, bargaining for a new enterprise agreement commenced when a notice of employee representational rights (NERR) was sent to all employees of Hungry Jack's working in its fast food restaurants. The first sentence of the NERR stated: "*Hungry Jack's Pty Ltd gives notice that it is bargaining in relation to an enterprise agreement National Hungry Jack's Enterprise Agreement 2017 which is proposed to cover employees that work in the Fast Food Industry*". The NERR in our view left no room for doubt that the enterprise agreement proposed was to cover Hungry Jack's and its employees in its fast food restaurants.

[3] There followed a long period of bargaining in which employees were represented by the SDA and the Australian Workers' Union (AWU) (on behalf of employees in northern Queensland). Hungry Jack's did not appoint a bargaining representative pursuant to s 176(1)(d) of the FW Act and represented itself in the negotiations. Eventually Hungry Jack's, the SDA and the AWU settled upon an outcome and, on 22 March 2019, Hungry Jack's provided its employees with a copy of the Agreement through its internal online information system and notified them that it intended to conduct an online ballot in respect of the Agreement commencing on 3 April 2019.

[4] We have earlier identified the title of the Agreement, which simply refers to "*Hungry Jack's*". However the coverage clause of the Agreement upon which employees were requested to vote blurred the picture. Clause 4 of the Agreement provides:

> "**4. Coverage**
>
> 4.1 This agreement shall apply to Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies operating food outlets and all employees of Hungry Jack's as defined.
>
> 4.2 The agreement will also cover:
>
> (a) The Shop, Distributive and Allied Employees' Association ("SDA"); and
>
> (b) The Australian Workers' Union (Queensland Branch) ("AWU")."

[5] It is not in dispute that HJA, to which the Agreement is said to apply, is not the employer of anybody employed in the Hungry Jack's restaurants. As earlier stated, the Hungry Jack's company is a subsidiary of HJA, and therefore it and its employees would fall within the coverage delineated by clause 4.1. It is also not in dispute that no NERR was ever sent to any employees of any entity other than Hungry Jack's, so that apart from Hungry Jack's itself the reference to "*subsidiaries, licensees and their associated companies*" had no effective work to do. This was not a case of an agreement that was intended to apply to employees of several single-interest employer entities, and in this respect we note that the application for approval of the Agreement that was subsequently made stated, in answer to question 2.1 in the standard Form F16, that there was only one employer covered by the

[3] ACN 065 643 343

Agreement. It has not been explained why the drafter of the Agreement expressed the coverage of the Agreement in the way it did instead of simply reflecting the terms of the NERR which had previously been issued.

[6] On 24 March 2019, two individual employees of Hungry Jack's nominated the RFFWUI as their bargaining representative, although one of these subsequently left the employment of Hungry Jack's.

[7] On 25 March 2019, Hungry Jack's employees were provided through the internal information system with a video presentation (presentation) which explained the bargaining process, how to access the relevant documents, the major changes effected by the Agreement and the voting process. The presentation simply referred to "*Hungry Jack's*" throughout. As to the content of the Agreement, the presentation:

- stated that the Agreement was "*based on having the Fast Food Industry Award as the minimum standard*";

- identified that there were differences between the Agreement and the *Fast Food Industry Award 2010* (Award) in respect of rates of pay (including juniors), employee classifications, part-time and full-time employee provisions, paid leave, breaks, crew meetings, abandonment of employment, dispute resolution, superannuation, allowances, notice of termination, overtime, uniforms and withholding of pay on termination, transfer of business and hours of work;

- gave an outline of the principal conditions for full-time and part-time employees under the Agreement;

- set out the award equivalent classifications for each classification under the Agreement;

- explained that base rates of pay under the Agreement would be set and increased in line with the Award and that permanent employees would receive an additional loading of 0.5% and ultimately 0.75% by 1 July 2021 on non-penalty ordinary hours, and that casual employees would receive an additional loading of 0.25% on non-penalty ordinary hours;

- stated that all allowances would be in line with the Award and would increase when the Award increases;

- set out the penalty rates for night work and early morning work Monday to Friday, and for Saturdays, Sundays and public holidays, which were said to be "*exactly the same as the Fast Food Industry Award*", with provision for the Sunday penalty rate to change in line with any change to the Award;

- said that the Agreement provided entitlements to full-time and part-time employees additional to those in the Award and the National Employment Standards (NES) in the form of personal leave being credited at the start of the year from the second year of employment, an extra day's compassionate leave, two days' paid "*National Disaster Leave*", and two days' paid and three days' unpaid domestic violence leave; and

- stated that it had "*only outlined a few aspects that differ between the award and the proposed agreement*" and advised employees to review the Agreement and the more detailed comparison document which were available on the online information system before voting.

[8] The comparison document contained a comparison of the "*major changes*" in the Agreement compared to the Award, namely the provisions concerning dispute resolution, full-time employment, part-time employment, notice of termination by an employee, abandonment of employment, redundancy, transfer of business, classifications, minimum weekly wage, savings clause, junior rates, allowances increase, Sunday penalty rate mirroring, additional allowances in the Agreement, superannuation, hours of work, restaurant security, overtime, breaks, shutdowns and refurbishment, personal/carer's leave, compassionate leave, natural disaster leave, NSW public holiday and domestic violence leave.

[9] Hungry Jack's also held meetings of employees at each restaurant to further explain the terms of the Agreement. The SDA, and parents and guardians of non-adult employees, were invited to these meetings. Employees were also invited to raise any questions about the Agreement or the process with their restaurant manager.

[10] The voting process commenced on 3 April 2019 and ended on 17 April 2019. Of a total of 16,311 employees, 10,855 cast a vote and 10,141 voted to approve the Agreement.

[11] Section 185 of the FW Act relevantly provides that, within 14 days of an enterprise agreement being made, a bargaining representative must apply to the Commission for approval of the agreement. Under s 176(1)(a) of the FW Act, an employer who will be covered by an agreement is a bargaining representative for the agreement. Accordingly the appropriate entity to make the application pursuant to s 185 on the employer's side was Hungry Jack's. However, the application for approval that was before the Deputy President, which was lodged on 18 April 2019, identified the applicant as "*Hungry Jack's Australia Pty Ltd*" with the ACN 065 643 343. As earlier stated, HJA did not employ anyone who would be covered by the Agreement, so it was not a bargaining representative and accordingly was not competent under s 185 to make the application for approval of the Agreement.

[12] The application was initially the subject of a full assessment by the Commission's staff, and a "*Single Enterprise Agreement Legislative Checklist*" (Checklist) was completed by 2 May 2019, approximately two weeks after the application for approval of the Agreement was lodged. The Checklist identified a number of potential approval difficulties in respect of the dispute resolution term, the flexibility term, consistency with the NES and the BOOT. The BOOT difficulties identified included that:

- the rate for an Assistant Manager under the Agreement only matched or fell below the corresponding rate in the Award;

- the Agreement allowed some employees to be paid salaries without indicating what those salaries would be; and

- ordinary-time base rates of pay were only slightly above the Award rates for non-penalty rate ordinary hours and were otherwise the same as the Award rates, and might be offset by detriments including greater uncertainty as to part-time hours of work at time of engagement, the capacity for employees to work additional hours at ordinary-

time rates of pay, a lower base rate for employees under the Supported Wage System, the omission of a cold work disability allowance, and a lesser pay benefit when required to work through meal breaks.

[13] On 30 April 2019, the RFFWUI sent correspondence to the Commission requesting to be heard in relation to the application for approval of the Agreement. The application was initially allocated to another member of the Commission who promptly (on 6 May 2019) requested that the RFFWUI file any submissions in relation to the application by 13 May 2019. This member conducted a conference in relation to the matter on 10 May 2019, and the RFFWUI's submissions were received in accordance with the earlier direction on 13 May 2019. The RFFWUI raised, in brief summary, the following concerns:

(1) The Agreement did not pass the BOOT, in that:

- for non-team leaders, the rate of pay is only very slightly above the Award for hours worked between 6.00am and 10.00pm, Monday to Friday, and is otherwise the same as the Award;
- for Team Leaders, the rate of pay is below the Award;
- the Award allowance for the performance of delivery duties using the employee's own car is, in the Agreement, excluded for employees who are not engaged primarily to perform delivery duties;
- the Agreement provides for a deduction of moneys for uniforms on the termination of employment which is not provided for in the Award;
- the meal break provisions in the Agreement are less beneficial than in the Award;
- the dispute resolution procedure does not provide for the representation of employees until the second stage of the dispute process and there is no clear statement of the right to have a representative as provided for in the Award;
- the Agreement contains a shutdown and refurbishment provision which is detrimental when compared with the Award;
- the Agreement requires superannuation contributions to be paid into the Retail Employees Superannuation Trust (REST), unlike the Award which provides for superannuation choice; and
- the part-time employment provisions of the Agreement do not provide for a guarantee that hours will be worked on set days at set times, unlike the Award, and therefore needed to be compared to casual employment under the Award, which were manifestly more beneficial because of the 25% casual loading.

(2) The dispute settlement term in the Agreement did not meet the requirements of s 186(6) of the FW Act in that it did not allow for the representation of employees.

(3) There was no proper explanation of the terms of the Agreement and their effect as required by s 180(5) and (6) of the FW Act, in that a number of the terms of the Agreement were not explained at all and a number of detriments in the Agreement compared to the Award were not identified. A proper and accurate comparison between the Agreement and the Award was particularly necessary given that the workforce was predominantly young and part-time or casual.

[14] On 20 May 2019, submissions were filed by the applicant (that is, in the name of HJA) which objected to the RFFWUI's standing to make submissions in the matter but otherwise responded to the matters in the RFFWUI's submissions. In addition, the then-representative for HJA filed on 20 May 2019 a document which was described as a response to issues raised by the member then dealing with the matter at the conference on 10 May 2019. The document was in tabular form, setting out in the left column the issue raised and in the right column the response. In a number of cases, the response included a proposed undertaking. An issue was identified in relation to clause 4.1 as follows:

> "Current clause 4.1 provides the agreement will apply to all employees of Hungry Jack's Australia Pty Ltd as defined. Employees are defined as [all] national system employee[s] within the meaning of the Act and could therefore presumably include all employees of the employer including head office staff, senior management and other employees who were probably not intended to be covered by the Agreement."

[15] The response was:

> "The Employer asks that it be noted this was an obvious error and the Agreement was intended to include the limitation under 4.1 that it only applies to employees for whom a classification exists under clause 17 of the Agreement.
>
> If required, the Employer agrees to provide an undertaking so limiting the Agreement as above, or alternatively if required will request the Commission to vary the Agreement under s.217 of the Act to remove an uncertainty or ambiguity in the drafting of the Agreement."

[16] The SDA filed its own submissions on 22 May 2019. On 28 May 2019, the RFFWUI was served by the Commission with the submissions of HJA and the SDA, and was directed to provide any submissions in response by 4 June 2019. The RFFWUI filed submissions in accordance with this direction on 4 June 2019.

[17] Due to a change in internal allocation procedures in the Commission, the matter was re-allocated to the Deputy President on 25 June 2019. We observe that, at this point, the Deputy President had before him all that was necessary to make an immediate decision: the evidentiary material in the Form F17 statutory declaration which accompanied the application; the Checklist, which identified from the Commission's perspective the potential difficulties in approving the Agreement; the submissions of the RFFWUI, which was the only party opposing approval of the Agreement; and the submissions in response from HJA and the SDA, and proposed undertakings to resolve concerns previously raised by the Commission.

At this point, the anomalous references to HJA found in the application and clause 4 of the Agreement still required an explanation. While the existence of the anomaly might not perhaps have been obvious, it was eminently detectible from a diligent reading of the file, because the NERR had identified Hungry Jack's Pty Ltd as the employer, and each of the existing collective agreements that applied to the employees in question (all of which were listed in the Form F17 statutory declaration) stated that the employer covered by the agreement was Hungry Jack's Pty Ltd. The Deputy President could therefore have identified the anomaly, raised it with the parties, dealt with what was a curable defect (as we explain below) and determined the application. However, this did not happen.

[18] It is not necessary to map out in detail the meandering course of the proceedings before the Deputy President over the course of the following six months, which involved widely interspersed hearings in July, September, October and November 2019, except to refer to some matters arising from a written submission made in the name of Hungry Jack's and filed on 23 September 2019. The submission consisted of eight pages of text and 50 paragraphs. The very last paragraph read as follows:

> "***Clarification***
>
> 50. The employer of employees to be covered by the Agreement is Hungry Jack's Pty Ltd (ACN 008 747 073; ABN 25 008 747 073) which is a subsidiary of Hungry Jack's Australia Pty Ltd."

[19] It is apparent that Hungry Jack's had by this time realised the error in the identification of the proper employer in clause 4.1 of the Agreement and in the application for approval of the Agreement. It did not make a formal application pursuant to s 586(a) of the FW Act to correct the name of the applicant in the application for approval of the Agreement in order to ensure that there was a competent application before the Commission. It may have expected the Deputy President to dispense with the requirements of the Rules or waive an irregularity in the manner in which the application had been made. However, it should have made an express application to this effect. The matter was not raised again at any subsequent point in the proceedings prior to the decision although, from this point, the company's correspondence with the Deputy President referred to Hungry Jack's Pty Ltd.

[20] The submission of 20 September 2019 attached a letter signed by Ms Jenny McKie, the Chief People Officer of Hungry Jack's, and dated 20 September 2019 which contained a number of proposed undertakings referred to in the text of the letter. Omitting formal parts, the letter stated:

> "**Undertakings**
>
> In the Fair Work Commission
>
> **FWC Matter No**: AG2019/1291
>
> **Applicant:** Hungry Jack's Pty Ltd T/A Hungry Jack's
>
> **Agreement:** *Hungry Jack's National Enterprise Agreement 2019*

I, Jenny McKie, Chief People Officer for Hungry Jack's Pty Ltd **('the Employer')** give the following undertakings in accordance with section 190 of the *Fair Work Act 2009* (Cth) **('the Act'),** with respect to the *Hungry Jack's National Enterprise Agreement 2019* **('the Agreement'):**

Authority to give undertakings

1. I have the authority given to me by the Employer to provide these undertakings in relation to the application before the Fair Work Commission.

Clause 2 Commencement

2. In relation to clause 2.1 of the Agreement, the Employer undertakes that that Agreement shall remain in force for a period of not more than 4 years after the day on which the Fair Work Commission approves the Agreement.

Clause 4 Coverage

3. In relation to clause 4.1 of the Agreement, the Employer undertakes that the Agreement will apply only to employees of Hungry Jack's in the classifications listed at clause 17 of the Agreement.

Clause 7 Individual Flexibility Arrangements

4. Under clause 7.9 of the Agreement, the Employer undertakes to give a copy of the individual flexibility arrangement to the employee within 14 days after it is agreed.

5. Under clause 7.11(b) of the Agreement, the Employer undertakes that the Agreement may be terminated by the either employer or employee by giving no more than 28 days written notice to the other party.

6. The Employer undertakes that terms of any individual flexibility arrangement made under clause 7 of the Agreement are about permitted matters under section 172 of the Act; and are not unlawful terms under section 194 of the Act.

Clause 9 Dispute resolution

7. The Employer undertakes to permit the employee to appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9 of the Agreement.

Clause 17 Classifications

8. With regards to clause 17.2 of the Agreement, an employee engaged as Crew Member-Team Lead will not have responsibility for supervising Crew Members and/or training new employees.

Clause 18 Minimum Weekly Wages

9. In relation to clause 18 of the Agreement, the Employer undertakes that the minimum weekly wage for an Assistant Manager will be $860.70 per week.

10. For the purposes of clause 18.2 of the Agreement, the Assistant Manager Agreement classification is mapped to the Fast Food Industry Award classification of a Level 3(b) employee.

Clause 20.4 Uniforms and Special clothing

11. In relation to clause 20.4(d) of the Agreement, the Employer undertakes to not withhold $30.00 to offset the costs of the uniform not being returned, in circumstances where the employee gives evidence satisfactory to the employer that the employee was not at fault.

Clause 20.5 Delivery Drivers

12. In relation to clause 20.5(h) of the Agreement, the Employer undertakes to pay an allowance of $0.41 per kilometre only where an employee is primarily engaged to perform delivery duties for the employer. Where the employee is requested to use their own private motor vehicle to perform delivery duties, and the employee is not primarily engaged by the employer to perform delivery duties, the employee will be paid an allowance of $0.78 per kilometre.

Schedule 'A' - A.10.3

13. In relation to clause A.10.3 in Schedule A the Employer undertakes to that the minimum amount payable to the employee during the trial period must be no less than $87 per week."

[21] Some important observations may be made about the above undertakings. The first is that the name of the applicant in the heading to the letter was identified, incorrectly, as "*Hungry Jack's Pty Ltd*". When read with the "*clarification*" in the submission, this was clearly no accident. Secondly, although undertaking 3 (using the numbering in the above letter) ostensibly formalised the undertaking proposed in the tabular submission of 20 May 2019 to address the problem raised by the Commission in respect of clause 4.1, it also referred to "*employees of Hungry Jack's*", with "*Hungry Jack's*" being effectively a defined term referring to Hungry Jack's Pty Ltd by reason of the way in which the identity of the applicant was expressed. This was clearly no accident, but no attempt was made to link this to the "*clarification*" in the submission of 20 September 2019.

[22] The proposed undertaking 3 was effective to resolve the problem earlier identified in the coverage provision of the Agreement, for reasons which we will explain later. However the Hungry Jack's submission never explained that it would have that purpose, nor was any such explanation provided prior to the decision being issued.

[23] Notwithstanding the fact that Hungry Jack's "*clarification*" fell short of an application to amend its application for approval of the Agreement, it must surely have been the case that if the Deputy President had actually read the Hungry Jack's submission, he would have

realised (as he later did) the significance of the "*clarification*" in paragraph 50. The Deputy President would have been able to take steps on his own initiative to ensure that the necessary amendment to the application was made to render it competent. But, as we explain below, it is apparent that he failed to read the submission at this time or at any time before he issued the decision.

[24] The Hungry Jack's submission of 20 September 2019 also responded to the contention advanced by the RFFWUI concerning the alleged lack of choice in superannuation funds. Hungry Jack's resisted this contention in its submission but in the alternative proposed that this could be remedied, if it was an issue of concern to the Commission, by an undertaking that Hungry Jack's would "*...pay an employee's superannuation contributions into an alternative complying fund, if an employee elects so in writing*". This undertaking was not included in the letter attached to the submission but, on 12 November 2019, lawyers for Hungry Jack's sent the Deputy President a letter formalising the proposed undertaking (although this never found its way into the electronic case file). At the hearing on 14 November 2019, the Deputy President said "*It looks like the superannuation issue is resolved through the undertaking having regard to the Kmart decision*",[4] and the issue was not thereafter agitated by the RFFWUI.

[25] As earlier stated, the decision was published on 16 December 2019. The decision in its entirety read as follows:

> "[1] An application has been made for approval of a single enterprise agreement known as the *Hungry Jack's National Enterprise Agreement 2019* (**Agreement**). The application was made pursuant to s.185 of the *Fair Work Act 2009* (**Act**). It has been made by Hungry Jack's Australia Pty Ltd (**Employer**).
>
> [2] The Employer has provided written undertakings dated 20 September 2019. Those undertakings are attached to this decision and marked as **Annexure A**. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement (as compared to the relevant provisions of the *Fast Food Industry Award 2010*) and that the undertakings will not result in substantial changes to the Agreement. I note that those undertakings become terms of the Agreement.
>
> [3] The Shop, Distributive and Allied Employees Association (**SDA**) and the Australian Workers' Union (**AWU**), being bargaining representatives of a registered employee organisation for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover each of them. In accordance with s.201(2) of the Act, I note the agreement covers these organisations.
>
> [4] I am satisfied that each of the requirements of ss.186, 187, 188 and 190 of the Act, as are relevant to this application for approval, have been met.
>
> [5] I am also satisfied the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.

[4] Transcript, 14 November 2019, PN24

[6] The Agreement is hereby approved and, in accordance with s.54 of the Act, will operate from 23 December 2019. The nominal term of the Agreement will expire on 23 December 2023.

[7] Further reasons for this decision will be published in due course."

[26] The decision did not deal with the "*clarification*" referred to in Hungry Jack's submissions of 20 September 2019. Annexure A to the decision contains a copy of Ms McKie's undertakings letter dated 20 September 2019. The superannuation undertaking contained in the Hungry Jack's letter of 12 November 2019 was not included in Annexure A and therefore, presumably, not accepted under s 190 of the FW Act in the decision.

[27] As stated above, the RFFWUI lodged its notice of appeal on 6 January 2020. The Deputy President had not by that time published his foreshadowed reasons but was evidently in the process of writing his reasons because when, on 7 January 2020, the RFFWUI requested access to the case file for the purpose of preparing its appeal book, the Deputy President's chambers responded by stating that the file would not be released until his reasons for decision had been published. On 20 January 2020 the appeal was listed for hearing on 26 March 2020. The next development was that on 3 March 2020, the Deputy President's chambers listed the matter for a telephone hearing on 9 March 2020. The following day, the Deputy President's chambers sent an email to the legal representative of Hungry Jack's/HJA, copied to the SDA, the AWU and the RFFWUI, which stated (omitting formal parts):

"1. I write on behalf of Deputy President concerning the re-listing of the above matter at **1:30pm AEDT** next **Monday, 9 March 2020** (by telephone). Representatives of the SDA, AWU, and RAFFWU have also been copied into this email.

2. It is noted that the Commission approved the *Hungry Jack's National Enterprise Agreement 2019* (**Agreement**) on 16 December 2019 (see [2019] FWCA 8492).

3. However, in drafting further reasons for that decision, the Deputy President's attention has been drawn to the Applicant's Outline of Further Submissions dated 20 September 2019 (at [50]), which reads:

"Clarification

50. The employer of employees to be covered by the Agreement is Hungry Jack's Pty Ltd (ACN 008 747 073; ABN 25 008 747 073) which is a subsidiary of Hungry Jack's Australia Pty Ltd."

4. The above so-called "clarification" was not otherwise raised (orally or in writing) by the Applicant or unions in this matter. It was not subject to any argument or objection before the Commission.

5. Clause 4.1 (Coverage) of the Agreement is expressed as coverage of the employer in the following terms "Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies" (my emphasis).

6. Even if it be accepted by the Commission that as a matter of law, a single enterprise agreement cannot extend coverage to an employer's "subsidiaries, licensees and their associated companies", and thus clause 4.1 ought only be read as applying to Hungry Jack's Australia Pty Ltd, this entity (on the Applicant's submissions above) is not the employer covered by the Agreement in any event. Rather, the true employer is Hungry Jack's Pty Ltd.

7. *Prima face*, it appears to the Commission that there has never been any enterprise agreement (or proposed enterprise agreement) capable of approval by the Commission, and that the approval application must be dismissed (or most likely simply quashed pursuant to the current appeal proceedings). This is not a matter that appears capable of being cured by way of undertaking or correction (see s.586 of the Fair Work Act 2009). In other words, any undertaking or correction that purports to correct a substantial or material defect such as the name of an employer, and in turn changes one employer (corporate entity) to another, would be beyond power (and outside jurisdiction, and thus invalid). This is so even where it may be the evidence that the employer (applicant's) name was in error, made by mistake, or will not result in any prejudice to employees. Further, this is not a matter where a single interest employer authorisation has been previously obtained, and thus applied at the time the proposed enterprise agreement was "made" (it is noted that such a single interest employer authorisation cannot be obtained so that it has the effect of retrospectively, for example, curing a defect such as the one in this matter).

8. The Commission also notes that both the F16 and F17 forms filed in these proceedings state that the "legal name of the employer" is "Hungry Jack's Australia Pty Ltd (ACN 065 643 343; ABN 83 065 643 343)". There is no suggestion in any of these forms that the legal name of the employer is "Hungry Jack's Pty Ltd (ACN 008 747 073; ABN 25 008 747 073)".

9. In view of the foregoing, the Deputy President directs that the Applicant and the Unions file (by way of email to these Chambers), by no later than 12:00PM next Monday, 9 March 2020, any written submissions they may wish to make in regard to the above (which they can supplement orally at the telephone hearing that same day). Such submissions also ought address as to whether the Deputy President is now "*functus officio*", and thus this issue is better dealt with by way of RAFFWU amending its notice of appeal, and having the issue dealt with on appeal as a threshold argument."

[28] At the telephone hearing on 9 March 2020, all the parties submitted that the Deputy President was now *functus officio* in relation to the application for approval of the Agreement. Despite this, on 17 March 2020, over three months after the decision was issued and nine days before the hearing of the appeal, the Deputy President issued a "Statement"[5] (statement), of which the most pertinent parts are as follows (footnotes omitted):

"[2] During the preparation of my further reasons, I became aware that the actual "national system employer" of the relevant employees covered by the Agreement is

[5] [2020] FWC 1314

"Hungry Jack's Pty Ltd" T/A Hungry Jack's (ACN 008 747 073, ABN 25 008 747 073) (**Actual Employer**). However, the Actual Employer is not the named Applicant in these proceedings. This issue arises despite clause 4.1 of the Agreement (which is titled "Coverage") being expressed to cover the Applicant. I understand the Applicant to be not only a different and distinct legal entity to the Actual Employer, but also the parent company to the Actual Employer.

[3] The issue of the Applicant not being the actual employer entity of relevant employees was not raised before me (by anyone) in oral argument during the two face-to-face hearings conducted by me in this matter. More specifically, it was not a contention raised by the Retail and Fast Food Workers' Union (**RAFFWU**) who opposed the approval of the Agreement. Further, the Applicant did not appear to consider this issue to be a matter of significance such that the Applicant sought to bring the matter to my attention during the hearings. I only become aware of the subtle difference between the name of the Applicant and the name of the Actual Employer by reference to a two-line paragraph at the end of one of the Applicant's various written submissions titled "Clarification" (as part of preparing my further reasons post the publication of my decision)...

[4] I note that all of the documents filed by the Applicant (i.e. the Form F16 and Form F17 Statutory Declaration Forms) in this matter have been filed in the name of the Applicant (not the Actual Employer). Further, all of the documents filed by the relevant employee organisations (i.e. the Form F18 Statutory Declaration Forms) in this matter identify the Applicant as the employer. No party, at any time, sought to replace or amend any of those documents. Nor did the Applicant seek to rely upon any evidence explaining to the Commission how any purported error, mistake, or mix-up between the Applicant and the Actual Employer on these documents, and/or on the face of the Agreement, occurred.

[5] Given that the name of the employer is incorrect, it appears to me that all of these documents, in their current form, are deficient (i.e. invalid) for the purposes of the application for approval in this matter. Significantly, the Form F17 (being the "Employer's statutory declaration in support of an application for approval of an enterprise agreement"), has not been signed by a representative of the Actual Employer. Instead, the Form F17 has been signed by, or on behalf of, a representative of the Applicant. The Agreement itself has also been signed by a representative of the Applicant (and not the Actual Employer).

. . . .

[7] I further note that the Applicant has provided undertakings in this matter, not in its name, but in the name of the Actual Employer. In this regard, knowing what I know now, I do not consider that such undertakings are valid or binding as they were not made by the Applicant, but by the Actual Employer. In making my decision to approve the Agreement, I sought undertakings from the purported Applicant employer, not the Actual Employer (i.e. the latter has never made an appearance in these proceedings). Again, the Applicant did not specifically bring to my attention the fact that the undertakings provided were not in its name. Further, Mr Tim *McDonald* (Solicitor, Morey & Agnew Lawyers, appearing on behalf of the Applicant) did not bring to my attention at any time that he was not only representing the Applicant in these proceedings, but also the Actual Employer.

. . . .

[10] On the basis of the submissions of the Applicant, and undertaking three (of the undertakings published with the approval of the Agreement), I accepted that the Agreement would only cover and apply to the relevant employees who were given the opportunity to vote to approve the Agreement (being those employees listed in the classifications found at clause 17 of the Agreement).

[11] I also accepted that the Agreement could only ever cover "Hungry Jack's Australia Pty Ltd" and not "its subsidiaries, licensees and their associated companies operating fast food outlets". I do not consider there to be any basis under the Act, or otherwise, for an enterprise agreement to cover current and/or future unnamed and unidentified "subsidiaries, licensees and their associated companies operating fast food outlets" of an Applicant employer. This is especially so when the Applicant is not even an "employer" (let alone a "national system employer")...

[12] In my view, these issues are not merely matters of technicality or ambiguity that can be resolved or cured by way of variation under, for example, s.217 of the Act. The purported employer named in the Agreement is "Hungry Jack's Australia Pty Ltd". This may be an error, but it is not a technicality or ambiguity. Indeed, it can hardly be a technicality that the purported employer named in the Agreement is not only not the employer of relevant employees, but not an employer at all. In my view, if the Applicant genuinely considered this to be a matter of technicality or ambiguity, the Applicant would have either never lodged the originating application in its own name, or immediately sought to amend its originating application (and filed relevant and direct evidence as to how long the Applicant was aware of this issue, why the Applicant chose to file the originating application that it did, and why the Applicant chose to conduct itself in these proceedings in respect of this issue in the manner that it did).

. . . .

[15] Having heard from the parties during that hearing, *prima face*, it now appears to me that there was never a proposed enterprise agreement capable of approval by the Commission, and that the application for approval of the Agreement ought to have been dismissed. Indeed, it appears to me that the current application ought to have never been made (i.e. lodged with the Commission for approval in the first place). I note that this is not a matter that appears capable of being cured by way of undertaking or correction...

[16] During the hearing, the parties jointly submitted that I am now *functus officio* in terms of dealing with the issues that flow from the Applicant not being the actual employer. I concur with the parties in this regard. Given that these proceedings are now subject to appeal, the issues I have identified in this Statement are now a matter for the Full Bench to consider and determine. I note that RAFFWU advised me (at the hearing on 9 March 2020) that it had already amended its Notice of Appeal to include this issue as a ground of appeal.

[17] I make one final observation in this matter. In my view, the fact that the Applicant is not the actual employer of relevant employees (or an employer at all) is an issue that ought to have been squarely brought to my attention by the Applicant orally at the commencement of the hearing. This issue is not one that should have been hidden away at the back of a set of written submissions under a heading "Clarification". The approach totally downplays the significance of the issue, and is therefore not an

> approach that has anything to commend it. In my view, it is very unfortunate that this issue was known to the Applicant, but was not raised in a totally upfront manner with the Commission.
> . . . "

[29] This statement does not constitute reasons for decision. It is not necessary for us to address the various legal or factual propositions it contains. The Deputy President has to date not produced any further reasons for the decision. We take it from the statement that the Deputy President has abandoned any intention to do so.

Submissions and further evidence on appeal

RFFWUI

[30] In the appeal, the RFFWUI submitted that:

(1) The Deputy President erred in being satisfied under s 186(2)(d) of the FW Act that the Agreement passed the BOOT. The RFFWUI submitted that the Agreement did not pass the BOOT for reasons essentially the same as those advanced at first instance and summarised in paragraph [13] above, and noted that the Deputy President had given no reasons as to why he had reached the requisite state of satisfaction under s 186(2)(d).

(2) The Deputy President erred in concluding that the requirements of s 180(5) and (6) had been met, and thereby erred in reaching a state of satisfaction that the Agreement had been genuinely agreed to as required by s 186(2)(a) as explicated in s 188(1)(a)(i). The evidence disclosed that the employer had not compared the Agreement to the extant industrial instruments at all, and only limited terms were explained as compared to the Award.

(3) The Deputy President erred by not publishing reasons for the decision and thereby denied the RFFWUI procedural fairness, in circumstances where the matter was vigorously contested and the subject of a number of competing submissions and hearings.

(4) There was no enterprise agreement capable of approval because the employer named as covered by the Agreement did not in fact employ anyone. Nor was the application made by a bargaining representative, as required by s 185(1). In those circumstances the Commission had no power to approve the Agreement.

[31] It was submitted by the RFFWUI that permission to appeal should be granted in the public interest because the Agreement did not comply with the BOOT and covered more than 16,000 employees, the appeal raises a significant procedural issue as to the Commission's procedure for assessing whether agreements meet the statutory approval criteria, injustice would accrue to the employees covered by the Agreement if it was left in place, and the duty to give reasons is a matter of broad public interest.

Hungry Jack's

[32] Hungry Jack's submitted that the RFFWUI did not have standing to appeal because it was not a "*person aggrieved*" by the decision as required by s 604(1) of the FW Act. It did not, it was submitted, seek to appeal the decision on behalf of any particular person covered by the Agreement, but sought to do so in its own right in circumstances where it was not a registered organisation and had no relevant interest in the matter. Hungry Jack's also submitted that permission to appeal should be refused because the RFFWUI acted as agent for only one employee whereas the remaining 16,300 employees did not oppose the approval of the Agreement, the employees benefited from wage increases paid after the Agreement was approved, and risked being worse off if approval of the Agreement was quashed and there was a reversion to the previously-applicable instruments. The RFFWUI's appeal, it was submitted, did not raise any issue of importance or general application or identify a diversity of decisions or disharmony in the application of legal principles requiring appellate guidance, nor did the decision manifest injustice or involve a counter-intuitive result.

[33] In relation to the BOOT grounds of appeal, Hungry Jack's submitted that the RFFWUI's submissions focused on the microscopic application of particular clauses without considering the overall effect of the Agreement, and that the alleged detriments in respect of choice of superannuation funds, meal breaks, changes to part-time employment, shutdown and refurbishment and uniform deduction were either not in fact detriments for the purpose of the BOOT or were outweighed by the benefits of the Agreement. In relation to the issue of genuine agreement and compliance with s 180(5), it was submitted that the evidence demonstrated that Hungry Jack's undertook a rigorous process to explain the terms of the Agreement and their effect. As to the failure to publish reasons, it was submitted that there was no such failure because the Deputy President indicated that reasons would be published and, in any event, this ground of appeal merely related back to the other grounds of appeal which were lacking in merit.

[34] In relation to the RFFWUI's proposed additional ground of appeal, Hungry Jack's submitted that the RFFWUI should not be granted leave to amend its notice of appeal because it sought to advance a new argument that had never been raised at first instance, and indeed the RFFWUI had proceeded before the Deputy President on the basis that there was a valid application for approval of an agreement before the Commission. In any event, Hungry Jack's submitted that the ground was without merit because:

- a valid NERR had been issued by Hungry Jack's to its employees;
- the employees of Hungry Jack's had approved the agreement in a valid voting process;
- clause 4.1 provided that the Agreement covered Hungry Jack's, since it was a subsidiary of HJA, and its employees;
- a valid agreement was therefore made pursuant to s 182 of the FW Act on 17 April 2019, and was able to be submitted to the Commission for approval; and
- any error in the identification of the applicant in the application for approval could be remedied by the Full Bench on appeal pursuant to s 607(3)(a) by way of a variation to the decision.

[35] In the alternative, if it was necessary to uphold the appeal, it was submitted that the Full Bench could re-determine the application for approval of the Agreement itself. In

anticipation of that possibility, on 27 March 2020 Hungry Jack's filed an amended application for the approval of the Agreement which identified the applicant as "*Hungry Jack's Pty Ltd*" with an ACN of 008 747 073.

[36] Hungry Jack's also read an affidavit sworn by Ms McKie on 25 March 2020 in which she stated, among other things, that:

- she was the Chief People Officer of Hungry Jack's;
- HJA is the parent company of Hungry Jack's and holds its entire issued share capital;
- Hungry Jack's employed about 16,311 persons in the fast food industry, whereas HJA employed only four persons who were not covered by the Award;
- the NERR and subsequently the Agreement and the voting instructions were issued to all employees of Hungry Jack's who worked in the fast food industry, and the information system required each employee to open them and acknowledge that they had received and read them;
- only the 16,311 employees of Hungry Jack's in the fast food industry were allowed to participate in the voting process;
- she had completed the Form F16 application for approval of the Agreement, and she had incorrectly stated that the applicant was HJA;
- she had also completed the accompanying Form F17 statutory declaration and again she wrongly identified HJA as the legal name of the employer;
- on 16 September 2019, when reviewing the submission to be filed with the Commission that she identified the erroneous references to HJA in the application and the statutory declaration;
- it was determined that the matter should be drawn to the Commission's attention in the submissions due to be filed on 20 September 2019, and the undertaking numbered 3 was also provided on the same day;
- Hungry Jack's is the only direct subsidiary of HJA;
- HJA does not employ and has no intention to employ anybody in the classifications covered by the Agreement;
- prejudice would result to Hungry Jack's if the RFFWUI was allowed to proceed with its amended notice of appeal, since Hungry Jack's had migrated to a new payroll system upon approval of the Agreement;
- the approval of the Agreement had resulted in significant new benefits to employees at a cost to Hungry Jack's which was already well in excess of $4 million; and

- Hungry Jack's new payroll system would be unable to facilitate a reversion to the previous industrial instruments.

SDA

[37] The SDA submitted that:

- the appeal was not competent because the RFFWUI had no standing in its own right to bring the appeal, not being a registered organisation and not otherwise having a relevant interest, and the appeal did not purport to be brought in the interests of the one employee which it represented;

- any failure to give reasons did not automatically lead to the appeal being upheld and the decision quashed, unless there was a demonstration that the resulting denial of procedural fairness could have made some difference to the outcome;

- because the decision was a discretionary one, it needs to be demonstrated that the outcome was unreasonable or plainly unjust such as to permit the inference that there was a failure to properly exercise the discretion;

- the BOOT detriments raised by the RFFWUI are of no substance: the superannuation fund issue was dealt with by a proposed undertaking, although this was not appended to the decision; the uniform deduction issue was dealt with by an undertaking; the meal breaks clause in the Agreement is superior to that in the Award; and the employer's submission on the shutdown and refurbishment made before the Deputy President ought be accepted; and

- the RFFWUI's submissions advanced in the appeal concerning the explanation of the Agreement were cursory, and the detailed submissions about this made at first instance by Hungry Jack's and the SDA were correctly accepted by the Deputy President.

Consideration

Standing to appeal

[38] We consider that the RFFWUI has standing to institute the present appeal. Section 604(1) confers a capacity to appeal, subject to the requirement for permission to appeal, upon a "*person who is aggrieved by a decision*". This expression has been assigned a wide meaning. It extends beyond persons whose legal interests are directly affected by the decision and registered organisations whose broader industrial and membership interests might be affected, and encompasses any person who has an interest in the decision beyond that of an ordinary member of the public.[6] In this case, we consider that the RFFWUI has the requisite standing because it was a bargaining representative for the Agreement appointed in accordance with s 176(1)(c) of the FW Act, it was permitted to be heard on the approval of

[6] *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 137 ALR 70, 65 IR 393 at 90-91; *Re Australian Industry Group* [2010] FWAFB 4337, 196 IR 125 at [11]; *J.J. Richards & Sons Pty Ltd and another v Transport Workers' Union of Australia* [2011] FWAFB 3377, 210 IR 231 at [9]

the Agreement at first instance (and indeed probably had a right to be heard in its capacity as a bargaining representative), and its submissions were (apparently) rejected in the decision.

Permission to appeal

[39] The unusual circumstances attending this appeal lead us to be satisfied that the grant of permission to appeal would be in the public interest. That things went badly astray in the proceedings before the Deputy President is sufficiently demonstrated by the fact that the Deputy President approved the Agreement in the decision and foreshadowed that he would publish his reasons later, then never published his reasons but instead issued a statement expressing his view that he should not have approved the Agreement. Full Bench review of this regrettable state of affairs is clearly required. Permission to appeal is therefore granted as required by s 604(2) of the FW Act.

Failure to publish reasons

[40] It is sufficient to dispose of the appeal to determine ground 5 in the notice of appeal, which contends that the Deputy President's failure to publish the further reasons foreshadowed in the decision constitutes appealable error.

[41] The FW Act does not in terms require that reasons be given for every decision made. Section 601(2) of the FW Act simply provides that the Commission "*may give written reasons for any decision that it makes*". However an obligation to give reasons which address material issues of fact and law may arise as an incident of the fundamental requirement upon the Commission to act judicially and provide procedural fairness, and will certainly be implied in any case where the decision significantly affects the rights and interests of relevant persons, the matter is seriously contested and the appeal facility in s 604 is available.[7]

[42] It is not in contest in this appeal that the Deputy President had an obligation to give adequate reasons for his decision. The Deputy President himself recognised that the content of the decision which he published on 16 December 2019 was not adequate to explain the outcome he had determined insofar as he indicated his intention to publish further reasons. As earlier explained, he has not done so and, we infer from the statement, does not intend to do so.

[43] The Deputy President's failure to give adequate reasons for his decision was a function of the course he chose to take of issuing his decision with an intention of publishing full reasons at a later time - a course which was, in the circumstances of this case, entirely unsatisfactory. Where the circumstances of a particular case or the FW Act itself require an urgent decision to be made, this course may be a necessity. However there was nothing urgent about this particular case beyond the fact that a matter which could have been decided in early July 2019 remained undecided five months later. In an appropriate case, the reasons for a decision may be reduced to writing and published after the decision is issued but, logically, in order to be reasons for a decision, they must be the reasons formulated in the mind of the decision-maker as justifying the decision at the time the decision is made. Otherwise, the subsequent written "reasons" are merely an ex post facto justification for the decision, being a statement of what the reasons for the decision could have been had they occurred to the

[7] See *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [10] per Moore J and at [44]-[48] per Marshall J; *Soliman v University of Technology, Sydney* [2012] FCAFC 146, 207 FCR 277, 226 IR 214 at [41]-[46]; *Barach v University of New South Wales* [2010] FWAFB 3307, 194 IR 259

decision-maker at the time of the decision. The course taken by the Deputy President was inappropriate for the reasons explained in the judgment of Chernov JA (with whom Charles and Vincent JJA agreed) in *Fletcher Construction Australia Ltd v Lines MacFarlane Marshall Pty Ltd* [8]:

> "[31] There are many reasons why it is 'eminently desirable' that reasons be given at the same time as judgment is pronounced. They include the following. First, the parties are entitled to a decision which is based on the reasoning process of the judge which has been concluded by the time the decision is pronounced. The court should not reserve to itself the opportunity to mould reasons, after the pronouncement of judgment, so as to make them appear consistent with the decision. That is not to say, of course, that a judge cannot review the reasons after they have been published. I will mention that matter again at a later stage. Secondly, the unsuccessful party should be in a position to determine within the time constraints imposed by the Rules of Court, whether to appeal against the decision. From a realistic point of view, it can only do this if the reasons for the decision are made available to it when, or very shortly after, judgment is pronounced. There are other sound reasons based on policy and practical considerations which were mentioned by Kirby, P and Priestley, JA in *Palmer* and to which I have referred which support the view that as a general rule, all judicial officers who are required to give reasoned judgments, should do so when pronouncing them..."

[44] The capacity to "mould reasons" when they are published after the decision is all the more to be deprecated where, as in this Commission, there is an internal appeal facility and members may readily have access to the notice of appeal and the grounds of appeal contained therein. In this case we note that the Deputy President appears to have still been attempting to formulate his reasons for decision well after the RFFWUI lodged its notice of appeal on 6 January 2020.

[45] That the failure of the Deputy President to provide adequate reasons for his decision involved a significant denial of procedural fairness may be illustrated in two ways. First, we infer from the fact that the Deputy President only noticed the "*clarification*" in the Hungry Jack's submission of 20 September 2019 while preparing his reasons on or about 3 March 2020 that he had not read that submission either in part or in whole, and perhaps had not read other submissions, when he made the decision. Where parties to proceedings are required to present their respective cases wholly or to a substantial degree by way of written submissions, as here, a failure to read those submissions will necessarily amount to a straightforward breach of the hearing rule. The consequences of that failure here were significant, because had the Deputy President deferred making the decision until he was ready simultaneously to publish his reasons, he would presumably have got around to reading the 20 September 2019 submission and therefore been in a position to deal properly with the issues flowing from the "*clarification*".

[46] Second, it is clear that in respect of the Agreement, there was a serious question to be determined as to whether it passed the BOOT. Clause 18 of the Agreement provides for the wage rates for five classifications, and four of these are the same as the Award rates. Clause 18.1 provides for pay increments in excess of the Award, but these are payable only in respect of "*non-penalty ordinary hours*" which, as a result of the penalty rate provisions in clause

[8] [2001] VSCA 167, 4 VR 28

25.7, only consist of 6am to 10pm Monday to Friday. In respect of a fast food chain of the nature of Hungry Jack's, it is not difficult to envisage that some casual and part-time employees will work their entire ordinary hours on weekends. For such employees it would be necessary to find some other non-contingent benefit in the Agreement in order to be properly satisfied that all such employees would be better off overall compared to the Award, and this necessarily made the BOOT issue a very finely balanced one. This difficulty is apparent on the face of the Agreement, was pointed out in the Checklist, and was emphasised in the RFFWUI's submissions. No undertaking offered by Hungry Jack's prior to the decision addressed this issue in any significant way.

[47] It may be presumed from his approval of the Agreement in the decision that the Deputy President was satisfied that the Agreement passed the BOOT, and it is not apparent that he resiled from this in the statement. However, in the absence of reasons, it is impossible to identify the basis upon which the Deputy President reached that state of satisfaction, particularly in relation to the class of employees to which we have referred. There is no obvious benefit afforded to this class by the Agreement as compared to the Award upon which it could be presumed that the Deputy President's satisfaction as to the BOOT was founded. The absence of reasons and the incapacity otherwise to readily identify any logical grounds for the Deputy President's conclusion as to the BOOT render the decision an arbitrary one. As Deane J said in *Australian Broadcasting Tribunal v Bond*:[9]

> "If the decision were determined by the toss of a coin or some other arbitrary procedure, the 'right' to a hearing would be illusory. If the decision could be based on unreasoned prejudice, the audi alteram partem rule would be pointless."

[48] Further, the lack of reasons has substantially diminished the rights of the parties to the appeal, since for the appellant it is not possible to identify the basis upon which the Deputy President erred in relation to the BOOT and for the respondents the grounds for the Deputy President's satisfaction as to the BOOT cannot be elucidated and defended.

[49] The failure of the Deputy President to give reasons for his decision has, we consider, wholly vitiated that decision. The appropriate course in the circumstances is to uphold the appeal and quash the decision.

[50] We do not consider it appropriate to remit the application for the approval to a single member of the Commission for re-determination. An entire year has now passed without a valid decision having been made in relation to that application, and to remit it to another member for re-determination is simply not the appropriate course. We will determine the application ourselves based on the evidence, submissions and other material that was before the Deputy President and the additional evidence and submissions received in the appeal.

Re-determination of the application for approval of the Agreement

[51] We will deal with the approval requirements in ss 186 and 187 of the FW Act, as relevant, in turn. However it is necessary at the outset to deal with the competency of the application, since the "*basic rule*" in s 186(1) that an agreement must be approved if those requirements are met is premised on there being "*an application for the approval of an enterprise agreement under ... section 185*". An application made under s 185 is one that is

[9] [1990] HCA 33, 170 CLR 321 at 366

made in accordance with s 185.[10] The application in the form in which it was filed was, as we have stated earlier, not made in accordance with the section because the person described as the applicant, HJA, was not a bargaining representative for the Agreement because it was not an employer who would be covered by the Agreement, not having any employees covered by the Agreement. Accordingly in its current form the application is not capable of approval.

[52] The affidavit of Ms McKie sworn on 25 March 2020 makes it clear that the identification of HJA as the applicant, instead of the actual employer Hungry Jack's, was simply an error on her part. An application has now been made to amend the name of the applicant to Hungry Jack's pursuant to s 586(a) of the FW Act.

[53] Consistent with the reasoning of the Full Bench majority in *CFMMEU v Griffith Cranes Pty Ltd*,[11] we do not consider that the application is invalid and a nullity by reason of the error made by Ms McKie; rather we consider this error to be amenable to correction under s 586(a), which authorises the Commission to "*allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate*". We consider the amendment should be allowed in order to correct the error. It is clear from the history of this matter which we have set out above, including from the NERR, the negotiations, the explanatory documents and the voting process that there was always intended to be an enterprise agreement which covered Hungry Jack's and its employees in its fast food restaurants. We do not consider that it would be fair or just that this intention be frustrated by an obvious error. We grant the amendment.

[54] We also note that the application for approval of the Agreement was arguably irregular for another reason. Section 185(2)(b) requires an application for approval of an enterprise agreement to be accompanied by "*any declarations that are required by the procedural rules to accompany the application*". Rule 24(5B) of the *Fair Work Commission Rules 2013* requires that an application for approval of an enterprise agreement "*must be accompanied by a statutory declaration, in support of the application for approval, made by an officer or authorised employee of each employer that is a bargaining representative for the agreement*". Ms McKie's affidavit makes it clear that Hungry Jack's is the only employer bargaining representative for the Agreement (being the only entity which employs persons covered by the Agreement) and that she is in fact an authorised employee of Hungry Jack's. Therefore on one view the Form F17 statutory declaration made by Ms McKie which accompanied the application for approval of the Agreement complied with the rule. However the RFFWUI points to the fact that the prescribed Form F17 requires that the name and ACN of the employer be stated in the declaration. This was not done insofar as Ms McKie incorrectly identified HJA and not Hungry Jack's as the employer. We consider that this is an error which should also be corrected pursuant to s 586(a), noting that that the declaration is a "*document relating to a matter before the FWC*" to which the provision is capable of application. Accordingly the Form F17 declaration of Ms McKie of 23 April 2019 is amended to change the name and ACN of the employer to "*Hungry Jack's Pty Ltd*" and "*008 747 073*" respectively.

[55] It is convenient at this point to deal with the contention advanced by the RFFWUI, which reflects paragraphs [10]-[15] of the Deputy President's statement, that there was never

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[10] *CEPU v Sustaining Works Pty Limited* [2015] FWCFB 4422 at [30]

[11] [2019] FWCFB 1717 at [42]-[43]

any enterprise agreement capable of approval by the Commission. We disagree. Section 182(1) provides when a single enterprise agreement is "*made*" as follows:

> "(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement."

[56] It is important to note that the above provision operates by reference to the outcome of a voting process in which the employees of the employer(s) that will be covered by a *proposed* enterprise agreement that is a single-enterprise agreement are requested to participate. The RFFWUI, and the Deputy President's statement, proceed on the presumption that the proposed agreement and the text of the agreement voted on are necessarily identical concepts under the statutory scheme. We do not accept that this is the case. The expression "*proposed enterprise agreement*" is used in respect of various stages of the bargaining process in Div 3 of Pt 2-4 of the FW Act, including at stages where it is likely that no text of a final agreement has been formulated. For example, s 173(2) describes when the notification time, which is the initiating point for the process, arises for a "*proposed enterprise agreement*". The notification time itself may, under s 173(2), be when a majority support determination, a scope order or a low-income authorisation comes into operation; each of these are orders of the Commission which, under ss 236, 238 and 242 respectively are made by reference to a "*proposed enterprise agreement*" (in the former two cases, a proposed single-enterprise agreement and, in the last case, a proposed multi-enterprise agreement). Bargaining representatives for the relevant "*proposed enterprise agreement*" in each case may apply for the order. The NERR, which under s 173(3) is required to be issued within 14 days of the notification time by the employer to be covered by the "*proposed enterprise agreement*" to all employees who will be covered by that agreement, must by virtue of by s 174(1A) of the FW Act and reg 2.05 and Schedule 2.1 of the *Fair Work Regulations 2009* (FW Regulations) commence with the following:

> "*[Name of employer]* gives notice that it is bargaining in relation to an enterprise agreement *([name of the proposed enterprise agreement])* which is proposed to cover employees that *[proposed coverage]*."

[57] Thus the NERR must set out the proposed coverage of the proposed agreement prior to the commencement of bargaining. The employer that will be covered by a "*proposed enterprise agreement*" may under s 181(1) request that the employees who will be covered by it approve it, but under s 181(2) this cannot occur less than 21 days after the last NERR in relation to the agreement is given. The effect of this provision is that the class of employees which is asked to vote in relation to the proposed agreement cannot be larger than the class of employees to which the NERR is issued, because otherwise the condition in s 181(2) will not be capable of satisfaction.

[58] Section 180 sets out a number of steps which an employer must take before requesting a vote under s 181(1) to approve a "*proposed agreement*". One of these (in s 180(2)(a)(i)) is to take all reasonable steps to provide employees with "*the written text of the agreement*" within the period of the seven days immediately prior to the day the vote commences. The use of this distinct expression at this late stage of the process suggests that while the text is undoubtedly intended to effectuate the proposed agreement and give certainty as to what is to

be voted upon, the concept of the "*proposed agreement*" exists prior to and independently of the ultimate text.

[59] In this case, as demonstrated by the NERR, the proposed agreement was a single-enterprise one which would only cover Hungry Jack's and its employees in its fast food restaurants. There is no evidence that, during the extensive negotiations in respect of the proposed agreement, there was ever any agreement or intention to change that position, nor was a scope order altering that position ever made or sought. The documents provided to employees prior to the vote confirm that the proposed agreement was only ever intended to cover Hungry Jack's and its restaurant employees. Under s 181, Hungry Jack's was entitled to seek that employees who would be covered by the proposed agreement (so described) and were within the class that had been provided with the NERR, and those employees only, vote upon the proposed agreement, and this is what it did. The coverage clause in the written text of the agreement provided pursuant to s 180(2)(a)(i) did not accurately reflect the coverage of the proposed agreement, for reasons which remain unexplained, but that does not alter the fact that a valid request was made under s 181 for a vote upon the proposed agreement. Once a majority voted in favour, the Agreement was made in accordance with s 182(1).

[60] The further point appears to be made by the RFFWUI and in the Deputy President's statement that, in any event, Hungry Jack's could never have applied for approval of the Agreement because it was not an employer covered by the Agreement according to the terms of its text, and that its employees were consequently also not covered. This is not correct. Clause 4.1 of the Agreement, which we have earlier set out, provides that the employers which it covers are "*Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies operating food outlets*". As the affidavit of Ms McKie makes clear, Hungry Jack's is a subsidiary, and indeed the only subsidiary, of HJA, and is therefore a covered employer. The employees covered are "*all employees of Hungry Jack's as defined*". There is no definition of "*Hungry Jack's*" in the definitions clause (clause 3.1) of the Agreement. In that context, we consider that "*Hungry Jack's as defined*" is to be read as referring to the formulation of employers covered in the same clause - that is, "*Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies operating food outlets*". Accordingly, the Agreement covers employees of Hungry Jack's.

[61] This is not to say that the text of clause 4.1 of the Agreement is not problematic in terms of the approval requirements in ss 186 and 187 (which operate by reference to the agreement that is "*made*" pursuant to s 182(1), not the "*proposed agreement*"). As we will come to shortly, it raises a concern in relation to the "*genuinely agreed*" approval requirement in s 186(2)(a). However we are satisfied that there is before the Commission an enterprise agreement which is, as a result of the amendment we have allowed, the subject of a valid application for approval.

Section 186(2)(a) – genuinely agreed

[62] Section 186(2)(a) requires that we be satisfied that the Agreement was genuinely agreed to by the employees covered the Agreement. Section 188(1) defines when the requisite genuine agreement has occurred and, in summary, requires satisfaction:

(1) as to compliance by the employer(s) covered by the Agreement with s 180(2), (3) and (5);

(2) as to compliance by the employer(s) covered by the Agreement with the s 181(2);

(3) that the agreement was made in accordance with s 182(1) or (2), as applicable; and

(4) that there are no other reasonable grounds for believing that the agreement was not genuinely agreed to by the employees.

[63] As to the first matter, the Form F17 declaration is demonstrative of compliance with s 180(2) and (3) *by Hungry Jack's*. In relation to s 180(5), we are satisfied that *Hungry Jack's* took all reasonable steps to explain the terms of the Agreement, and their effect, to its employees. It did so by way of the presentation, the comparison documents and meetings with employees in each restaurant. In doing so, we consider that a readily comprehensible explanation of the key features of the Agreement which were likely to affect the way in which employees were likely to vote was provided. The submissions of the RFFWUI before the Deputy President proceeded on the premise that it was necessary for Hungry Jack's to give an explanation of every single provision of the Agreement, and to identify any way in which the Agreement differed from the Award. We do not accept this premise. The central effect of this Agreement was that Hungry Jack's was departing from pre-FW Act instruments that provided for lesser benefits than the Award and moving to a new national arrangement which had a far greater degree of alignment with the Award but differed in some respects from that Award. We consider than Hungry Jack's took all reasonable steps to explain this. The type of hyper-detailed explanation demanded by the RFFWUI would not, we consider, have improved the comprehension of the Hungry Jack's workforce, which was demographically young in age, but rather have produced an excessively long document that would be difficult to read.

[64] As to the second matter referred to above, we are satisfied for the reasons we have already set out that s 181(2) was complied with *by Hungry Jack's*.

[65] We have emphasised compliance by *Hungry Jack's* with the above provisions because on the face of clause 4.1 of the Agreement as made, it was not the only employer covered by the Agreement (as distinct from the employer intended to be covered by the proposed Agreement). There is no evidence or even an assertion that HJA or any other potential entity complied with s 180(2), (3) or (5) or s 181(2). This aspect of the s 186(2)(a) "*genuinely agreed*' requirement is not satisfied.

[66] In relation to the third matter, we are satisfied for the reasons earlier stated that the Agreement was made under s 182(1). As to the fourth matter, we consider there is one ground for believing that the Agreement made was not genuinely agreed to by the employees covered by it, namely that there is no basis to conclude that the employees (if any) of the entities identified as covered by the Agreement apart from Hungry Jack's voted to approve it.

[67] For the reasons and to the extent we have identified, we have a concern that the approval requirement in s 186(2)(a) is not satisfied.

Section 186(2)(c) – no exclusion of the NES

[68] Section 186(2)(c) requires that we be satisfied that the terms of the Agreement do not contravene s 55 of the FW Act, which subject to certain exceptions prohibits an enterprise

agreement from excluding the NES or any provision of the NES. We are satisfied that it is not possible for any individual provision of the Agreement to be read as contravening s 55 because clause 6.1 of the Agreement provides:

> "This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency."

Section 186(2)(d) – the BOOT

[69] Because of the following matters, we have a concern that the Agreement does not pass the BOOT:

(1) The rate of pay in clause 18 for the classification of Assistant Manager as at the time the application for approval was lodged was $850.30 per week. The increment payable under clause 18.1 for non-penalty rates ordinary hours is 0.5% at the commencement of the Agreement and 0.75% only from 1 July 2021. The classification arguably better aligns with the Level 3 classification in the Award. At the date the application was filed, the rate for this classification was $850.30 per week if in charge of one or no persons, and $860.70 per week if in charge of two or more persons. We cannot conclude that an Assistant Manager is *better off* overall under the Agreement, and such an employee may be in fact worse off if in charge of two or more persons.

(2) For persons in the other classifications in clause 18 (except the Crew Member – Team Lead), the rates of pay are the same as under the Award. The pay increments provided for in clause 18.1 do not apply to employees who work ordinary hours to which penalty rates apply. Although Hungry Jack's submits that the proportion of employees who wholly work ordinary hours when penalty rates are applicable is low (less than 4%), there is no doubt that this cohort exists. There would also be a larger cohort that works a substantial proportion of penalty rate ordinary hours and a smaller proportion of non-penalty rate ordinary hours: for this cohort, the margin of benefit provided by the pay increments is minimal and may be outweighed by other detriments in the Agreement (discussed below). Hungry Jack's submitted that all employees attend training and crew meetings paid at non-penalty ordinary hours from time to time, but these are so infrequent and the pay benefit obtained is so marginal that they are likely to be outweighed by other detriments. Hungry Jack's also pointed to a range of additional benefits provided by the Agreement compared to the Award (principally consisting of the leave benefits identified in the eighth bullet point of the summary of the presentation in paragraph [7] above), but these are wholly or largely contingent benefits which are unlikely to produce any actual benefit for the large majority of employees.

(3) The definition of the classification of Crew Member – Team Lead in clause 17.2 includes responsibility for "*championing a production area in front or back of house*", which may be read as involving supervisory or training duties. If so, the classification may align with the Level 2 classification in the Award, which has a significantly higher rate of pay.

(4) Clause 20.4 concerns uniforms, and paragraph (d) allows the employer to withhold $30.00 from an employee from any monies owing to the employee if the uniform is not returned. This clause applies even if there is no fault on the part of the employee. There is no equivalent provision in the Award. The provision could not be used to deduct the amount from any NES entitlements that are required to be paid out, since this would be overridden by clause 6.1, but it could operate with respect to any wages owing.

(5) Clause 20.5(f) allows the employer to require an employee to use their private vehicle to perform delivery duties, and clause 20.5(h) provides that in that circumstance the employee is to be paid an allowance of $0.41 per kilometre. However, clause 19.6 of the Award provides that the allowance is to be $0.78 per kilometre where the employee is not engaged primarily to perform delivery duties.

(6) Clause A.10.3 of Schedule A of the Agreement provides that during the trial period of an employee being assessed for capacity pursuant to the Supported Wage System, the minimum amount to be paid to the employee is $82 per week. The equivalent provision in the Award (clause C.10.3 of Schedule C) provides for a minimum payment of $87 per week.

[70] There are four aspects of the Agreement that were contended by the RFFWUI to be detriments when compared to the Award, namely the arrangement of hours for part-time employment, superannuation fund choice, meal breaks, and the shutdown and refurbishment clause. We do not accept the RFFWUI's contentions in this regard. In relation to part-time employment, clauses 12.1, 12.2 and 12.4 of the Agreement provide:

"**12.1** 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.

12.2 At the time of engagement, 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).

. . .

12.4 The guaranteed minimum hours shall not be less than 8 hours per week."

[71] Clauses 12.1, 12.2 and 12.8 of the Award provide:

"**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 in relation to a particular rostered shift provided that:

(a) any agreement 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.

. . . .

12.8 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."

[72] The RFFWUI submitted that part-time employment under the Agreement would be casual employment under the Award by virtue of clause 12.8 of the Award because it does not meet the definition of part-time employment under the Award, or is generally more akin to casual employment, so that the BOOT comparison must be with casual employment under the Award. We reject this. The definition of part-time employment in clause 12.1 of the Agreement is relevantly the same as in clause 12.1 of the Award. Further, although clause 12.2 of the Agreement does not, unlike the Award, require agreement at the outset as to the days of the week required to be worked and the start and finishing times in each day, it does require that the amount of hours worked in each week or roster cycle must be fixed and

confined to the days and times the employee agrees to be available to work. The requirement for agreement as to availability gives the employee a considerable degree of control over when hours are to be work, and the overriding requirement for reasonable predictability of hours remains. This position is to be contrasted to that considered by the Full Bench in *Loaded Rates Agreements*,[12] where the scheme of part-time employment in the Aldi enterprise agreements in question there did not provide for any guarantee of the hours of work to be provided in any particular week or for reasonable predictability of hours.[13] We note in addition that clause 12.4 of the Agreement provides for a minimum of 8 hours' work each week – a guarantee which is not contained in the Award.

[73] In respect of superannuation, the Full Bench in *SDA and Kmart Australia Limited v RFFWUI*[14] expressed a concern in respect of the BOOT about the lack of choice of superannuation funds in an enterprise agreement in the following terms:

> "[56] ... our concern arises from the particular circumstances of Kmart's workforce, two-thirds of which are casual employees. Our assessment, having regard to the general characteristics of employment in the retail industry, is that it is likely that a significant proportion of such casual employees have previously had other casual employment or have a second job. In that context, a choice of funds may be a benefit so that the casual employee can seamlessly remain in a single superannuation fund rather than having two or more funds arising from different jobs with all the inconvenience and additional administration costs that this involves. To this extent, we agree with the some of the matters adverted to in paragraphs [131]-[133] of the Decision. However, against this, it is necessary to acknowledge, as Kmart submitted, that s 32C(6)(h) of the *Superannuation Guarantee (Administration) Act 1992* provides that a contribution to a fund made under or in accordance with an enterprise agreement constitutes compliance with the employee choice of fund requirements of that Act. It might be considered paradoxical that a provision of an enterprise agreement which facilitates satisfaction of the choice of funds requirement in the superannuation legislation is capable of being characterised as a less beneficial term because it denies a right of choice."

[74] The Full Bench also made it clear in stating that it held this concern for the purpose of s 190(1)(a) that such a concern did not "necessarily involve a final determination about the issue; it is sufficient that there is an apprehension or perturbation that the requirement in question may not be satisfied".[15]

[75] There are two distinguishing factors in this case which cause us not to have the same concern. The first is that the workforce here is *not* predominantly casual, unlike Kmart: the Form F17 declaration discloses that of the workforce of 16,311, only 1,100 are casual employees (with 13,396 being part-time employees). This, we infer, means that there is a more stable and longer-term workforce. Secondly, clause 22.4 of the Agreement provides that where the employer was paying superannuation contributions into a different fund before the commencement of the Agreement, the employer will continue to do so rather than paying into REST.

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[12] [2018] FWCFB 3610

[13] Ibid at [37]-[38] and [135]-[137]

[14] [2019] FWCFB 7599

[15] Ibid at [54]

[76] As to the breaks provision of the Agreement, we do not consider that it is necessary to analyse it in detail. In overview, we consider that it is at least as beneficial as the Award provision and possibly more so. The shutdown and refurbishment clauses allow the employer to require employees to take annual leave, or to work at another store which is geographically nearby, where a store is not operating due to refurbishment. We do not consider that this provision gives rise to any relevant detriment.

[77] Finally, we note the comment in the Checklist that the Agreement does not contain the allowance provided for in clause 19.8 of the Award to a person principally employed in cold storage work. There is no evidence that employees of Hungry Jack's engage in such work, so we do not regard this as relevant to the BOOT.

Section 186(3) – fairly chosen

[78] We have a concern that the group of employees expressed as covered by the Agreement in clause 4.1 was not fairly chosen to the extent that it goes beyond Hungry Jack's and its employees.

Section 186(4) – unlawful terms

[79] We are satisfied that the Agreement does not contain any unlawful terms.

Section 186(5) – nominal expiry date

[80] Section 186(5) requires the Commission to be satisfied that an enterprise agreement specifies a date as its nominal expiry date which is not more than 4 years after the day on which the Commission approves the agreement. Clause 2.1 of the Agreement provides that it "*shall take effect from the beginning of the first pay period commencing on or after 7 days of approval by the FWC and shall remain in force for a period of four years*" (underlining added). The effect of this is to give the agreement a nominal term which is seven days' longer than the permitted maximum. Accordingly we are not satisfied that the s 186(5) requirement is met.

Section 186(6) – disputes settlement term

[81] Section 186(6) requires the Commission to be satisfied that an enterprise agreement includes a term that provides for a procedure that requires or allows for the Commission or another independent person to settle disputes about any matters arising under the agreement or in relation to the NES, and that allows for the representation of employees covered by the agreement for the purpose of the procedure. We have a concern that this requirement is not satisfied because the dispute resolution procedure in clause 9 does not in terms allow for the representation of employees at the initial stage at all, and at the following stages only allows for representation by the SDA (and by the AWU at one further stage).

Section 187

[82] We are satisfied that any applicable approval requirement in s 187 is met.

Sections 202 and 203 – flexibility term

[83] Section 202 is not an approval requirement as such. It provides, in summary, that an enterprise agreement must contain a flexibility term which meets the requirements set out in s 202(1)(a) and s 203 and, if it does not, the agreement is taken to include the model flexibility term prescribed by the FW Regulations. Section 201(1) requires the Commission to note in its approval decision if the model flexibility term is taken to be a term of the agreement.

[84] Clause 7, *Individual flexibility arrangements* of the Agreement does not meet the requirements of s 203 in the following respects:

- the clause does not require the employer to ensure that the individual flexibility agreement (IFA) must be about permitted matters and must not include unlawful terms, as required by s 203(2)(b);

- the clause provides for termination of IFAs by the employer or employee giving 13 weeks' written notice, contrary to the requirement in s 203(6) that the term must allow an IFA to be terminated on no more than 28 days' notice (or otherwise by agreement); and

- the clause does not require the employer to provide the employee with a copy of the IFA within 14 days after the IFA is made, as required by s 203(7)(b);

[85] Accordingly the model flexibility term must be taken to be a term of the Agreement if approved.

[86] We note in passing that, in approving the Agreement, the Deputy President in the decision accepted undertakings rectifying the deficiencies we have identified in clause 7 of the Agreement rather than noting that the model flexibility term was a term of the Agreement. This was an error. Section 190 of the FW Act permits the acceptance of undertakings to address concerns only about the approval requirements in ss 186 and 187; it does not contemplate that undertakings may be accepted to address deficiencies with respect to the requirements for flexibility terms in s 203 as a substitute for the model flexibility term being taken to be a term of the agreement.

Undertakings

[87] Section 190 of the FW Act provides, in summary, that the Commission may approve an enterprise agreement notwithstanding that it has concerns that the agreement does not meet the approval requirements in ss 186 and 187 by accepting undertakings which address those concerns, provided that the undertakings are not likely to cause financial detriment to any employee covered by the change or result in substantial changes to the agreement. In respect of the concerns identified above, Hungry Jack's continues to proffer the undertakings contained in its letter dated 20 September 2019 and signed by Ms McKie which were accepted by the Deputy President and appended to the decision (previous undertakings). These undertakings are reproduced in paragraph [20] above. In addition, Hungry Jack's now proffers an additional undertaking (new undertaking) in response to the BOOT concern in paragraph [69](2) above, in the following terms:

> "Under clause 18.1 of the Agreement, in addition to the weekly wages above in Clause 18, all penalty hours worked in accordance with clause 25.7, will attract an additional loading of 0.25% from the commencement of the Agreement."

[88] We have sought the views of the bargaining representatives both as to the previous undertakings and the new undertakings, as required by s 190(4).

[89] We consider that our concerns that the Agreement does not meet the approval requirements of ss 186 and 187 are addressed by the previous undertakings and the new undertaking in the following way:

(1) Our concerns in respect of s 186(2)(a) and 186(3) are addressed by undertaking 3 of the previous undertakings (using the numbering system contained in the Hungry Jack's letter of 20 September 2019 as set out in paragraph [20] above).

(2) Our concerns about the BOOT (s 186(2)(d)) are addressed in the following way:

  (a) Previous undertakings 9 and 10 address the concern set out in paragraph [69](1) above.

  (b) The new undertaking addresses the concern in paragraph [69](2) above.

  (c) Previous undertaking 8 addresses the concern in paragraph [69](3) above.

  (d) Previous undertaking 11 addresses the concern in paragraph [69](4) above.

  (e) Previous undertaking 12 addresses the concern in paragraph [69](5) above.

  (f) Previous undertaking 13 addresses the concern in paragraph [69](6) above.

(3) Our concern about the nominal expiry date (s 186(5)) is addressed by previous undertaking 2.

(4) Our concern about the disputes settlement term (s 186(6)) is met by previous undertaking 7.

[90] We are satisfied that acceptance of the undertakings identified above would not be likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement. In relation to previous undertaking 3, that conclusion requires brief elaboration. In *CEPU and AMWU v Main People Pty Ltd*,[16] a Full Bench determined that the acceptance of an undertaking which had the effect of narrowing the coverage of an enterprise agreement was in error in that it would be likely to cause a significant change to the agreement. In this respect, the Full Bench said:

[16] [2015] FWCFB 4467

> "[34] We consider that in two respects the Deputy President erred in approving the Agreement on the basis of the undertaking proposed by Main People. First, we consider that acceptance of paragraph 1 of the undertaking, which confined the coverage of the Agreement to work covered by the Metals Award, resulted in a significant change to the Agreement contrary to the requirement in s.190(3)(b) of the FW Act. It may be accepted that an undertaking which clarifies an ambiguous provision of an agreement for which approval is sought in accordance with the intention of the parties will not be likely to cause a significant change in that agreement. However, this was not a case of ambiguity. The breadth of the classifications in the Agreement, and the geographical scope of its coverage, made it apparent that it had application beyond work covered by the Metals Award. The first Full Bench made a clear finding to that effect in the Appeal Decision with which we agree.
>
> [35] The scope of coverage of an enterprise agreement is one of its fundamental features. The coverage provision of an agreement serves to identify the class of persons who will be entitled to its benefits while it is in operation. The importance of an agreement's coverage is signified by the fact that, under the FW Act, s.186(3) requires the group of employees covered by the agreement to be fairly chosen. For that reason an undertaking which purports to alter the coverage of an enterprise agreement by excluding classes of persons who, on the face of the agreement, would be covered by it, will always be likely to be a significant change."

[91] In determining to accept undertaking 3, we do not intend to depart from the general principle established in *Main People*. However, as we have been at pains to describe earlier in our decision, this case involves unusual circumstances which place it far outside the normal position discussed in *Main People* in that the coverage clause of the Agreement does not reflect the coverage of the proposed agreement that was identified in the NERR and upon which the bargaining between Hungry Jack's, the SDA and the AWU proceeded, nor does it reflect what was explained to the employees or the composition of the cohort of employees who were requested to vote to approve the Agreement. Undertaking 3 does no more than give effect to what was always intended to be the coverage of the Agreement.

[92] Accordingly we are prepared to approve the Agreement with the undertakings identified above.

Final comments, conclusions and orders

[93] We make a final comment about this matter. It is obviously highly regrettable that the Agreement may only now be approved almost a year after the application for its approval was lodged. That has been the result of a combination of matters occurring both prior to the lodgment of the application and in the conduct of the proceedings before the Commission. First, there was a lack of care in the drafting of the Agreement and the application. An enterprise agreement which prescribes the wages and employment conditions of over 16,000 employees for a period of 4 years is a major undertaking, exceeding in monetary value all but the largest commercial transactions. The appropriate legal and other resources should have been applied to ensure that the statutory requirements could be met without difficulty.

[94] Second, an excessive amount of time was devoted to dealing with the application for approval of the Agreement at first instance. As earlier stated, the application was in a position to be determined in early July 2019, had the file been carefully considered. Although the mistake in the name of the employer was only raised by Hungry Jack's in September 2019, and then only in a submission rather than an application to amend the s 185 application, the error should not have gone unnoticed, and could have been corrected.

[95] Finally, the Deputy President fell into fundamental error by issuing a decision without reasons in circumstances where he clearly had not finished his consideration of the matter.

[96] In respect of the appeal, we order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision ([2019] FWCA 8492) is quashed.

[97] In respect of our re-determination of the application for approval of the Agreement, we have decided to approve the Agreement on the basis of an acceptance of the undertakings identified in paragraph [89] above. A signed and consolidated copy of those undertakings is attached to this decision as Annexure A.

[98] The SDA and the AWU have given notice under s 183 of the FW Act that they want the Agreement to cover them. In accordance with s 201(2) of the FW Act we note that the Agreement covers the SDA and the AWU. We also note, pursuant to s 201(1), that the model flexibility term is taken to be a term of the Agreement.

[99] The Agreement is approved and, in accordance with s 54 of the FW Act, will operate from 16 April 2020. In accordance with clause 2.1 of the Agreement as modified by the undertakings, the nominal expiry date of the Agreement is 9 April 2024.

VICE PRESIDENT

Appearances:

Mr J Cullinan on behalf of the Retail and Fast Food Workers Union Incorporated.
Mr W Friend QC with *Ms S Burley* on behalf of the Shop, Distributive and Allied Employees Association.

Mr Y Shariff of counsel with *Mr T McDonald* on behalf of Hungry Jack's Australia Pty Ltd t/a Hungry Jack's.

Hearing details:

2020.
Sydney (via telephone):
26 March.

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Annexure A

Undertakings

In the Fair Work Commission

FWC Matter No: C2020/41

Applicant: Hungry Jack's Pty Ltd T/A Hungry Jack's

Agreement: *Hungry Jack's National Enterprise Agreement 2019*

I, Jenny McKie, Chief People Officer for Hungry Jack's Pty Ltd (**'the Employer'**) give the following undertakings in accordance with section 190 of the *Fair Work Act (2009)* (Cth) (**'the Act'**), with respect to the *Hungry Jack's National Enterprise Agreement 2019* (**'the Agreement'**):

Clause 2 Commencement

1. In relation to clause 2.1 of the Agreement, the Employer undertakes that that Agreement shall remain in force for a period of not more than 4 years after the day on which the Fair Work Commission approves the Agreement.

Clause 4 Coverage

2. In relation to clause 4.1 of the Agreement, the Employer undertakes that the Agreement will apply only to employees of Hungry Jack's in the classifications listed at clause 17 of the Agreement.

Clause 9 Dispute resolution

3. The Employer undertakes to permit the employee to appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9 of the Agreement.

Clause 17 Classifications

4. With regards to clause 17.2 of the Agreement, an employee engaged as Crew Member-Team Lead will not have responsibility for supervising Crew Members and/or training new employees.

Clause 18 Minimum Weekly Wages

5. In relation to clause 18 of the Agreement, the Employer undertakes that the minimum weekly wage for an Assistant Manager will be $860.70 per week.
6. Under clause 18.1 of the Agreement, in addition to the weekly wages above in Clause 18, all penalty hours worked in accordance with clause 25.7, will attract an additional loading of 0.25% from the commencement of the Agreement.

7. For the purposes of clause 18.2 of the Agreement, the Assistant Manager Agreement classification is mapped to the Fast Food Industry Award classification of a Level 3(b) employee.

Clause 20.4 Uniforms and Special clothing

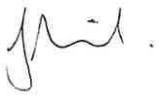
8. In relation to clause 20.4(d) of the Agreement, the Employer undertakes to not withhold $30.00 to offset the costs of the uniform not being returned, in circumstances where the employee gives evidence satisfactory to the employer that the employee was not at fault.

Clause 20.5 Delivery Drivers

9. In relation to clause 20.5(h) of the Agreement, the Employer undertakes to pay an allowance of $0.41 per kilometre only where an employee is primarily engaged to perform delivery duties for the employer. Where the employee is requested to use their own private motor vehicle to perform delivery duties, and the employee is not primarily engaged by the employer to perform delivery duties, the employee will be paid an allowance of $0.78 per kilometre.

Schedule 'A' – A.10.3

10. In relation to clause A.10.3 in Schedule A the Employer undertakes to that the minimum amount payable to the employee during the trial period must be no less than $87 per week.



Jenny McKie, Chief People Officer

7th April 2020

[2019] FWCA 8492 [Note: This decision and the associated agreement has been quashed - refer to Full Bench decision dated 9 April 2020 [2020] FWCFB 1693]

DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Hungry Jack's Australia Pty Ltd T/A Hungry Jack's
(AG2019/1291)

HUNGRY JACK'S NATIONAL ENTERPRISE AGREEMENT 2019

Fast food industry

DEPUTY PRESIDENT BOYCE SYDNEY, 16 DECEMBER 2019

Application for approval of the Hungry Jack's National Enterprise Agreement 2019.

[1] An application has been made for approval of a single enterprise agreement known as the *Hungry Jack's National Enterprise Agreement 2019* (**Agreement**). The application was made pursuant to s.185 of the *Fair Work Act 2009* (**Act**). It has been made by Hungry Jack's Australia Pty Ltd (**Employer**).

[2] The Employer has provided written undertakings dated 20 September 2019. Those undertakings are attached to this decision and marked as **Annexure A**. I am satisfied that the undertakings will not cause financial detriment to any employee covered by the Agreement (as compared to the relevant provisions of the *Fast Food Industry Award 2010*) and that the undertakings will not result in substantial changes to the Agreement. I note that those undertakings become terms of the Agreement.

[3] The Shop, Distributive and Allied Employees Association (**SDA**) and the Australian Workers' Union (**AWU**), being bargaining representatives of a registered employee organisation for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover each of them. In accordance with s.201(2) of the Act, I note the agreement covers these organisations.

[4] I am satisfied that each of the requirements of ss.186, 187, 188 and 190 of the Act, as are relevant to this application for approval, have been met.

[5] I am also satisfied the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.

[6] The Agreement is hereby approved and, in accordance with s.54 of the Act, will operate from 23 December 2019. The nominal term of the Agreement will expire on 23 December 2023.

[7] Further reasons for this decision will be published in due course.

DEPUTY PRESIDENT

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Annexure A

Undertakings

In the Fair Work Commission

FWC Matter No: AG2019/1291

Applicant: Hungry Jack's Pty Ltd T/A Hungry Jack's

Agreement: *Hungry Jack's National Enterprise Agreement 2019*

I, Jenny McKie, Chief People Officer for Hungry Jack's Pty Ltd (**'the Employer'**) give the following undertakings in accordance with section 190 of the *Fair Work Act (2009)* (Cth) (**'the Act'**), with respect to the *Hungry Jack's National Enterprise Agreement 2019* (**'the Agreement'**):

Authority to give undertakings

1. I have the authority given to me by the Employer to provide these undertakings in relation to the application before the Fair Work Commission.

Clause 2 Commencement

2. In relation to clause 2.1 of the Agreement, the Employer undertakes that that Agreement shall remain in force for a period of not more than 4 years after the day on which the Fair Work Commission approves the Agreement.

Clause 4 Coverage

3. In relation to clause 4.1 of the Agreement, the Employer undertakes that the Agreement will apply only to employees of Hungry Jack's in the classifications listed at clause 17 of the Agreement.

Clause 7 Individual Flexibility Arrangements

4. Under clause 7.9 of the Agreement, the Employer undertakes to give a copy of the individual flexibility arrangement to the employee within 14 days after it is agreed.
5. Under clause 7.11(b) of the Agreement, the Employer undertakes that the Agreement may be terminated by the either employer or employee by giving no more than 28 days written notice to the other party.
6. The Employer undertakes that terms of any individual flexibility arrangement made under clause 7 of the Agreement are about permitted matters under section 172 of the Act; and are not unlawful terms under section 194 of the Act.

Clause 9 Dispute resolution

7. The Employer undertakes to permit the employee to appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9 of the Agreement.

Clause 17 Classifications

8. With regards to clause 17.2 of the Agreement, an employee engaged as Crew Member-Team Lead will not have responsibility for supervising Crew Members and/or training new employees.

Clause 18 Minimum Weekly Wages

9. In relation to clause 18 of the Agreement, the Employer undertakes that the minimum weekly wage for an Assistant Manager will be $860.70 per week.
10. For the purposes of clause 18.2 of the Agreement, the Assistant Manager Agreement classification is mapped to the Fast Food Industry Award classification of a Level 3(b) employee.

Clause 20.4 Uniforms and Special clothing

11. In relation to clause 20.4(d) of the Agreement, the Employer undertakes to not withhold $30.00 to offset the costs of the uniform not being returned, in circumstances where the employee gives evidence satisfactory to the employer that the employee was not at fault.

Clause 20.5 Delivery Drivers

12. In relation to clause 20.5(h) of the Agreement, the Employer undertakes to pay an allowance of $0.41 per kilometre only where an employee is primarily engaged to perform delivery duties for the employer. Where the employee is requested to use their own private motor vehicle to perform delivery duties, and the employee is not primarily engaged by the employer to perform delivery duties, the employee will be paid an allowance of $0.78 per kilometre.

Schedule 'A' – A.10.3

13. In relation to clause A.10.3 in Schedule A the Employer undertakes to that the minimum amount payable to the employee during the trial period must be no less than $87 per week.

Jenny McKie, Chief People Officer

Dated: 20-9-19.

Note - this agreement is to be read together with an undertaking given by the employer. The undertaking is taken to be a term of the agreement. A copy of it can be found at the end of this agreement.

Hungry Jack's National Enterprise Agreement 2019

Part 1 —Application and Operation

1. Title

1.1 The agreement is the Hungry Jack's National Enterprise Agreement 2019.

2. Commencement

2.1 This agreement shall take effect from the beginning of the first pay period commencing on or after 7 days of approval by the FWC and shall remain in force for a period of four years.

3. Definitions and interpretation

3.1 In this agreement, unless the contrary intention appears:

Act means the *Fair Work Act 2009* (Cth)

Crew Meeting covers emergency evacuation drills, product launches, reward and recognition, and WHS.

default fund employee means an employee who has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cth)

defined benefit member has the meaning given by the *Superannuation Guarantee (Administration) Act 1992* (Cth)

employee means national system employee within the meaning of the Act

employer means national system employer within the meaning of the Act

fast food industry means the industry of taking orders for and/or preparation and/or sale and/or delivery of:

- meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
- take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment

FWC means the Fair Work Commission

MySuper product has the meaning given by the *Superannuation Industry (Supervision) Act 1993* (Cth)

NES means the National Employment Standards as contained in sections 59 to 131 of the *Fair Work Act 2009* (Cth)

standard rate means the minimum weekly wage for a Shift Supervisor in clause 18—Minimum weekly wages. Where an allowance is provided for on an hourly basis, a reference to **standard rate** means 1/38th of the weekly wage referred to above.

Union means the Shop, Distributive and Allied Employees' Association ("SDA"); and the Australian Workers Union (Queensland Branch) ("AWU") in relation to its coverage of North Queensland.

3.2 Where this Agreement refers to a condition of employment provided for in the NES, the NES definition applies.

4. Coverage

4.1 This agreement shall apply to Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies operating food outlets and all employees of Hungry Jack's as defined.

4.2 The agreement will also cover:

(a) The Shop, Distributive and Allied Employees' Association ("SDA"); and

(b) The Australian Workers' Union (Queensland Branch) ("AWU").

5. Access to the Agreement and the National Employment Standards

5.1 The employer must ensure that copies of this Agreement and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

6. The National Employment Standards and this Agreement

6.1 This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.

7. Individual flexibility arrangements

7.1 Despite anything else in this agreement, the employer and an individual employee may agree to vary the application of the terms of this agreement relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

7.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the agreement term, or agreement terms, the application of which is to be varied; and

(c) set out how the application of the agreement term, or each agreement term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

7.8 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of this agreement provided for by an agreement.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party.

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this agreement term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this agreement that provides for an agreement between an employer and an individual employee.

Part 2— Consultation and Dispute Resolution

8. Consultation about major workplace change

8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and

(b) discuss with affected employees and their representatives (if any):

(i) the introduction of the changes; and

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees; and

(c) commence discussions as soon as practicable after a definite decision has been made.

8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8: significant effects, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

8.A Consultation about changes to rosters or hours of work

8A.1 Clause 8A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable

8A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

8A.3 For the purpose of the consultation, the employer must:

(a) provide to the employees and representatives mentioned in clause 8A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.

8A.4 The employer must consider any views given under clause 8A.3(b).

8A.5 Clause 8A is to be read in conjunction with any other provisions of this agreement concerning the scheduling of work or the giving of notice.

9. Dispute resolution

9.1 The procedure shall be used in regard to any dispute, grievance, disagreement or issue arising between an employee or employees of the employer and/or the SDA /AWU on the one hand and the employer on the other and any dispute in relation to the NES.

9.2 It is agreed that every endeavour will be made to amicably settle any grievance which may arise in the workplace by direct negotiation and consultation between the parties to this Agreement.

9.3 To facilitate the settlement of any such grievances the following channel of communication shall apply:

(a) If the employee has a grievance, they should discuss the matter with their Restaurant Manager or District Manager, who will endeavour to resolve the matter speedily and effectively. The Restaurant Manager or District Manager will respond to the employee's grievance as soon as possible, and, unless there are exceptional circumstances, within 24 hours. A longer period may apply if agreed by the employee and the Restaurant Manager or District Manager.

(b) If unresolved the employee (accompanied by their representative, which includes a Union Delegate if the employee so wishes) will discuss the matter with their Restaurant Manager or District Manager. If the issue cannot be resolved, the representative will discuss the case with the relevant Manager.

(c) Should the matter remain unresolved, the case will be referred to the employer's relevant State HR Representative and the relevant State Secretary of the SDA and/or their nominee or the employee's representative or employee.

(d) Should the matter still remain unresolved the case will be referred to the employers National Field HR Manager, and the National Secretary of the SDA or the employee's representative or employee.

9.4 If the matter in dispute is not settled after direct negotiations and consultation after carrying out the foregoing procedure it shall be referred to the Fair Work Commission for mediation or conciliation and if required, arbitration.

9.5 It is agreed that the objective of the above procedure is to settle disputes through the specified procedure without the need for industrial action. Whilst the above procedure is being followed the pre-issue status quo will be maintained.

9.6 Nothing in this procedure shall operate to the prejudice of an employee's health and safety.

Part 3— Types of Employment and Termination of Employment

10. Employment categories

10.1 Employees under this Agreement will be employed in one of the following categories:

(a) full-time employees;

(b) part-time employees; or

(c) casual employees.

10.2 At the time of engagement an employer will inform each employee of the terms of their engagement and, in particular, whether they are to be full-time, part-time or casual.

11. Full-time employees

11.1 A full-time employee is an employee who is engaged to work an average of 38 hours per week.

11.2 A full-time salaried Assistant Manager or Restaurant Manager employee is an employee who is engaged to work an average of 40 hours per week.

12. Part-time employees

12.1 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.

12.2 At the time of engagement, 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).

12.3 The employee may not be rostered to work less than 3 consecutive hours in any shift.

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

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

12.6 Where there has been a genuine and ongoing change in the employee's personal circumstances, the employee may alter the days and hours of the employee's agreed availability with 14 days' written notice to the employer. If the alteration to the employee's agreed availability cannot reasonably be accommodated by the employer within the guaranteed minimum hours then, despite clause 12.2, those guaranteed minimum hours will no longer apply and the employer and the employee will need to reach a new agreement in writing concerning guaranteed minimum hours in accordance with clause 12.2.

12.7 An employee may be offered ordinary hours in addition to their 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;

(b) The employee may not be rostered for work outside of the employee's availability;

(c) Agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times) and accrue entitlements such as annual leave and personal/carer's leave;

(d) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(e) Additional hours worked in accordance with this clause are not overtime; and

(f) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

12.8 A part-time employee who immediately prior to (operative date of variation) 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 12.2.

12.9 Where a part-time employee has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed minimum hours, the

employee may request in writing that the employer agree to increase the guaranteed minimum hours. If the employer agrees to the request, the new agreement concerning guaranteed minimum hours will be recorded in writing. The employer may refuse the request only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal.

12.10 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.

12.11 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly rate prescribed for the class of work performed.

12.12 The employer recognises the value of permanent employment over casual employment for all parties, from higher skill retention and development from guaranteed hours, to stability in working arrangements. Where appropriate to all parties' circumstances the employer will promote permanent employment.

13. Casual employment

13.1 A casual employee is an employee engaged as such.

13.2 A casual will be paid both the ordinary hourly rate paid to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.

13.3 Casual employees will be paid at the termination of each engagement, or weekly or fortnightly in accordance with pay arrangements for full-time employees.

13.4 The minimum daily engagement of a casual employee is three hours.

13.5 Right to request casual conversion

(a) A person engaged as a regular casual employee may request that their employment be converted to full-time or part-time employment.

(b) A regular casual employee is a casual employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this agreement.

(c) A regular casual employee who has worked equivalent full-time hours over the preceding period of 12 months casual employment may request to have their employment converted to full-time employment.

(d) A regular casual employee who has worked less than equivalent full-time hours over the preceding period of 12 months' casual employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.

(e) Any request under this subclause must be in writing and provided to the employer.

(f) Where a regular casual employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.

(g) Reasonable grounds for refusal include that:

(i) it would require a significant adjustment to the casual employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this agreement –that is, the casual employee is not truly a regular casual employee as defined in paragraph (b);

(ii) it is known or reasonably foreseeable that the regular casual employee's position will cease to exist within the next 12 months;

(iii) it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months; or

(iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.

(h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.

(i) Where the employer refuses a regular casual employee's request to convert, the employer must provide the casual employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in this agreement.

(j) Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:

(i) the form of employment to which the employee will convert –that is, full-time or part-time employment; and

(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause 12.2

(k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.

(l) Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.

(m) A casual employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.

(n) Nothing in this clause obliges a regular casual employee to convert to full-time or part-time employment, nor permits an employer to require a regular casual employee to so convert.

(o) Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.

(p) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

(q) A casual employee's right to request to convert is not affected if the employer fails to comply with the notice requirements in paragraph (p).

14. Termination of employment

14.1 The NES sets out requirements for notice of termination by an employer. See ss.117 and 123 of the Act.

14.2 Notice of termination by an employee

The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. A Crew Member and Crew Member – Team Lead employee notice period by an employee is capped at a maximum of two weeks. If an employee who is at least 18 years old does not give the period of notice required in this clause the employer may deduct from wages due to the employee under this agreement an amount that is no more than one week's wages for the employee.

14.3 Job search entitlement

Where an employer has given notice of termination to an employee, an employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.

15. Abandonment of employment

15.1 The parties recognise that the onus is on the employee to advise the employer when the employee is unable to work and to ensure contact details are up to date.

15.2 The absence of an employee from work for a continuous period of three (3) consecutive days or shifts without just cause and without notification to their supervisor will be evidence that the employee has abandoned the employment.

15.3 The employer will provide in writing (email where provided, otherwise by post) notification that failure to contact the employer within seven working days with a satisfactory explanation for the absence will result in the employer regarding the employee as having abandoned their employment.

15.4 Termination of employment by abandonment in accordance with this clause will operate from the date of the last attendance at work.

15.5 Where the employee establishes that the absence was for a reasonable cause, within four (4) weeks of the termination date, the employer will reinstate the employee to their former position.

16. Redundancy

16.1 Redundancy pay is provided for in the NES.

16.2 Any employee engaged before 1 July 2019 whose preceding enterprise agreement contained redundancy pay that was greater than the NES entitlement will receive the greater redundancy entitlement.

16.3 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the ordinary time rate of pay for the number of weeks of notice still owing.

16.4 Employees leaving during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee is entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice but is not entitled to payment instead of notice.

16.5 Job search entitlement

(a) An employee given notice of termination in circumstances of redundancy must be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee must, at the request of the employer, produce proof of attendance at an interview or they will not be entitled to payment for the time absent. For this purpose a statutory declaration is sufficient.

(c) This entitlement applies instead of clause 14.3.

16.6 Transfer of Business

Where a business is before or after the date of this Agreement, transmitted from one Employer (in this subclause called "the transmitter") to another employer (in this subclause called "the transmittee") and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee:

(a) The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission,

(b) The period of employment which the employee has had with the transmitter or any prior transmitter shall be deemed to be service of the employee with the transmittee,

(c) In this subclause "business" includes trade, process, business or occupation and includes part of any such business and "transmission of business" includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

Part 4— Classifications and Wage Rates

17. Classifications

17.1 Crew Member: An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres. An employee will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning and cleaning of toilets.

17.2 Crew Member - Team Lead: An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres and has the responsibility of championing a production area in front or back of house (e.g. burger station, drive-thru, etc). An employee will undertake duties as directed within the limits of their competence, skills and training including incidental cleaning and cleaning of toilets.

17.3 Shift Supervisor: An employee who has the major responsibility on a day to day basis for supervising Crew and/or training new employees or an employee required to exercise trade skills.

17.4 Assistant Manager: An employee who has the major responsibility on a day to day basis for supervising Crew and/or training new employees or an employee required to exercise trade skills and has the responsibility of one restaurant portfolio.

17.5 Restaurant Manager: An employee appointed by the employer to be in charge of a restaurant, food outlet, or delivery outlet.

17.6 Salaried Employee:

(a) Where a full-time employee classified as Assistant Manager or Restaurant Manager is paid a salary in excess of their entitlements under this Agreement, including any bonus or incentive amount, this amount may be used to set off any other amount payable by the employer to that employee under this Agreement, including wages, overtime, loadings, penalty rates and allowances.

(b) Nothing in this agreement requires an employer to maintain or increase any over Agreement payment.

(c) Where the employer is utilising the set off provisions under this clause for a Assistant Manager or Restaurant Manager employee, the employer will for each three (3) month period of employment reconcile all payments made to the

employee over that three (3) month period against the amounts payable under this Agreement for the same period to ensure that the employee is paid no less than the amounts payable to the employee under the terms of this Agreement. If the period is less than three (3) months as a result of termination of employment, then the employer will reconcile for that shorter period.

17.7 All employees covered by this Agreement must be advised by the employer in writing of their classification and of any changes to their classification.

17.8 The classification by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

18. Minimum weekly wages

Classifications	**Per week**
	$
Crew Member	789.90
Crew Member – Team Lead	793.70
Shift Supervisor	837.40
Assistant Manager	850.30
Restaurant Manager	860.70

18.1 In addition to the weekly wages above all non-penalty ordinary hours will attract the following loading:

For permanent employees:

a) From commencement of Agreement - 0.5%
b) From 1 July 2021 – 0.75%

For casual employees:

a) From commencement of Agreement - 0.25%

18.2 The minimum weekly wages above will be increased in July every year in line with any national minimum wage increases. To avoid confusion the above levels are mapped to the Fast Food Industry Award classifications as follows:

Agreement Classification	Award Equivalent
Crew Member	**Level 1**
Crew Member – Team lead	**Level 1 plus $3.80 per week**
Shift Supervisor	**Level 2**

Assistant Manager	**Level 3(a)**
Restaurant Manager	**Level 3(b)**

18.3 No employee's base rate of pay will go backwards with the implementation of this Agreement. Where an employee is on a higher base rate of pay under their current state-based enterprise agreement, that rate will be frozen until it is surpassed by this agreement.

19. Junior rates

19.1 Junior employees will be paid the following percentage of the appropriate wage rate in clause 18—Minimum weekly wages

Age	**% of weekly wage**
Under 16 years of age	40
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age	90
From 1 July 2020 – 20 years of age	95

19.2 Award Mirroring – 20 years of age junior rate

The 20 years of age junior rates in this Agreement will move in line with the Fast Food Industry Award 2010. If the same 20 year old rate percentage in the Fast Food Industry Award is increased above what is contained in the Agreement, the corresponding increased percentage will apply to the 20 year old rates in this Agreement from the first full pay period after that Award is amended by the FWC.

20. Allowances

20.1 Meal allowance

(a) An employee required to work more than one hour of overtime after the employee's ordinary time of ending work, without being given 24 hours' notice, will be provided with a meal or paid a meal allowance of $12.91. Where such overtime work exceeds four (4) hours, a further meal will be provided or an additional allowance of $11.66.

20.2 Staff Discount

(a) All employees on a rostered day can access the company's discounted meal scheme. This scheme changes from time to time based on operational requirements and full details are outlined in the discounted meal policy.

20.3 Higher duties

(a) Any employee not appointed but required to undertake higher duties in a shift shall be paid the applicable rate for the work performed in those duties. Where required to perform higher duties for more than two (2) hours in a day, the employee will be paid the applicable higher rate for all hours worked on that day.

20.4 Uniforms and Special clothing

(a) Where the employer requires an employee to wear any protective or special clothing such as a uniform, dress or other clothing, the employer will reimburse the employee for any cost of purchasing such clothing and the cost of replacement items when replacement is due to normal wear and tear. This provision will not apply where the special clothing is supplied and/or paid for by the employer.

(b) Where an employee is required to launder any special uniform, dress or other clothing, the employee will be paid the following applicable allowance:

(i) For a full-time employee—$6.25 per week;

(ii) For a part-time or casual employee—$1.25 per shift.

(c) A uniform shall be supplied to each employee upon commencement. Such uniforms shall remain the property of the employer and shall be returned to the employer upon termination of employment in good order, subject to fair wear and tear.

(d) Upon termination of employment, the employer may withhold $30.00 to offset the costs of the uniform from any monies owing to the employee if the uniform is not returned to the employer.

20.5 Delivery Drivers

(a) Employees employed under the terms of this Agreement to perform vehicle or motorcycle delivery duties shall not be paid less than the 18-year old rate.

(b) Employees performing delivery duties must maintain a valid driver's licence (at least a Provisional P2 licence), drive safely, and familiarise themselves and comply with all traffic rules and regulations.

(c) The employer is committed to ensuring the safety of employees performing delivery duties. This will include providing for each driver/car a safety kit that contains at least, a safety fluoro vest, a torch, a first aid kit, emergency contact numbers, and written procedures to follow in the event of a breakdown.

(d) The employer may require the employee to carry either an employer provided GPS-type device or download a GPS delivery app on a mobile phone that tracks the location and movement of the vehicle during a delivery.

(e) Where a store mobile phone is not provided, and the employee is required to use their own mobile phone to perform delivery duties, the employee will be provided with the following:

(i) A data allowance of $0.05 per delivery

(ii) Reimbursement for any phone calls or text messages made for the delivery or to contact the store.

(iii) Where an employee does not receive an itemised costing due to being on an all-inclusive mobile plan the employee will receive $1.00 per shift rather than the allowance and reimbursement at (i) and (ii).

(f) The employer may require an employee to use a company owned vehicle or an employee's privately-owned vehicle to deliver orders to customers

(g) Where the employee is required to use the employee's own private vehicle to perform the delivery duties, the employee will be provided with the following additional benefit when evidence if provided:

(i) Payment of any road tolls used in the course of home deliveries.

(h) Where an employee is required to use the employee's privately-owned vehicle, it is required that the employee, at their own cost, - register, maintain, clean and service their own vehicle. Over the course of the employee's employment, where the employee is required to use their own private vehicle to deliver customer orders, the employee shall receive a $0.41 per kilometre allowance.

20.6 Excess travelling costs

Where an employee is required by their employer to move temporarily from one branch or shop to another for a period not exceeding three weeks, all additional transport costs so incurred will be reimbursed by the employer.

20.7 Travelling time reimbursement

(a) An employee who on any day is required to work at a place away from their usual place of employment, for all time reasonably spent in reaching and returning from such place (in excess of the time normally spent in travelling from their home to their usual place of employment and returning), will be paid travelling time and also any fares reasonably incurred in excess of those normally incurred in travelling between their home and their usual place of employment.

(b) Where the employer provides transport from a pick-up point, an employee will be paid travelling time for all time spent travelling from such pick up point and return thereto.

(c) The rate of pay for travelling time will be the ordinary time rate except on Sundays and public holidays when it will be time and a half.

20.8 Transfer of employee reimbursement

Where any employer transfers an employee from one township to another, the

employer will be responsible for and will pay the whole of the moving expenses, including fares and transport charges, for the employee and their family.

20.9 Transport allowance

Other than as provided in clause 20.5(h), where an employer requests an employee to use their own motor vehicle in the performance of their duties such employee will be paid an allowance of $0.78 per kilometre.

20.10 Safe Transport

Where an employee is required to cease work beyond the normal rostered ceasing time and the employees regular safe means of transport is not available and the employee is unable to arrange their own alternative safe transport home, the employer shall arrange at its own cost an alternative safe form of transport for the employee.

20.11 Broken Hill

An employee in the County of Yancowinna in New South Wales (Broken Hill) will in addition to all other payments be paid an allowance for the exigencies of working in Broken Hill of 4.28% of the standard rate.

20.12 Crew Meeting allowance

Employees shall only be directed to attend staff meetings as part of a rostered shift and attendance at such meetings will be treated as time worked. Where an employee voluntarily attends up to 6 meeting a year when not working a rostered shift, but is not directed to do so, the employee shall be paid an allowance equivalent to the amount of time spent at the meeting, with a minimum payment equivalent to one hours' work at the applicable wage rate. Training does not form part of staff meetings.

20.13 Allowance Increases

No allowance in this clause will be less than the applicable allowance in the Fast Food Industry Award 2010 during the life of the agreement.

21. Accident Pay

21.1 An employee in receipt of weekly payments under the provisions of applicable workers' compensation legislation will be entitled to receive accident pay from the employer subject to the following conditions and limitations.

21.2 Definitions

(a) Accident pay means a weekly payment made to an employee by the employer that is the difference between the weekly amount of compensation the employee is entitled to receive pursuant to the applicable workers' compensation legislation and the employee's weekly wage payable under this Agreement for the classification of work if the employee had been performing their normal duties (not including over Agreement payments, shift loadings, overtime,

attendance bonus payments, special rates, fares and travelling allowance or other similar payments).

(b) Injury will be given the same meaning and application as applying under the applicable workers' compensation legislation covering the employer.

21.3 Entitlement to accident pay

(a) The employer must pay accident pay where an employee suffers an injury and weekly payments of compensation are paid to the employee under the applicable workers' compensation legislation. The maximum period of accident pay is 26 weeks (or in Victoria 39 weeks).

(b) Accident pay shall not apply:

(i) In respect of an injury during the first seven consecutive days (including non-working days) of incapacity.

(ii) To any incapacity occurring during the first two weeks of employment unless such incapacity continues beyond the first two weeks.

21.4 Calculation of the period

(a) The 26-week period commences from the first day of incapacity for work, which may be subsequent to the date of injury. In the event of more than one absence arising from one injury, such absences are to be cumulative in the assessment of the 26-week period.

(b) The entitlement to accident pay continues on termination of an employee's employment where such termination:

(i) is by the employer other than for reasons of the employee's serious and/or wilful misconduct; or

(ii) arises from a declaration of bankruptcy or liquidation of the employer, in which case the employee's entitlement will be referred to the Fair Work Commission to determine.

(c) For a period of less than one week, accident pay (as defined) will be calculated on a pro rata basis.

21.5 When not entitled to payment

An employee will not be entitled to any payment under this clause in respect of any period of paid annual leave or long service leave, or for any paid public holiday.

21.6 Return to work

If an employee entitled to accident pay under this clause returns to work on reduced hours or modified duties, the amount of accident pay due will be reduced by any amounts paid for the performance of such work.

21.7 Redemptions

In the event that an employee receives a lump sum payment in lieu of weekly payments under the applicable workers' compensation legislation, the liability of the

employer to pay accident pay will cease from the date the employee receives that payment.

21.8 Damages independent of the Acts

Where the employee recovers damages from the employer or from a third party in respect of the said injury independently of the applicable workers' compensation legislation, such employee will be liable to repay to the employer the amount of accident pay which the employer has paid under this clause and the employee will not be entitled to any further accident pay thereafter.

21.9 Casual employees

For a casual employee, the weekly payment referred to in clause 21.2(a) will be calculated using the employee's average weekly ordinary hours with the employer over the previous 12 months or, if the employee has been employed for less than 12 months by the employer, the employee's average weekly ordinary hours over the period of employment with the employer. The weekly payment will include casual loading but will not include over Agreement payments, shift loadings, overtime, attendance bonus payments, special rates, fares and travelling allowance or other similar payments.

22. Superannuation

22.1 Superannuation legislation

(a) Superannuation legislation, including the Superannuation Guarantee (Administration) Act 1992 (Cth), the Superannuation Guarantee Charge Act 1992 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth) and the Superannuation (Resolution of Complaints) Act 1993 (Cth), deals with the superannuation rights and obligations of employers and employees.

(b) The rights and obligations in these clauses supplement those in superannuation legislation.

22.2 Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

22.3 Voluntary employee contributions

(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause 22.1.

(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of three months' written notice to their employer.

(c) The employer must pay the amount authorised under clauses 22.3(a) or (b) no later than 28 days after the end of the month in which the deduction authorised under clauses 22.3(a) or (b) was made.

(d) These voluntary contributions are in addition to and do not offset the employer's obligation to pay superannuation under clause 22.

22.4 Superannuation fund

(a) The employer will make the superannuation contribution to one fund for employees. The Superannuation fund for employees will be the Retail Employees Superannuation Trust (REST).

(b) Where an employee is paid by the employer into a different fund before the commencement of this agreement, the employer will continue to pay into that fund rather than the Retail Employees Superannuation Trust (REST).

(c) By invitation the employer may invite salaried employees to join the employer's Corporate Fund. If the invitation is accepted, then the superannuation contributions will be made to that fund.

22.5 Absence from work

(a) Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 22.2 and pay the amount authorised under clauses 22.3(a) or (b):

(b) Paid leave—while the employee is on any paid leave.

(c) Work-related injury or illness—For the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that:

(i) the employee is receiving worker's compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and

(ii) the employee remains employed by the employer.

23. Payment of wages

23.1 Wages shall be paid either weekly or fortnightly in arrears by electronic funds transfer, except salaried employees whose wages may be paid monthly. Where payment is made monthly it must be on the basis of two weeks in advance and two weeks in arrears.

23.2 Payment on termination of employment

(a) The employer must pay an employee no later than seven (7) days after the day on which the employee's employment terminates:

(i) the employee's wages under this agreement for any complete or incomplete pay period up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this Agreement and the NES.

(b) The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this agreement or the Act.

24. Supported wage

See Schedule A

Part 5— Ordinary Hours of Work

25. Hours of work

25.1 This clause does not operate to limit or increase or in any way alter the trading hours of any employer as determined by the relevant State or Territory legislation.

25.2 Ordinary hours

(a) The ordinary hours of work are an average of 38 per week over a period of no more than four (4) weeks.

(b) Hours of work on any day will be continuous, except for rest pauses and meal breaks.

(c) The ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two-week period.

(i) This requirement will not apply where the employee requests other arrangements in writing. It cannot be made a condition of employment that an employee make such a request.

(ii) An employee can withdraw their written request to other arrangements by giving four (4) weeks written notice to the employer.

25.3 Maximum hours on a day

An employee may be rostered to work up to a maximum of 11 ordinary hours on any day.

25.4 38-hour week rosters

A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms:

(i) 38 hours in one week;

(ii) 76 hours in two consecutive weeks;

(iii) 114 hours in three consecutive weeks; or

(iv) 152 hours in four consecutive weeks.

25.5 Rosters

(a) A roster of the working hours will be exhibited a minimum of fourteen (14) days in advance.

(b) An employee is entitled and can request to be rostered off at least once every four weeks on the weekend. This request must be made in the employee portal before the release of the roster cycle in your relevant restaurant.

(c) Ordinary hours of work cannot be worked over more than 5 days in a week.

(d) Employee's will be provided with a minimum 10-hour break between shifts.

(e) Under 18 years of age employees will not be rostered outside agreed written availability without parental/ guardian consent.

(f) A roster for part-time employees must be prepared by the employer and made available to the employee which sets out the name of each employee, the days of the week to be worked, and their start and finishing times.

(g) No changes will be made to a posted roster, unless there is mutual agreement between the employer and employee.

25.6 Restaurant Security

(a) In restaurants that operate 24 hours, overnight there shall be a minimum of three (3) employees on shift where the public has access to the restaurant and there shall be a minimum of two (2) employees on shift in drive-thru stores where there is no public access.

(b) A security guard will be on duty in the restaurant where appropriate to the risk identified

25.7 Penalty rates

(a) Evening work Monday to Friday

(i) A loading of 10% will apply for ordinary hours of work within the span of hours between 10.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(ii) A loading of 15% will apply for ordinary hours of work after midnight and before 6 am, and for casual employees this loading will apply in addition to their 25% casual loading.

(b) Saturday work

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual loading.

(c) Sunday work – Crew members & Crew Members – Team Lead

(i) A 35% loading will apply for all hours of work on a Sunday for full-time and part-time Crew Members and Crew Members – Team Lead employees. A 60% loading will apply for all hours of work on a Sunday for casual Crew Members and Crew Members – Team Lead employees (inclusive of the casual loading).

(ii) From 1 July 2019 - A 25% loading will apply for all hours of work on a Sunday for full-time and part-time Crew Members and Crew Members – Team Lead employees. A 50% loading will apply for all hours of work on a Sunday for casual Crew Members and Crew Members – Team Lead employees (inclusive of the casual loading).

(d) Sunday work –Shift Supervisor, Assistant Managers and Restaurant Managers

A 50% loading will apply for all hours of work on a Sunday for full-time and part-time Shift Supervisor, Assistant Manager and Restaurant Manager employees. A 75% loading will apply for all hours of work on a Sunday for casual Shift Supervisor, Assistant Manager and Restaurant Manager employees (inclusive of the casual loading).

25.8 Award Mirroring – Sunday Penalty Rates

Sunday penalty rates in this Agreement will move in line with the Fast Food Industry Award 2010. If the same Sunday penalty rates in the Fast Food Industry Award are increased or decreased, the corresponding increase or decrease will apply to the Sunday penalty rates in this Agreement from the first full pay period after that Award is amended by the FWC.

26. Overtime

26.1 Rate of overtime

(a) The rate of overtime for full time and part-time employees shall be time and a half for the first two (2) hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half.

(b) The rate of overtime for casual employees shall be time and three quarters of the ordinary hourly rate of pay for the first two (2) hours on any one day and double time and a quarter of the ordinary hourly rate of pay thereafter, except on a Sunday which shall be double time and a quarter of the ordinary hourly rate of pay and double time and three quarters of the ordinary hourly rate on a Public Holiday (inclusive of the casual loading).

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

(iii) eleven hours on any one day; or

(iv) when a 10 hour break has not been provided between ceasing of a shift to the commencement of the next shift

(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.

26.3 A part-time employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week; or

(ii) five days per week; or

(iii) eleven hours on any one day; or

(iv) when a 10 hour break has not been provided between ceasing of a shift to the commencement of the next shift

(b) Hours worked by a part-time employee outside the employee's availability; or

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

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

(e) Outside the ordinary hours of work; or

(f) Provided that no overtime penalty is payable for hours worked within the employee's availability by the part-time employee in excess of the guaranteed minimum hours that are:

(i) rostered; or

(ii) not rostered in advanced but agreed to be worked consistent with clause 12.7.

26.4 A casual employee shall be paid overtime for all work in excess of:

(a) 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle; or

(i) eleven hours on any one day;

(ii) five days per week; or

(iii) when a 10 hour break has not been provided between ceasing of a shift to the commencement of the next shift

(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.

26.5 Where an employee works overtime on a Sunday and that work is not immediately preceding or immediately following ordinary hours, then that employee must be paid a minimum payment of four hours at such rate.

26.6 Time off instead of payment for overtime

(a) An employee and employer may agree to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause 26.6 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

(c) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(d) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 26.6 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(e) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (c), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(f) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(g) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 26.6 will apply for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(h) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 26.6 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate

applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 26.6.

26.7 Reasonable overtime

(a) An employer may require an employee to work reasonable overtime in accordance with the provisions of this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace or enterprise;

(iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

(v) any other relevant matter.

27. Breaks

27.1 Breaks during work periods

(a) Breaks will be given as follows:

Hours worked	Rest break	Meal break
Less than 4 hours	No rest break	No meal break
4 hours but less than 5 hours	One 10 minute rest break	No meal break
5 hours but less than 9 hours	One 10 minute rest break	One meal break of at least 30 minutes but not more than 60 minutes
9 hours or more	Two 10 minute rest breaks, with one taken in the first half of the work hours and the second taken in the second half of the work hours, two rest breaks will be given unless a second meal break is provided	One or two meal breaks of at least 30 minutes but not more than 60 minutes

(b) The timing of the taking of a rest break or meal break is intended to provide a meaningful break for the employee during work hours.

(c) An employee cannot be required to take a rest break or meal break within one hour of commencing or ceasing work. An employee cannot be required to take a rest break(s) combined with a meal break.

(d) The time of taking rest and meal breaks and the duration of meal breaks form part of the roster

(e) Rest breaks are paid breaks and meal breaks are unpaid breaks.

(f) An employee cannot work more than five hours without a meal break.

(g) Where an employee is required to work through their meal break, the employee will be paid at time and half from six hours until they cease the shift or are allowed an unpaid meal break in line with 27(a).

(h) Where due to operational requirements a Crew Member and Crew Member – Team Lead employee may be provided a paid meal break, this paid meal break will be counted as time worked.

(i) If required employees are entitled to a 20 minute paid break instead of an unpaid meal break when their entitlement becomes due between 10pm and 6am. Where only two employees are on site and the break cannot be taken consecutively due to maintaining customer service no less than two paid 10-minute paid breaks must be provided.

(i) However, where an employee is rostered for more than 8 hours, they will receive a 30 minute paid meal break instead.

(i) Where due to operational requirements a Shift Supervisor, Assistant Manager and Restaurant Manager employees may be provided a paid meal break, whilst maintaining customer service, this paid meal break will be counted as time worked.

(i) If required employees are entitled to a 20 minute paid break instead of an unpaid meal break.

(ii) However, where an employee is rostered for more than 8 hours they will receive a 30 minute paid meal break instead.

28. Requests for flexible working arrangements

28.1 Employee may request change in working arrangements

(a) Clause 28 applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

Note 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

Note 2: An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds'(see s.65(5) and (5A)).

Note 3: Clause 28 is an addition to s.65.

28.2 Responding to the request

(a) Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

(i) the needs of the employee arising from their circumstances;

(ii) the consequences for the employee if changes in working arrangements are not made; and

(iii) any reasonable business grounds for refusing the request.

Note 1: The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

Note 2: If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

28.3 What the written response must include if the employer refuses the request

(a) Clause 28.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause 28.2.

(i) The written response under s.65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.

(ii) If the employer and employee could not agree on a change in working arrangements under clause 28.2, the written response under s.65(4) must:

28.3.a.ii.1. state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and

28.3.a.ii.2. if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

28.4 What the written response must include if a different change in working arrangements is agreed

(a) If the employer and the employee reached an agreement under clause 28.2 on a change in working arrangements that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

28.5 Dispute resolution

(a) Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause 28, can be dealt with under clause 9 – Dispute resolution

Part 6— Leave and Public Holidays

29. Annual leave

29.1 Annual leave is provided for in the NES.

29.2 Definition of shiftworker

For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is a seven-day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week.

29.3 Annual leave loading

(a) During a period of annual leave an employee will receive a loading calculated on the wage rate prescribed in clause 18—Minimum weekly wages. Annual leave loading is payable on leave accrued.

(b) The loading will be as follows:

(i) Day work

Employees who would have worked on day work only had they not been on leave—17.5% or the relevant weekend penalty rates, whichever is the greater but not both.

(ii) Shiftwork

Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including relevant weekend penalty rates), whichever is the greater but not both.

29.4 Annual leave in advance

(a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.

(b) An agreement must:

(i) state the amount of leave to be taken in advance and the date on which leave is to commence; and

(ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

(c) The employer must keep a copy of any agreement under clause 29.4 as an employee record.

(d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause 29.4, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

29.5 Cashing out of annual leave

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 29.5.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 29.5.

(c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.

(d) An agreement under clause 29.5 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made.

(e) An agreement under clause 29.5 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

(f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 29.5 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 29.5.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 29.5.

29.6 Excessive leave accruals: general provision

Note: Clauses 29.6 to 29.8 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.

(a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 29.2).

(b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.

(c) Clause 29.7 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.

(d) Clause 29.8 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

29.7 Excessive leave accruals: direction by employer that leave be taken

(a) If an employer has genuinely tried to reach agreement with an employee under clause 29.6(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.

(b) However, a direction by the employer under paragraph 29.7(a):

(i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 29.6, 29.7 or 29.8 or otherwise agreed by the employer and employee) are taken into account; and

(ii) must not require the employee to take any period of paid annual leave of less than one week; and

(iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and

(iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.

(c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.

(d) An employee to whom a direction has been given under paragraph (a) may request to take a period of paid annual leave as if the direction had not been given.

Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 29.7(b)(i).

Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave

29.8 Excessive leave accruals: request by employee for leave

(a) If an employee has genuinely tried to reach agreement with an employer under clause 29.6(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.

(b) However, an employee may only give a notice to the employer under paragraph 29.8(a) if:

(i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and

(ii) the employee has not been given a direction under clause 29.8(a) that, when any other paid annual leave arrangements (whether made under clause 29.6, 29.7 or 29.8 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.

(c) A notice given by an employee under paragraph 29.8(a) must not:

(i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 29.6, 29.7 or 29.8 or otherwise agreed by the employer and employee) are considered; or

(ii) provide for the employee to take any period of paid annual leave of less than one week; or

(iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or

(iv) be inconsistent with any leave arrangement agreed by the employer and employee.

(d) An employee is not entitled to request by a notice under paragraph 29.8(a) more than 4 weeks paid annual leave (or 5 weeks' paid annual leave for a shift worker, as defined by clause 29.2) in any period of 12 months.

(e) The employer must grant paid annual leave requested by a notice under paragraph 29.8(a).

30. Shut down and Refurbishments

30.1 Employees may be required to take a nominated period of annual leave over annual shut down or refurbishment periods. Prior to the shutdown, the employer shall notify employees of the dates during which the leave is to be taken. An employee who does not have sufficient leave at the time of the shutdown, shall be required to take leave without pay for the duration of the shutdown.

Where possible the employer shall attempt to find the employee suitable work at another geographically nearby store.

31. Personal/Carer's Leave

31.1 Permanent employees are entitled to 10 days Personal/Carer's leave per year.

Casual employees

(a) Casual employees are entitled to be not available for work or to leave work to care for a person who is sick and requires care and support or who requires care due to an emergency.

(b) Such leave is unpaid. A maximum of 48 hours' absence is allowed by right with additional absence by agreement.

31.2 Personal/Carer's leave is any leave taken for the purposes of:

(a) Personal illness or injury (Personal Leave) or

(b) To provide care and support to an immediate family or household member who is ill, injured or is affected by an unexpected emergency (Carer's Leave).

31.3 The employee must notify the employer of their inability to attend for work as early as practicable prior to the normal commencement time.

31.4 For absences of more than two (2) consecutive days, the employee will be required to produce a medical certificate from a legally qualified medical practitioner, a statutory declaration or other evidence satisfactory to the employer, stating the nature of the illness and the period or approximate period that the employee will be unable to attend work.

31.5 Where the employer reasonably suspects and has reasonable proof that an employee is abusing the personal leave entitlement, it may require the employee to provide a medical certificate for all absences irrespective of duration.

31.6 Personal/Carer's Leave entitlement will be cumulative from year to year. During the second or subsequent years of continued employment with the employer, the employee will be credited their personal leave in advance.

31.7 A full time, part time or casual employee may, subject to the Fair Work Act 2009, take unpaid carer's leave for the purpose of providing care and support for a member of their immediate family or a member of the employee's household who requires care or support because of personal illness, or injury of the member, or an unexpected emergency affecting the member.

31.8 Unpaid carer's leave can only be taken when the employee's entitlement to paid personal leave has been exhausted. Unpaid carer's leave may be taken as a single, unbroken, period of 2 days, or two separate periods of 1 day each, or any separate periods totalling 2 days to which the employer and the employee agree. The 2 days unpaid carer's leave may be taken per occasion

31.9 An employer must not fail to re-engage a casual employee because the employee has accessed the entitlement under this clause.

32. Compassionate Leave

32.1 A full-time or part-time employee on the death of an immediate family member or member of their household, is entitled to three paid days of leave on each occasion. Proof of such death shall be furnished by the employee to the satisfaction of the Company.

32.2 This leave can be as a continuous 3 day period, 2 separate periods of 2 days and 1 day or as any other separate period of time as agreed with the employer.

32.3 Where a member of the full-time or part-time employee's immediate family or household suffers a serious illness or injury that poses a serious threat to their life, the employee will be entitled to 2 days paid leave on each occasion. This leave can be continuous or as two separate periods.

32.4 Casual employees are entitled to unpaid leave in the above circumstances.

32.5 "Immediate Family Member" means an employee's:

a. Spouse or partner (including former, de facto or a former de facto spouse); or

b. child, (including step, adopted, ex-nuptial or foster child); or

c. parent (including step-parent); or

d. father and mother-in-law; or

e. grandparent (including grandparent-in-law); or

f. grandchild (including grandchild of a spouse); or

g. siblings; or

h. brother and sister-in-law.

33. Natural Disaster Leave

33.1 Where a yellow alert or a state of emergency is declared, or where flooding, earthquake or bushfires occur, or are imminent, an employee shall be allowed to leave work to care for their family and/or property where there is a genuine risk.

33.2 A full time or part-time employee is to receive up to 2 days' paid leave if there is a reasonable and justified reason that the employee is unable to attend work due to a natural disaster. Provided that such leave may be extended with agreement of the Company in extenuating circumstances

34. Public Holidays

34.1 Public holidays are provided for in the NES.

34.2 An employer and a majority of employees may agree to substitute another day for a public holiday. If an employee works on either the public holiday or the substitute day

public holiday penalties apply. If both days are worked, the public holiday penalties must be paid on one day chosen by the employee.

34.3 Work on a public holiday must be compensated by payment at the rate of double time and a quarter of the ordinary rate, casual employees will receive double time and half (inclusive of casual loading).

34.4 Union Picnic Day (first Tuesday in November in NSW) will continue to be a Public Holiday in NSW.

35. Community Service Leave

35.1 Community service leave is provided for in the NES.

36. Leave to deal with Family and Domestic Violence

36.1 This clause applies to all employees, including casuals

36.2 Definitions

(a) In this clause:

family and domestic violence means violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful.

family member means:

(i) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(ii) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or

(iii) a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

(b) A reference to a spouse or de facto partner in the definition of family member in clause 36.2(a) includes a former spouse or de facto partner.

36.3 Entitlement to paid and unpaid leave

An employee is entitled to 2 days paid leave and 3 days 'unpaid leave to deal with family and domestic violence, as follows:

(a) the leave is available in full at the start of each 12-month period of the employee's employment; and

(b) the leave does not accumulate from year to year; and

(c) is available in full to part-time and casual employees.

Note: 1. A period of leave to deal with family and domestic violence may be less than a day by agreement between the employee and the employer.

2. The employer and employee may agree that the employee may take more than 5 days leave entitlement to deal with family and domestic violence.

36.4 Taking paid and unpaid leave

An employee may take paid and unpaid leave to deal with family and domestic violence if the employee:

(a) is experiencing family and domestic violence; and

(b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

36.5 Service and continuity

The time an employee is on unpaid leave to deal with family and domestic violence does not count as service but does not break the employee's continuity of service.

36.6 Notice and evidence requirements

(a) Notice

An employee must give their employer notice of the taking of leave by the employee under clause 36. The notice:

(i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(ii) must advise the employer of the period, or expected period, of the leave.

(b) Evidence

An employee who has given their employer notice of the taking of leave under clause 36 must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause 36.4

Note: Depending on the circumstances such evidence may include a document issued by the police service, a court or a family violence support service, or a statutory declaration.

36.7 Confidentiality

(a) Employers must take steps to ensure information concerning any notice an employee has given, or evidence an employee has provided under clause 36.6 is treated confidentially, as far as it is reasonably practicable to do so.

(b) Nothing in clause 36 prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

36.8 Compliance

An employee is not entitled to take leave under clause 36 unless the employee complies with clause 36.

37. Signatures

Employee Representative Signature

GERARD ANDREW DWYER
Print Full Name

SDA NATIONAL SECRETARY-TREASURER
Employee Representative Authority

6/53 QUEEN STREET, MELBOURNE
Address

18/4/19
Date

Employer Authorised Person Signature

Jenny McKie
Print Name

Chief People Officer.
Position / Authority

100 WILLIAM ST, WOOLOOMOOLOO, NSW 2011
Address

18/4/19
Date

Witnessed by:

Witness Signature

SueAnne Burley
Print Name

6/53 Queen St Melbourne
Address

18/4/19
Date

Witnessed by:

Witness Signature

Sophie Tuck.
Print Name

100 WILLIAM ST, WOOLOOMOOLOO, NS 2011
Address

18/4/19
Date

Schedule A— Supported Wage System

A.1 This schedule defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this Agreement.

A.2 In this schedule:

approved assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system

assessment instrument means the tool provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system

disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991* (Cth), as amended from time to time, or any successor to that scheme

relevant minimum wage means the minimum wage prescribed in this Agreement for the class of work for which an employee is engaged

supported wage system (SWS) means the Commonwealth Government system to promote employment for people who cannot work at full Agreement wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au

SWS wage assessment agreement means the document in the form required by the Department of Social Services that records the employee's productive capacity and agreed wage rate

A.3 Eligibility criteria

A.3.1 Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this Agreement, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

A.3.2 This schedule does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this Agreement relating to the rehabilitation of employees who are injured in the course of their employment.

A.4 Supported wage rates

A.4.1 Employees to whom this schedule applies will be paid the applicable percentage of the relevant minimum wage according to the following schedule:

Assessed capacity (clause A.5)	Relevant minimum wage
%	%
10	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

A.4.2 Provided that the minimum amount payable must be not less than $87 per week.

A.4.3 Where an employee's assessed capacity is 10%, they must receive a high degree of assistance and support.

A.5 Assessment of capacity

A.5.1 For the purpose of establishing the percentage of the relevant minimum wage, the productive capacity of the employee will be assessed in accordance with the Supported Wage System by an approved assessor, having consulted the employer and employee and, if the employee so desires, a union which the employee is eligible to join.

A.5.2 All assessments made under this schedule must be documented in an SWS wage assessment agreement and retained by the employer as a time and wages record in accordance with the Act.

A.6 Lodgement of SWS wage assessment agreement

A.6.1 All SWS wage assessment agreements under the conditions of this schedule, including the appropriate percentage of the relevant minimum wage to be paid to the employee, must be lodged by the employer with the Fair Work Commission.

A.6.2 All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment. Where a union which has an interest in the Agreement is not a party to the assessment, the assessment will be referred by the Fair Work Commission to the union by certified mail and the agreement will take effect unless an objection is notified to the Fair Work Commission within 10 working days.

A.7 Review of assessment

The assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review. The process of review must be in accordance with the procedures for assessing capacity under the supported wage system.

A.8 Other terms and conditions of employment

Where an assessment has been made, the applicable percentage will apply to the relevant minimum wage only. Employees covered by the provisions of this schedule will be entitled to the same terms and conditions of employment as other workers covered by this Agreement on a pro rata basis.

A.9 Workplace adjustment

An employer wishing to employ a person under the provisions of this schedule must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

A.10 Trial period

A.10.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this schedule for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

A.10.2 During that trial period the assessment of capacity will be undertaken and the percentage of the relevant minimum wage for a continuing employment relationship will be determined.

A.10.3 The minimum amount payable to the employee during the trial period must be no less than $82 per week.

A.10.4 Work trials should include induction or training as appropriate to the job being trialled.

A.10.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause A.5.

Schedule B— Part-day Public Holidays

This schedule operates where this Agreement otherwise contains provisions dealing with public holidays that supplement the NES.

B.1 Where a part-day public holiday is declared or prescribed between 7.00 pm and midnight on Christmas Eve (24 December) or New Year's Eve (31 December) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this Agreement relating to public holidays to the extent of the inconsistency:

(a) All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.

(b) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00 pm and midnight but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.

(c) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00 pm and midnight but as a result of being on annual leave does not work, they will be taken not to be on annual leave between those hours of 7.00 pm and midnight that they would have usually been rostered to work and will be paid their ordinary rate of pay for such hours.

(d) Where a part-time or full-time employee is usually rostered to work ordinary hours between 7.00 pm and midnight, but as a result of having a rostered day off (RDO) provided under this Agreement, does not work, the employee will be taken to be on a public holiday for such hours and paid their ordinary rate of pay for those hours.

(e) Excluding annualised salaried employees to whom clause B.1(f) applies, where an employee works any hours between 7.00 pm and midnight they will be entitled to the appropriate public holiday penalty rate (if any) in this Agreement for those hours worked.

(f) Where an employee is paid an annualised salary under the provisions of this Agreement and is entitled under this Agreement to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked between 7.00 pm and midnight.

Undertakings

In the Fair Work Commission

FWC Matter No: AG2019/1291

Applicant: Hungry Jack's Pty Ltd T/A Hungry Jack's

Agreement: *Hungry Jack's National Enterprise Agreement 2019*

I, Jenny McKie, Chief People Officer for Hungry Jack's Pty Ltd ('**the Employer**') give the following undertakings in accordance with section 190 of the *Fair Work Act (2009)* (Cth) ('**the Act'**), with respect to the *Hungry Jack's National Enterprise Agreement 2019* ('**the Agreement'**):

Authority to give undertakings

1. I have the authority given to me by the Employer to provide these undertakings in relation to the application before the Fair Work Commission.

Clause 2 Commencement

2. In relation to clause 2.1 of the Agreement, the Employer undertakes that that Agreement shall remain in force for a period of not more than 4 years after the day on which the Fair Work Commission approves the Agreement.

Clause 4 Coverage

3. In relation to clause 4.1 of the Agreement, the Employer undertakes that the Agreement will apply only to employees of Hungry Jack's in the classifications listed at clause 17 of the Agreement.

Clause 7 Individual Flexibility Arrangements

4. Under clause 7.9 of the Agreement, the Employer undertakes to give a copy of the individual flexibility arrangement to the employee within 14 days after it is agreed.
5. Under clause 7.11(b) of the Agreement, the Employer undertakes that the Agreement may be terminated by the either employer or employee by giving no more than 28 days written notice to the other party.
6. The Employer undertakes that terms of any individual flexibility arrangement made under clause 7 of the Agreement are about permitted matters under section 172 of the Act; and are not unlawful terms under section 194 of the Act.

Clause 9 Dispute resolution

7. The Employer undertakes to permit the employee to appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 9 of the Agreement.

Clause 17 Classifications

8. With regards to clause 17.2 of the Agreement, an employee engaged as Crew Member-Team Lead will not have responsibility for supervising Crew Members and/or training new employees.

Clause 18 Minimum Weekly Wages

9. In relation to clause 18 of the Agreement, the Employer undertakes that the minimum weekly wage for an Assistant Manager will be $860.70 per week.
10. For the purposes of clause 18.2 of the Agreement, the Assistant Manager Agreement classification is mapped to the Fast Food Industry Award classification of a Level 3(b) employee.

Clause 20.4 Uniforms and Special clothing

11. In relation to clause 20.4(d) of the Agreement, the Employer undertakes to not withhold $30.00 to offset the costs of the uniform not being returned, in circumstances where the employee gives evidence satisfactory to the employer that the employee was not at fault.

Clause 20.5 Delivery Drivers

12. In relation to clause 20.5(h) of the Agreement, the Employer undertakes to pay an allowance of $0.41 per kilometre only where an employee is primarily engaged to perform delivery duties for the employer. Where the employee is requested to use their own private motor vehicle to perform delivery duties, and the employee is not primarily engaged by the employer to perform delivery duties, the employee will be paid an allowance of $0.78 per kilometre.

Schedule 'A' – A.10.3

13. In relation to clause A.10.3 in Schedule A the Employer undertakes to that the minimum amount payable to the employee during the trial period must be no less than $87 per week.

Jenny McKie, Chief People Officer

Dated: 20-9-19.