

IN THE FAIR WORK COMMISSION

AT MELBOURNE

MATTER NO. AM2021/73

Fair Work Act 2009 s.157–Application to vary or revoke a modern award – insertion of loaded rates schedule

ACTU SUBMISSION

I. INTRODUCTION

1. On 9 December 2020, the Attorney General wrote to the FWC President requesting that the FWC initiate a process to examine the potential for changes to awards in the retail and hospitality industries.
2. The ACTU has previously expressed the principles which, in our view, should guide this process.¹ We maintain this general position.
3. On 19 July 2021, an application to vary *the Hospitality Industry (General) Award 2020 (Hospitality Award)* was made by the Australian Hotels Association (**Application**).
4. The ACTU makes this submission in opposition of the Application. We support the submission of our affiliate, the UWU, who also opposes the Application.

A. *The Nature of the Proposal*

5. The Application, if granted, would insert a schedule (Schedule K) into the Hospitality Award which would provide for the payment of loaded rates.
6. Schedule K would be applicable to full-time employees who are classified under the Hospitality Award at level 3 or above.
7. There would be 6 sets of loaded rates that may apply, depending on the employee’s pattern of work.
8. Schedule K (at clause K.6) provides for 6 parameters within which a loaded rates agreement must operate.

¹ ACTU, AWU, SDA, UWU Position, 28 January 2021. <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/submissions/am2020103-sub-actu-and-ors-280121.pdf>

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B. *The Nature of the Industry*

9. The Applicant correctly points out that there is a level of concern over award non-compliance in the hospitality industry.²
10. Insecure employment is prevalent in the hospitality industry.
11. Within the accommodation and food services industry (of which hospitality forms part) the clear majority (about 508,100 out of 790,500) of workers are employed casually.³
12. Of the small cohort of workers who are employed on a permanent basis, only 184,200 are employed on a full-time basis.⁴
13. These figures are in contrast to the figures across all industries, which show 10,990,800 employees, of whom 8,391,300 employees are employed permanently.⁵

II. THE LIMITED UTILITY OF THE PROPOSAL

14. The Applicant, in support of the application makes the following submissions:
 - a. The Hospitality Award currently has a number of wage levels, allowances and penalty rates;⁶
 - b. The Hospitality Award is currently complex;⁷
 - c. Employers may be found liable for underpayment claims because the Hospitality Award is complex;⁸
 - d. Schedule K will minimize the instances of Award non-compliance (and therefore be of benefit to employees);⁹
15. In an industry where the minority of workers are employed on a full-time basis, and even fewer are classified at level 3 or above, Schedule K will be limited in application to a very small cohort of workers – it will be of no practical effect whatsoever in some workplaces. This limits the relevance of Schedule K in term of its ability to deliver meaningful measures to assist businesses in their post-COVID-19 recovery.

² Australian Hotels Association, *Supplementary Submissions* at [37].

³ ABS cat 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards; note: ABS uses employees without leave entitlements as an indicator of casual employment.

⁴ ABS cat 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards; note: that is full-time employees with leave entitlements

⁵ ABS cat 6291.0.55.001 - EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards; note: ABS uses employees without leave entitlements as an indicator of casual employment.

⁶ Australian Hotels Association, *Supplementary Submissions* at [35].

⁷ Australian Hotels Association, *Supplementary Submissions* at [35].

⁸ Australian Hotels Association, *Supplementary Submissions* at [36].

⁹ Australian Hotels Association, *Supplementary Submissions* at [38.1].

16. Schedule K is put forward as a panacea to the complexity of the Hospitality Award (upon which the Applicant rests responsibility for the epidemic of wage theft in the hospitality industry). It is not this.
17. Schedule K, with its multitude of different loaded rates – each of which apply to different work patterns – and its numerous parameters, is itself a complicated prescription.
18. To the extent that Schedule K is found to benefit workers – and the ACTU denies this – those benefits have been found to be minor – for example, the FWC calculates that under Schedule K a level 3 employee working 40 hours between Monday and Friday would receive an extra \$0.05.¹⁰ In the submission of the ACTU, at best the significance of this is negligible.

III. THE POTENTIAL PITFALLS OF THE PROPOSAL

19. Schedule K will not leave workers better off, and it may leave workers worse off.
20. The ACTU submits that the Application should not be granted if it has the potential to leave workers worse off under Schedule K than they would be otherwise.
21. The sheer number of work patterns available across the Hospitality industry as a whole means that assessment of a loaded rates proposal is very different across the industry-as-a-whole compared to assessment of a similar proposal for a single enterprise.
22. The ACTU submits that aspects of the Better of Overall Test (**BOOT**) are appropriate considerations to assist in determining the merits of the Application. In particular:
 - a. Even a small cohort of workers being significantly disadvantaged should weigh against granting the Application;¹¹
 - b. The task of assessing whether a loaded rates proposal will leave employees better or worse off is complicated where future work patterns cannot be predicted with certainty.¹²
23. The ACTU submits that the following are ways in which Schedule K may leave workers worse off:
 - a. When a Monday to Saturday or Monday to Sunday worker paid according to Schedule K works overtime on a weekday (instead of the overtime being applicable to a Saturday or Sunday). This may arise if a worker performs additional hours outside of their roster, in addition to their rostered hours.
 - b. When a worker paid according to Schedule K works on their rostered day off. For example, if a Monday to Sunday worker performs work on a Tuesday, which is their RDO, after being called in at short notice, and performs 10 hours shifts on the Saturday and/or Sunday as per their ordinary roster.

¹⁰ <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am202173-analysis-loaded-rates-200721.pdf>

¹¹ See, for example (as relevant to the BOOT): *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWFCB 2887; FW Act s 193(7)

¹² [2018] FWCFB 3610 at [103], [115]

24. In addition to this, the ACTU submits that the proposal may have the following negative consequences:
- a. The denial of working opportunities to casual employees, who may lose shifts to permanent employees who are called in to work additional hours at short notice;
 - b. The reduced work and overtime opportunities for part-time workers and level 1-2 full-time workers which may flow from the proposal;
 - c. The ability for employers to schedule work outside of the roster at short notice without paying overtime rates;
 - d. Greater pressure for employees to work additional hours, including unrostered overtime.

IV. THE MODERN AWARDS OBJECTIVE

25. The ACTU submits that granting the Application is not necessary to meet the Modern Awards Objective.
26. The FW Act s 134(2) provides that the modern awards objective (as defined in s 134(1)) applies to the performance or exercise of the FWC's modern award powers (which includes its powers under s 157).
27. The FW Act s 157 provides that the FWC may make a determination varying a modern award on application on satisfaction that doing so is necessary to achieve the modern awards objective.
28. In *Hospitality Industry (General) Award 2010* ([2020] FWCFB 1574), the Fair Work Commission said:

[44] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[45] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[46] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[47] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterized as broad social objectives. In giving effect to the modern

awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[48] section 138 of the Act emphasizes the importance of the modern awards objective:

‘Section 138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[49] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.

A. *A Fair and Relevant Minimum Safety Net*

29. The specific considerations contained in s134 are considered below. It is important to bear in mind the well-established principle that the section 134 considerations serve an overall objective.¹³ Here, the broad concerns of fairness and relevance are critical.

30. In 4 yearly review of modern awards – Penalty Rates Decision, the Full Bench observed:¹⁴

“... the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’ (emphasis added)”

31. It is submitted that granting the Application is not necessary to achieve the Modern Awards objective, and moreover may be counter to achieving that objective.

B. *134(a) relative living standards and the needs of the low paid;*

32. Hospitality workers are low-paid workers.

33. Accordingly, any variation which reduces the actual or available take-home pay of hospitality workers will affect them significantly, and at any rate is a relevant consideration to the FW Act s 134(a).

34. It is submitted that regard should be had not only to hospitality workers as a whole, but also to the relative standards and needs of various classes of workers within the hospitality industry – for

¹³ Annual Wage Review 2016-17 [2017] FWCFB 3500 at [128]

¹⁴ [2017] FWCFB 1001 at [120]. See also [2016] FWCFB 8025, [2009] AIRCFB 800 at [4]

instance, the relative living standards and needs of casual, part-time and level 1-2 full time workers (who may have reduced work opportunities under this proposal) as compared to the living standards and needs of level 3 and above full-time workers within the industry.

C. *134(b) the need to encourage collective bargaining;*

35. Many employers are incentivised to negotiate collective agreements through a desire to implement genuinely non-complex loaded rates. Doing so in a way that ensures workers are better off overall is a matter of statutory imperative and can properly be the subject of negotiations at the enterprise level, where work patterns and other contextual factors are more readily assessable.
36. The availability of loaded rates, albeit for only a small section of the workforce, may diminish the incentive that employers have to engage in enterprise bargaining, on the basis of a preparedness to negotiate other terms which are beneficial for workers in exchange for securing loaded rates.

D. *134(c) the need to promote social inclusion through increased workforce participation;*

37. The Application, if granted, may divert work opportunities from casual and part-time workers into additional hours for level 3 and above full-time workers covered by Schedule K.
38. This would decrease workforce participation and reduce social inclusion for some workers.

E. *134(d) the need to promote flexible modern work practices and the efficient and productive performance of work;*

39. The ACTU submits that flexible modern work practices should not come at a cost of reduce take-home pay for workers, or at the expense of other factors to be considered as part of the Modern Awards Objective.

F. *134(da) the need to provide additional remuneration for: (i) employees working overtime; or (ii) employees working unsocial, irregular or unpredictable hours; or (iii) employees working on weekends or public holidays; or (iv) employees working shifts; and (e) the principle of equal remuneration for work of equal or comparable value;*

40. This submission has above identified ways in which Schedule K could dispense with existing arrangements for the payment of additional remuneration (on an overall basis) to workers covered by Schedule K. The ACTU submits that this weighs against granting the Application.

G. *134(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;*

41. Notwithstanding that the adoption of Schedule K is voluntary for employers, it is the submission of the ACTU that it will increase complexity for businesses.

42. Schedule K contains a number of parameters, and provides for 6 different loaded rates – each with specific eligibilities. There is considerable risk that employers will apply the wrong rates to the wrong employees, or fail to adhere to the several parameters. This does not reduce the risk of wages non-compliance, but rather increases it due to the lack of familiarity with the proposed provisions.
43. Further, on the basis that Schedule K is unlikely to be adopted for all workers in an enterprise, it will create a system of dual regulation and the complexity that attaches to that.

H. *134(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards;*

44. We refer to our submission above as to the complexity of the proposal, and submit that employers will likely find the proposed new scheme difficult to understand and apply *correctly*.

I. *134(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

45. The ACTU submits that due to the limited scope of Schedule K, it will have minimal positive impact on employment growth etc.

V. CONCLUSION

46. For the reasons above, the ACTU submits that the FWC should not grant the Application.

Friday, 20 August 2021

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For the ACTU

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