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**Sent:** Monday, 26 July 2021 2:04 PM  
**To:** Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>; AMOD <AMOD@fwc.gov.au>  
**Cc:** Ben Redford <Ben.Redford@unitedworkers.org.au>  
**Subject:** AM2021/73 - AHA Supplementary Submissions

To whom it may concern

I refer to the above-mentioned matter.

Following the private conference last Thursday, please see **attached** the AHA's supplementary submissions in support of its 19 July 2021 application.

If you have any further questions, please do not hesitate to contact me.

Kind regards

Bianca

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**Matter No:**

AM2021/73

AWARD FLEXIBILITY – HOSPITALITY

**Party**

AUSTRALIAN HOTELS ASSOCIATION

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**SUPPLIMENTARY SUBMISSIONS**

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**Introduction**

1. These supplementary submissions are made by the Australian Hotels Association (**AHA**) in support of its 19 July 2021 application to vary the *Hospitality Industry (General) Award 2020* (**Award**) for the inclusion of a new schedule to provide a simplified pay arrangement in the form of a loaded rates arrangement (**Application**).<sup>1</sup>
2. The Application was made in response to the statement of the Fair Work Commission (**FWC**) which invited proposals for additional award flexibility in light of the extraordinary circumstances caused by the COVID-19 pandemic.<sup>2</sup>
3. The Application contained a proposed draft determination which set out, among other things:
  - 3.1. six (6) loaded rate percentages based on a set range of days and maximum weekly hours;
  - 3.2. the parameters for which the maximum daily and weekly hours could be worked in respect of each of the loaded rate percentages; and
  - 3.3. that employees are remunerated in accordance with the Award as usual for work in excess of the set range of days and / or maximum weekly hours.

**(Proposed Variation)**

4. These supplementary submissions outline the AHA's position regarding:
  - 4.1. the context and background of the Application;

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<sup>1</sup> AHA Application.

<sup>2</sup> [2020] FWC 6636, [11].

**Lodged by the Australian Hotels Association**

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- 4.2. its formulation of the Proposed Variation;
- 4.3. ensuring employees are not disadvantaged or ‘worse off’;
- 4.4. the satisfaction of the modern award objectives outlined at section 134(1) of the *Fair Work Act 2009* (Cth) (**Act**); and
- 4.5. changes in light of the COVID-19 pandemic.

### **Background and context to the Application**

5. On 9 December 2020, the former Attorney General and Minister for Industrial Relations, the Hon Christian Porter MP wrote to the FWC President the Hon Justice Iain Ross AO regarding the impact of the COVID-19 pandemic (**December Letter**), specifically referring to the “*need for sensible flexible work arrangements to assist employers and employees in adapting to the changed conditions and to support the recovery*” for priority industries most impacted by the pandemic.<sup>3</sup>
6. Minister Porter outlined the following proposals he intended for the FWC to consider:
  - 6.1. the introduction of a simplified pay arrangement in the form of loaded rates / exemption rates; and
  - 6.2. the streamlining of classification structures.

#### **(Minister’s Proposals)**

7. In response to the December 2020 letter, the FWC commenced a process of its own motion to consider the inclusion of the Minister’s Proposals in modern awards of the priority industries.

### **Formulating the loaded rates proposal**

8. On 17 December 2020, the AHA indicated to the FWC, it was ‘open’ to the inclusion of loaded rates in the Award.<sup>4</sup>
9. As part of formulating its proposal, the AHA considered:
  - 9.1. the penalty rates in the Award which would be most appropriate to form part of a loaded rate;
  - 9.2. whether it was appropriate for a loaded rate to apply to all wage levels or select wage levels;

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<sup>3</sup> Letter from Minister Porter to Justice Ross of the Fair Work Commission, 9 December 2020, p. 1.

<sup>4</sup> Transcript of Proceedings, *Award Flexibility – Hospitality and Retail Sectors* (Fair Work Commission, AM2020/103, Justice Ross President, 17 December 2020) PN33.

- 9.3. if it was possible for a loaded rate to apply to all full time, part time or casual employees; and
  - 9.4. how to structure loaded rates in a manner that makes it easy for employers and employees to understand.
10. The AHA determined, the maximum weekly hours would be set at either 40 or 45 hours. This was based on the maximum weekly hours as outlined in the National Employment Standards and reasonable additional hours worked by a full time employee in the hospitality industry. Further, the AHA understood hours of work for a full time employee in the industry are typically rostered in the following configurations:
- 10.1. five (5) days a week at nine (9) hours a day; or
  - 10.2. five (5) days a week at eight (8) hours a day; or
  - 10.3. five (5) days a week at a combination of variable day lengths.
11. On 27 January 2021, the AHA submitted an initial loaded rates proposal:
- 30. *The AHA proposes the introduction of six loaded rates:*
    - A. *Monday to Friday 40 hours – 10% loading*
    - B. *Monday to Saturday 40 hours – 19 % loading*
    - C. *Monday to Sunday 40 hours – 28% loading*
    - D. *Monday to Friday 45 hours – 20% loading*
    - E. *Monday to Saturday 45 hours – 25% loading; and*
    - F. *Monday to Sunday 45 hours – 35% loading.*

*31. In each case, the loaded rate will compensate the employee for work performed between 7:00am – 12:00am Monday to Friday, Saturday (maximum of 10 hours) and Sunday (maximum of 10 hours), overtime up to the relevant 40 or 45 hour range, split shift allowance, weekly tool allowance and contain a buffer of \$10 per week. Worked performed on public holidays or in excess of daily/weekly limits is paid at the applicable award overtime or public holiday rate.<sup>5</sup>*

**(January Proposal)**

- 12. The January Proposal was assessed by the FWC agreements team who determined it would not result in employees being ‘better off’ when compared to the Award.

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<sup>5</sup> Australian Hotels Association, ‘Submissions and Proposals’, Submission in *Award Flexibility – Hospitality and Retail Sectors*, AM2020/103, 27 January 2021, paragraphs 30 – 31.

13. Following this feedback, the AHA reconfigured its January Proposal, to better ensure employees were not disadvantaged or worse off under a loaded rate arrangement.

14. On 25 March 2021, the AHA submitted a draft determination with a revised loaded rate arrangement (**March Proposal**). During a conference listed on the same day, the following reasons were provided for the changes between the January Proposal and the March Proposal:

*JUSTICE ROSS: ... It appears that the parameters around the working for that loaded rate have not changed since the last proposal, but the loaded rate has decreased ...*

*MR RYAN: ... The percentages in that table have varied, so the first relevant column, 10.2, has gone up ... 16.95 has reduced for that category, the 23.4 - there has been some change there. That is because we have narrowed the scope and breadth of the parameters following discussions both with United Voice as well as the Fair Work Commission's enterprise agreement team.*

*JUSTICE ROSS: ... [FWC agreements team] raised a question about the tool allowance and whether that is paid to someone on the loaded rate or not. That seems to make a difference to the Monday to Saturday 45 hours ... Can you clarify what the position is with that?*

*MR RYAN: Yes. We have removed the tool allowance from being within the parameters of the loaded rate. We have also shrunk or restricted the split shift allowance only to include those split shifts which are three hours or less. We have also restricted work on Saturday and Sunday to a maximum of 10 hours of either the 40 or 45 respectively. They are matters or parameters that we have taken into consideration following consultation with members and our relevant stakeholders within the association's branches. That is why there is that reduction in the percentage.<sup>6</sup>*

15. Following this conference, the AHA agreed to continue to work with the FWC agreements team and the United Workers Union (UWU) in relation to its March Proposal.

16. Between March and June 2021, the AHA worked with the FWC agreements team and the UWU regarding its March Proposal.<sup>7</sup>

17. On 19 July 2021, the AHA lodged the Application, which it submits ensures employees are not worse off or disadvantaged, eases the administrative burden for employers and provides sensible workplace flexibility in response to changing economic conditions.

### **Ensuring employees are not disadvantaged**

18. The AHA is cognisant of some of the philosophical arguments regarding the inclusion of loaded rates in modern awards, specifically, that the arrangement may leave the employee worse off

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<sup>6</sup> Transcript of Proceedings, *Award Flexibility – Hospitality and Retail Sectors* (Fair Work Commission, AM2020/103, Justice Ross President, 25 March 2021) PN13 – PN14 and PN17 – PN18.

<sup>7</sup> AHA Application, paragraphs 10 and 11.

when compared to award entitlements and by extension, result in employees being disadvantaged.

19. The AHA proposes the apprehension may be attributed to the perceived ‘mystery’ regarding a loaded rate calculation methodology and what aspects of the modern award are and are not included.
20. The AHA submits its Proposed Variation does not disadvantage, nor leave employees ‘worse off’ when compared to the Award.
21. The AHA workshopped a number of separate roster scenarios as part of its process to determine the appropriate percentage rates. These roster scenarios and the calculation methodology underpinning the loaded rate percentages were provided to the FWC agreements team and the UWU for their assessment and feedback.
22. The FWC agreements team assessed the AHA’s March Proposal to determine whether employees would be disadvantaged or worse off. On each occasion the FWC agreements team assessed the loaded rate percentages, they found it did not leave employees worse off when compared to the Award.
23. Furthermore, it is noted that work performed in excess of the loaded rate parameters, or for allowances not specified, remain payable as separate entitlements in accordance with the Award.
24. As outlined at paragraphs 21 to 23 above, the FWC agreements team have assessed and confirmed the Proposed Variation will not disadvantage employees or result in them being ‘worse off’ when compared to the Award.
25. The Proposed Variation contains a further safeguard to ensure employees are not disadvantaged by its operation, in that the Award’s dispute resolution procedure is open to be enlivened by any employee aggrieved by a loaded rate arrangement.
26. While it would be anticipated any such dispute would likely resolve at the workplace discussion level, the Proposed Variation requires any particular loaded rate arrangement must include the employer’s consent to FWC arbitration of a dispute arising from the arrangement, meaning any loaded rate arrangement is ultimately subject to the FWC’s oversight.

**Satisfaction of the modern awards objective**

27. As outlined the Application, proposal satisfies the following modern award objectives:
  - 27.1. section 134(1)(a) of the Act;
  - 27.2. section 134(1)(d) of the Act;
  - 27.3. section 134(1)(f) of the Act; and
  - 27.4. section 134(1)(g) of the Act.

*Section 134(1)(a) - relative living standards and the needs of the low paid*

28. The AHA submits the Proposed Variation protects the needs of the low paid by ensuring there is no disadvantage to employees for the reasons outlined at paragraphs 22 to 26 above.
29. Further the Proposed Variation providing greater certainty for employees in relation to weekly take home pay, hours worked per week and entitlements owed for work in excess of the loaded rate arrangement.

*Section 134(1)(d) – promotion of flexible modern work practices and the efficient and productive performance of work*

30. The AHA submits the Proposed Variation will promote more flexible work practises and is necessary given the need for flexibility and support as employers in the hospitality industry continue and contribute to the recovery efforts in response to the impact of COVID-19 on the national economy.
31. Furthermore, the Proposed Variation will allow employers to opt for different payment styles for Award covered employees, while remaining compliant with Award obligations.

*Section 134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden*

32. The AHA submits the Proposed Variation will reduce both the administrative and regulatory burden on employers as the processing of payroll and associated administrative tasks will be more efficient (particularly for those employers who do not have sophisticated payroll processes which automatically calculate penalties and entitlements owed).
33. Additionally, employers can feel more confident they are complying with regulatory and legal obligations in a clear and concise manner.

*Section 134(1)(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*

34. The AHA accepts all relevant section 134 matters must be treated as a matter of significance as part of the decision making process.<sup>8</sup>
35. However, the AHA submits the Proposed Variation goes to the heart of section 134(1)(g). Currently the Award has:
  - 35.1. 7 wage levels (not including juniors or apprentice classifications);

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<sup>8</sup> *Restaurant and Catering Industrial* [2021] FWCFB 4149, [121] referring to *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

35.2. 15 different allowances; and

35.3. 5 different penalties (not including public holidays)

which apply to different employees at different times based on different days. The Award, without the Proposed Variation is a complex industrial instrument.

36. As a result of this, employers can be found liable for underpayment claims as a result of inadvertent errors being made due to the complexity of the Award and its legal requirements.

37. Further, various employee union bodies have raised their concerns regarding Award non-compliance in the hospitality industry.<sup>9</sup>

38. The Proposed Variation balances the needs of:

38.1. employees by minimizing the instances of Award non-compliance, and

38.2. employers by creating a simplified pay structure which assists with better legal compliance and accountability.

39. The AHA submits the Proposed Variation will simplify and make the Award easier to understand for both employers and employees.

#### **Changes in light of the COVID-19 pandemic**

40. The ongoing impact of the pandemic on various state economies across the country has meant the active recovery process while ongoing, is ‘lagging’ and continues to be a challenge for many employers in the hospitality industry,<sup>10</sup> especially since the re-introduction of prolonged lockdowns in multiple states.

41. As outlined in the Application, the hospitality industry is still in a state of recovery and not back to its pre-pandemic levels,<sup>11</sup> and the Proposed Variation “balances the Government’s request for sensible workplace flexibility in response to changing economic conditions against the need to maintain appropriate safeguards and ensuring employees are not ‘worse off’ when compared to Award entitlements.”<sup>12</sup>

#### **For the Australian Hotels Association**

**Monday, 26 July 2021**

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<sup>9</sup> United Workers Union, ‘Submissions – United Workers Union’, Submission in *Application by Restaurant Catering Industrial*, AM2021/58, 29 June 2021, [38(b)]; Australian Council of Trade Unions, ‘ACTU, AWU, SDA, UWU Position’, Submissions in response to *Fair Work Commission 10 December 2021 Statement*, [2020] FWC 6636, 28 January 2021, [4].

<sup>10</sup> *Restaurant and Catering Industrial* [2021] FWC 4149, [15]-[31]; Borland J (2021), *An assessment of the economic effects of COVID-19*, Version 5, a report to the Fair Work Commission, 4 June, p. 11.

<sup>11</sup> AHA Application, paragraph 18.

<sup>12</sup> *Ibid*, paragraph 19.