

## Information Note—Late night/early morning penalties in the *Hospitality Industry (General) Award 2020*

*This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.*

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### Introduction

This information note provides an overview of the late night/early morning penalties provided for by clause 29.2 of the *Hospitality Industry (General) Award 2020* (Hospitality Award), including its origin and arbitral history. This note also provides an overview of pro-rata arrangements under the Hospitality Award.

### Current Hospitality Award provisions

Late night/early morning penalties, applicable to both casual and permanent employees, are prescribed by the *Hospitality Industry (General) Award 2020* (Hospitality Award) as follows:

**29.2** An employer must pay an employee as follows for hours worked by the employee during a period, or on a day, specified in column 1 of **Table 14—Penalty rates**:

(a) for a full-time or part-time employee, at the percentage specified in column 2 of that Table of the ordinary hourly rate of the employee under **Table 3—Minimum rates** plus the additional amount specified in that column for hours worked between 7.00 pm and 7.00 am on a Monday to Friday; or

(b) for a casual employee, at the percentage specified in column 3 of that Table of the ordinary hourly rate of the employee under **Table 3—Minimum rates** plus the additional amount specified in that column for hours worked between 7.00 pm and 7.00 am on a Monday to Friday.

**Table 14—Penalty rates**

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Time of ordinary hours worked</b>	<b>Full-time and part-time employees</b>	<b>Casual employees</b>
	<b>% of ordinary hourly rate</b>	<b>% of ordinary hourly rate (inclusive of casual loading)</b>
<b>Monday to Friday – 7.00 am to 7.00 pm</b>	100%	125%
<b>Monday to Friday – 7.00 pm to midnight</b>	100% plus \$2.31 per hour or part of an hour	125% plus \$2.31 per hour or part of an hour
<b>Monday to Friday—midnight to 7.00 am</b>	100% plus \$3.46 per hour or part of an hour	125% plus \$3.46 per hour or part of an hour
<b>Saturday</b>	125%	150%
<b>Sunday</b>	150%	175%
<b>Public holiday</b>	225%	250%

NOTE: Schedule B—Summary of Hourly Rates of Pay sets out the hourly penalty rate for all employee classifications, including junior employees and apprentices.

## **Award modernisation**

The [Hospitality Industry \(General\) Award 2010](#) (Hospitality Award 2010) was created on 19 December 2008 by the Australian Industrial Relations Commission (AIRC) acting pursuant to the award modernisation request made by the Minister for Employment and Workplace Relations under s.576C(1) of the Workplace Relations Act 1996.

The Hospitality Award commenced operation on 1 January 2010 and the late night/early morning penalties were set out at clause 32.4 as follows:

### **32.4 Other penalty**

Employees will be entitled to the following additional penalty for work performed at the following times:

- (a) Monday–Friday—7.00 pm to midnight: 10% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours;
- (b) Monday–Friday—midnight to 7.00 am: 15% of the standard hourly rate per hour or any part of an hour for such time worked within the said hours.

The Catering industry, Liquor & accommodation industry and the Restaurant industry (which included the Clubs industry) were considered together in the priority industry stage of the Award Modernisation process.

On 12 September 2008 the AIRC published an [exposure draft](#) for the Hospitality Award 2010 that differed to the final version. The late night/early morning penalties were provided for as follows:

### 31.3 Other penalty

(a) Any employee who is required to work any of their ordinary hours between the hours of 7.00 p.m. and midnight Monday to Friday inclusive will be paid an additional amount, calculated as follows:

- 0.25% of the standard rate per hour or any part of an hour for such time worked within the said hours.

(b) Any employee who is required to work any of their ordinary hours between midnight and 7.00 a.m. Monday to Friday inclusive will be paid an additional amount, calculated as follows:

- 0.35% of the standard rate per hour or any part of an hour for such time worked within the said hours.

The inclusion of late night/early morning penalties received opposition from parts of the industry that had not previously been subject to this requirement. For example:<sup>1</sup>

36. This provision is opposed. It mandates a payment which originated in the hotel industry, for reasons specific to that industry, across a diversity of industries which include accommodation in motels, guest houses, and the restaurant and catering industry whose normal hours of operation ordinarily extend into the evening. Costs to these industries will be unreasonably and substantially increased. We submit that there is no basis for such an extension. Industries in this sector not traditionally bound by such provisions should not have their costs increased for without reason.

The Australian Hotels Association submitted the following alternative wording for the clause: <sup>2</sup>

37.2 Employees will be entitled to the following additional penalty for work performed at the following times:

Monday to Friday - 7pm to Midnight	10% of standard hourly rate
Monday to Friday – Midnight to 7am	15% of standard hourly rate

Other submissions regarding the structure of the clause proposed renaming the provision as 'Late Work/Early Start Penalty' to conform with current terminology and aid understanding.<sup>3</sup>

The desirability of expressing the amount of the additional remuneration as a percentage of the standard rate, as opposed to a dollar figure, received further attention from the Hotel, Motel & Accommodation Association at the hearing before the Award Modernisation Full Bench:<sup>4</sup>

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<sup>1</sup> [Submission](#) by Australian Federation of Employers and Industries on 10 October 2008.

<sup>2</sup> [Submission](#) by Australian Hotels Association on 10 October 2008, p.23.

<sup>3</sup> [Submission](#) by Hotel, Motel & Accommodation Association on 29 October 2008, p.32.

<sup>4</sup> [Transcript](#) of hearing on 31 October 2008, PN2599.

... in relation to permanent employees, there will be ... an additional evening penalty after 7 pm of some 10 per cent. In relation to that there's a lot of confusion that's arisen from the draft award. It was expressed as being .025 per cent of the standard rate. Now, upon further consideration there is actually a definition of the standard rate which refers to a weekly rate and if you work it out that way it comes to around about 10 per cent. Some people have read it as being 25 per cent, other people have read it as being .025 per cent of the weekly rate, which was an allowance of 5 cents to 8 cents an hour, and so some people have said in the statements, for example, well, that would be more of an administrative headache than anything else to put in place such a low allowance, but if there was to be an allowance, with respect, it might be easier for that allowance to be expressed in monetary terms.

Giudice J explained in response:<sup>5</sup>

... the point of the percentage is to provide for automatic adjustment which is one of the requirements of the request... those percentages are generally intended to be a translation of an existing monetary allowance into a percentage so that whenever the wage rate alters, the standard rate alters the allowance alters without the need for a separate variation.

Regarding the penalty rates regime adopted for the Hospitality Award 2010, the Fair Work Commission (Commission) observed in the Penalty Rates case that:<sup>6</sup>

[759] ... The relevant award modernisation decisions show that in setting the penalty rates in the Hospitality Award the Award Modernisation Full Bench considered whether the modern award provisions reflected the existing penalty rates in the most widely-used pre-reform instruments, rather than undertaking a detailed or considered review of the appropriate penalty rates for the industry.

## Origin of the late night/early morning penalty provisions

### *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*

The main terms of the *Hospitality Industry (General) Award 2010* were based on *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998*.<sup>7</sup>

Additional to the standard casual loading,<sup>8</sup> *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* entitled casual employees to the late night/early morning penalties as follows:

#### **15.2.2(a) Monday to Friday**

For work performed between the hours of 7.00 p.m. and midnight, a casual employee must be paid an additional \$1.63 per hour or any part of an hour with a minimum daily payment of \$2.45 and a maximum daily payment of three hours.

For work performed between midnight and 7.00 a.m., a casual employee must be paid an additional \$2.32 per hour or part of an hour for such time worked within the said hours with a minimum payment of \$2.45 and a maximum daily payment of three hours.

<sup>5</sup> [Transcript](#) of hearing on 31 October 2008, PN2600 and PN2602

<sup>6</sup> [\[2017\] FWCFB 1001](#)

<sup>7</sup> [2017] FWCFB 1001 at [753]; [AP783479CRV](#)

<sup>8</sup> [AP783479CRV](#) clause 15.2.2.

For the purposes of this clause, midnight shall include midnight Sunday.

Late night/early morning penalties for other employees were as follows:

### **19.3 Other penalty**

**19.3.1** An employee, other than a casual employee, who is required to work any of their ordinary hours between the hours of 7.00 p.m. and midnight Monday to Friday inclusive will be paid an additional \$1.63 per hour or any part of an hour for such time worked within the said hours, with a minimum payment of \$2.45 for any one day.

**19.3.2** An employee, other than a casual employee, who is required to work any of their ordinary hours between midnight and 7.00 a.m. Monday to Friday inclusive will be paid an additional \$2.32 per hour or part of an hour for such time worked within the said hours, with a minimum payment of \$2.45 for any one day. For the purposes of this clause, midnight will include midnight Sunday

### *The Hotels, Resorts and Hospitality Industry Award 1992*

A precursor to *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* is *The Hotels, Resorts and Hospitality Industry Award 1992*,<sup>9</sup> created by the Australian Industrial Relations Commission (AIRC) on 17 September 1992 by consent. It prescribed late night/early morning penalties on the bases set out below.

#### Part-time employees

Clause 13(c) entitled part-time employees to a late night/early morning penalty on the following basis:

(iii) For all ordinary time before 7.00 a.m. and/or after 7.00 p.m. on Monday to Friday inclusive \$1.03 per hour or any part of an hour shall be paid plus the 10 per cent herein prescribed with a minimum daily payment of \$1.57.

(iv) The said additional 10 per cent shall not apply in addition to the rates prescribed for work on Saturday, Sunday, holidays, overtime, or where double time is prescribed in the award.

#### Casual employees

Clause 16(b) entitled casual employees to a late night/early morning penalty on the following basis:

(b) A casual employee shall be paid per hour at the rate of 1/38 of the weekly rate prescribed for the class of work performed, plus the appropriate undermentioned addition to that rate:

(i) 25 per cent for work on Monday to Friday inclusive provided that for such work performed before 7.00 a.m. and/or after 7.00 p.m. an additional \$1.03 per hour or any part of an hour shall be paid with a minimum daily payment of \$1.57 and a maximum daily payment of \$3.13.

#### Permanent employees

Clause 21(c) entitled permanent employees to a late night/early morning penalty on the following basis:

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<sup>9</sup> Print K3966

### **Other penalty**

(c) A permanent employee who is required to work any of his/her ordinary hours outside the hours of 7.00 a.m. and 7.00 p.m. on Monday to Friday inclusive shall be paid \$1.03 per hour, or any part of an hour, for such time worked outside the said hours, with a minimum payment of \$1.57 for any one day.

### **4 yearly review of modern awards**

As a result of the 4 yearly review proceedings, the Commission decided to change the words 'per hour or any part of an hour for such time worked within the said hours' in clause 32.3 of the Hospitality Award 2010 concerning late night/early morning penalties to 'per hour or part of an hour' for the purposes of the new award.<sup>10</sup> Based on submissions to the [Plain Language Full Bench \(AM2016/15\)](#), it does not appear that any party submitted that this change in language altered the operation of the existing award in any way.

During the proceedings the Australian Hotels Association noted that parties had agreed to amend the late night/early morning penalty provisions in the *Registered and Licensed Clubs Award 2010* to clarify it operated on a pro-rata basis and submitted that the same interpretation should to the late night/early morning penalty clauses in the restaurant and hospitality exposure drafts.<sup>11</sup> This point does not appear to have been subject substantive discussion or conclusions at the time.

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<sup>10</sup> [\[2020\] FWCFB 1814](#) at [18]

<sup>11</sup> Australian Hotels Association [submission](#) on 27 November 2019.