

IN THE FAIR WORK COMMISSION

Matter No:

AM2021/73

AWARD FLEXIBILITY – HOSPITALITY

Party

AUSTRALIAN HOTELS ASSOCIATION

SUBMISSIONS IN REPLY

Introduction

1. These submissions in reply are made by the Australian Hotels Association (**AHA**) in accordance with the directions outlined in the Fair Work Commission (**FWC**) decision of 27 July 2021¹ in response to the submissions filed on Friday, 20 August 2021 by the United Workers Union (**UWU Submissions**) and the Australian Council of Trade Unions (**ACTU Submissions**).
2. The UWU Submissions and ACTU Submissions were prepared following the AHA’s application to vary the *Hospitality Industry (General) Award 2020* (**Award**) for the inclusion of a new schedule to provide a loaded rates arrangement (**Proposed Variation**).²
3. The UWU Submissions and ACTU Submissions collectively raise the following concerns regarding the Proposed Variation:
 - 3.1. It is not clear how the Proposed Variation sits “*within the compass of the matters identified by section 139 of the Act, that are terms which may be included in modern awards*”;³
 - 3.2. The potential for employees to be disadvantaged under the Proposed Variation;⁴
 - 3.3. The Proposed Variation is complex and difficult to understand;⁵

¹ *Australian Hotels Association* [2021] FWCFB 4513 at [50].

² AHA Application.

³ UWU Submissions, [18].

⁴ UWU Submissions, [30] to [35]; ACTU Submissions, [19] to [24].

⁵ UWU Submissions, [36] to [43]; ACTU Submissions, [41] to [44].

Lodged by the Australian Hotels Association

Address for Service:
27 Murray Crescent
GRIFFITH ACT 2603

Telephone: (08) 9321 7701
Email: wra@ahawa.asn.au

- 3.4. The unilateral application of the Proposed Variation by an employer on an employee;⁶
and
- 3.5. The satisfaction of the modern award objectives in the *Fair Work Act 2009* (Cth) (**Act**).⁷

Consideration of section 139 of the Act

4. Part 2-3, Division 3 of the Act identifies the types of issues which may, must and must not be included in modern awards.⁸
5. The UWU Submissions correctly point out section 139 of the Act does not contain a provision for a ‘loaded rate arrangement’.⁹
6. However, as outlined in *4 yearly review of modern awards*,¹⁰ a decision cited in the UWU Submissions,¹¹ the Full Bench of the FWC confirmed it is not appropriate to interpret remedial or beneficial provisions in a narrow or restrictive manner, rather these provisions should be afforded a liberal and fair meaning.¹²
7. Further:
- If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.*¹³
- (emphasis added)
8. Further, the FWC expressed as part of its provisional view of the Proposed Variation: “*there appears to be no legislative barrier to the inclusion of terms about loaded rates in modern awards*”.¹⁴

⁶ UWU Submissions, [55] to [58].

⁷ UWU Submissions, [44] to [54]; ACTU-Submissions, [25] to [45].

⁸ *Fair Work Act 2009* (Cth) sub-div B to D.

⁹ UWU Submissions, [21].

¹⁰ *4 yearly review of modern awards – Plain language – standard clauses* [2017] FWCFB 5258.

¹¹ UWU Submissions, [25].

¹² *4 yearly review of modern awards – Plain language – standard clauses* [2017] FWCFB 5258 at [62] to [66].

¹³ *Ibid*, [63].

¹⁴ *Australian Hotels Association* [2021] FWCFB 4513 [21].

9. The AHA submits while section 139(1) of the Act does not contain an express loaded rates arrangement provision, it does not, based on its construction, preclude the aggregation of various matters into a loaded rate arrangement.
10. Section 139(1) of the Act does not express how the various matters may be included in a modern award. By extension, the AHA maintains it is open on the legislative construction of section 139(1) of the Act for the provision of a loaded rate arrangement to be included in modern awards.
11. Furthermore, a loaded rate arrangement is not identified as a matter which must not be included in a modern award.¹⁵
12. The inclusion of loaded rates in modern awards is not a novel concept.¹⁶ The issue was addressed in both 2012¹⁷ and 2017¹⁸.
13. The AHA notes in its recent decision regarding changes to the *Restaurant Industry Award 2020 (Restaurant Award)*, the FWC approved the inclusion of a ‘substitute allowance’ designed to pay full time employees an all-purpose allowance instead of certain individual allowances, akin to a loaded rate arrangement.¹⁹
14. The FWC in this decision did not consider substitute allowance outside the matters outlined in section 139(1) of the Act.
15. Accordingly, the AHA submits the Proposed Variation is not in breach of the section 139(1) considerations outlined in the Act.

The potential for employees to be disadvantaged under the Proposed Variation

16. Both the UWU Submissions and ACTU Submissions outline concerns regarding the potential for employees to be worse off under a loaded rates arrangement.
17. As was confirmed by the FWC agreements team, the loaded rate arrangements outlined in the Proposed Variation will not result in employees being disadvantaged when compared to employees who do not work in accordance with a loaded rates arrangement.²⁰

¹⁵ *Fair Work Act 2009* (Cth) sub-div D.

¹⁶ *Australian Hotels Association* [2021] FWCFB 4513 at [20] to [24].

¹⁷ *Modern Award Review (the Transitional Review)* [2013] FWCFB 1635.

¹⁸ *4 yearly review of modern awards – Penalty rates case* [2017] FWCFB 1001.

¹⁹ *Restaurant & Catering Industrial* [2021] FWCFB 4149 at [145].

²⁰ AHA Supplementary Submissions, [24].

18. The primary disadvantage example used in the UWU Submissions and ACTU Submissions is an employee working on a rostered day off, not being entitled to payment of overtime in accordance with clause 28.2(d) of the Award.²¹
19. For the avoidance of doubt, the AHA never intended the Proposed Variation to vary the application of clause 28.2(d) of the Award. If an employee is required to work on a rostered day off, the employee is entitled to be compensated in accordance with the Award requirements.
20. Separately, clause K.13. of the Draft Determination provides “*Unless modified by clauses K.2, K.9, and subject to clause K.14 a Loaded Rate Arrangement does not vary the application of other terms of this award*”.²²
21. If the FWC agrees with the UWU Submissions and ACTU Submissions regarding the uncertainty of clause K.14. Note 1 wording, the AHA will not oppose an amendment to ensure the appropriate intention is clearly conveyed.
22. Paragraph 22 of the ACTU Submissions state:

The ACTU submits that aspects of the Better of Overall Test (BOOT) are appropriate considerations to assist in determining the merits of the Application:

 - a. *Even a small cohort of workers being significantly disadvantaged should weight against the granting of the Application;*
 - b. *The task of assessing whether a loaded rates proposal will leave employees better or worse of is complicated where future patterns cannot be predicted with certainty.*
23. In relation the above, the AHA submits the BOOT assessment is not an applicable assessment tool to assess the merits of the Proposed Variation, and therefore not an appropriate consideration. However, if the BOOT was the applicable assessment tool:
 - 23.1. no employee would be ‘significantly’ disadvantaged as no employee on a loaded rate arrangement is worse off when compared to an employee who is not on a loaded rate arrangement; and
 - 23.2. as part of preparing the Proposed Variation, the AHA, in conjunction with the FWC agreements team assessed the various configurations to determine the parameters which would not leave employees worse off. It is for this reason the parameters are set. It provides the relevant certainty and predictability for both employers and employees.

²¹ UWU Submissions, [33].

²² *Australian Hotels Association* [2021] FWCFB 4513.

Furthermore, if for any reason these parameters are no longer compatible with future rostering patterns, then appropriate applications can be made to vary them.

24. Finally, paragraph 35 of the UWU Submissions provides:

... if FWC is inclined to make the variation sought, it is appropriate that the following course be adopted (which was the course adopted by the FWC in relation to recent variations made to the Restaurant Industry Award 2020:

a. Schedule K be limited to a term of operation of 12 months (where such period of operation could be extended on application);

b. A review be conducted in relation to the Schedule, which should commence no later than 9 months after its commencement date. The review should consider, among other things, the concerns raised by UWU in relation to its operation.

25. The AHA submits the course as outlined above is not warranted in relation to the Proposed Variation. The changes to the Restaurant Award, being a revised classification schedule, and the inclusion of an exemption rate and substitute allowance²³ are considerably more extensive when compared to the proposal sought in the Application.

26. Furthermore, given the nature of the changes and the wider impact the changes will have within the restaurant industry, ongoing consultation in this instance is, arguably, necessary. However, the same cannot be said regarding the Proposed Variation.

27. The Proposed Variation sits separately to the Award and conditions and is entirely optional for employers to opt into. The terms, conditions and entitlements of the Award are not changed with the inclusion of the Proposed Variation.

28. In the absence of any other demonstrable disadvantage (which has not been explained as part of these submissions), or evidence the loaded rate arrangement leaves employees worse off when compared to the Award, the AHA submits, the Proposed Variation does not disadvantage employees.

The Proposed Variation is complex and difficult to understand

29. The UWU Submissions and ACTU Submissions maintain the Proposed Variation is complex and may have a negative impact on compliance.²⁴

30. Additionally, the UWU Submissions state:

²³ *Restaurant Industry Award 2020, Schedule AA and Schedule R.*

²⁴ UWU Submissions, [36] to [43]; ACTU Submissions, [41] to [44].

To comply with the loaded rates scheme proposed, it will be necessary for an employer to pay careful attention to the circumstances in which the payment of a loaded rate will not satisfy their obligations under the award.²⁵

31. Even without the Proposed Variation, employers must always pay careful attention to the applicable provisions of the Award in order to ensure compliance with various obligations such as; rostering of ordinary hours (clause 15 of the Award), breaks (clause 16 of the Award), and penalty rates and allowances (respectively, clauses 29 and 26 of the Award) and overtime (clause 28 of the Award).
32. The AHA submits the Proposed Variation is no more complex than understanding and interpreting other aspects of the Award.
33. The Proposed Variation provides greater clarity and eases compliance obligations because:
 - 33.1. the parameters are narrow and clear;
 - 33.2. the tables at K.10 and K.11 outlined in the Draft Determination qualify the dollar value of the loaded rates percentage on the ordinary hourly rate;²⁶ and
 - 33.3. Schedule L clearly and articulately particularise the intended arrangement.
34. Finally, the AHA notes within the UWU Submissions, concern was raised regarding the ‘recalibration’ of the loaded rates each year as part of the Annual Wage Review.²⁷
35. As with all dollar amounts outlined in the Award, the AHA submits these will be updated by the FWC as part of the Annual Wage Review decision. It was also for this reason the AHA elected to include the tables at K.10 and K.11 to mitigate the risk of employers making rounding errors and inadvertently resulting in employees being worse off under the Proposed Variation.

Unilateral application of the Proposed Variation by an employer on an employee

36. The AHA notes, its Proposed Variation does not invite an employer and employee to agree on entering into a loaded rate arrangement, rather the introduction of the loaded rate arrangement is at the employer’s behest.
37. Further, the Proposed Variation does not provide for a consultation obligation between employers and employees. However, the Proposed Variation allows for a loaded rate arrangement to be terminated via mutual agreement.

²⁵ UWU Submissions, [42].

²⁶ *Australian Hotels Association* [2021] FWCFB 4513.

²⁷ UWU Submissions, [43].

38. In his 9 December 2020 letter, the former Attorney General and Minister for Industrial Relations, the Hon Christian Porter MP to the FWC President the Hon Justice Iain Ross AO, stated:

*[P]ayment by loaded rates [is] subject to agreement between employers and employees as a protection against disadvantage.*²⁸

(emphasis added)

39. As outlined at paragraph 17 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.

40. The AHA submits mutual consent to enter into a loaded rate arrangement is therefore not required because there is no disadvantage to protect employees from.

41. Alternatively, should the FWC determine a consultation provision in the Proposed Variation is warranted, the AHA does not oppose the proposed consultation clause in the UWU Submissions.²⁹

42. However, the AHA does oppose the variation sought at paragraph 58(c) of the UWU Submissions because K.19(b) of the Draft Determination already empowers the FWC to terminate a loaded rate arrangement where entering into one is “*unfair to the employee*”.

Satisfaction of modern award objectives

43. The AHA submits its Supplementary Submissions have already dealt with how the Proposed Variation satisfies the applicable modern award objectives.

44. However, the AHA notes UWU Submissions and ACTU Submissions deal with other factors outlined at section 134(1) of the Act. Accordingly, the AHA provides the following responses regarding the factors raised:

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

45. Section 134(1)(a) of the Act is required to deal with the ‘needs’ of the low paid.

46. The AHA submits the needs of the ‘low paid’ would entail assurance and protection against instances of underpayment (whether unintentional or deliberate) by ensuring an employer’s legal obligations are clear and easy to understand.

47. Separately, no basis other than speculation has been presented which would demonstrate how the Proposed Variation would impact the needs of casual, part time or level 1 or 2 full time employees under the Award.

²⁸ Letter from Minister Porter to Justice Ross of the Fair Work Commission, 9 December 2020, p. 3.

²⁹ UWU Submissions, [58(b)].

48. Accordingly, the AHA maintains the Proposed Variation satisfies section 134(1)(a) of the Act.

Section 134(1)(b) – the need to encourage collective bargaining

49. There is no substantial reasoning presented in the UWU Submissions or the ACTU Submissions which indicate the Proposed Variation would have any impact on collective bargaining.

50. Accordingly, the AHA maintains section 134(1)(b) of the Act is a neutral consideration.

Section 134(1)(c) – the need to promote social inclusion through increased workforce participation

51. No basis other than speculation has presented in the ACTU Submissions which would demonstrate the Proposed Variation would decrease workforce participation and result in reduced social inclusion.

52. Accordingly, the AHA maintains section 134(1)(c) of the Act is a neutral consideration.

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

53. In direct response to the ACTU Submissions,³⁰ there is no demonstrable disadvantage, nor does the Proposed Variation reduce take home pay for workers.

54. As outlined at paragraph 31 of the AHA’s Supplementary Submissions, the Proposed Variation will allow employers to opt for different payment styles for Award covered employees, while remaining compliant with Award obligations.

55. Accordingly, the AHA maintains the Proposed Variation satisfies section 134(1)(d) of the Act.

Section 134(1)(da) – the need to provide additional remuneration for matters (i) to (iv)

56. As outlined above at paragraphs 19 to 21, the Proposed Variation does not “*dispense with existing arrangements for the payment of additional remuneration*”.³¹

57. Accordingly, the AHA maintains section 134(1)(da) of the Act is a neutral consideration.

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

58. As outlined at paragraph 32 and 33 of the AHA’s Supplementary Submissions, the Proposed Variation will look to reduce the regulatory and administrative burden for employers who do not have sophisticated payroll processes.

59. Separately, in direct response to paragraph 51(b) of the UWU Submissions, any “*significant additional regulatory burden*” is only limited to understanding the loaded rate parameters of the

³⁰ ACTU Submissions, [39].

³¹ Ibid, [40].

Proposed Variation. It is the AHA's view once employers understand the parameters, enforcing it within the business will not be difficult.

60. Accordingly, the AHA maintains the Proposed Variation satisfies section 134(1)(f) of the Act.

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

61. As outlined at paragraphs 29 to 35 above, the Proposed Variation provides clarity and simplicity by combining Award entitlements into one readily 'packaged' rate of pay, subject to clear and decisive parameters.

62. Furthermore, the AHA submits the parameters of the Proposed Variation are no more complex than other loaded rate arrangements in enterprise agreements.

63. Finally, in terms of the submissions made regarding payroll processes,³² facilitating the inclusion of a loaded rate arrangement is no more difficult to manage and implement than those processes which already deal with the payment of wages (i.e., in complying with the parameters, it is an hourly rate multiplied by the loaded rate maximum weekly hours).

64. Accordingly, the AHA maintains the Proposed Variation satisfies section 134(1)(g) of the Act.

Section 134(1)(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

65. There is no substantial reasoning provided in the ACTU Submissions which would demonstrate the Proposed Variation would only have a minimal impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

66. Accordingly, the AHA maintains section 134(1)(h) of the Act is a neutral consideration.

For the Australian Hotels Association

Friday, 27 August 2021

³² UWU Submissions, [41(a) and (b)(ii)].