

IN THE FAIR WORK COMMISSION

Matter No:
AM/2016/13
FOUR YEARLY REVIEW OF MODERN AWARDS
ANNUALISED SALARIES

Party:
AUSTRALIAN HOTELS ASSOCIATION

SUBMISSIONS IN RESPONSE TO OUTER LIMITS AND DRAFT DETERMINATIONS

Introduction

1. These submissions are made on behalf of the Australian Hotels Association (**AHA**) in response to the decision of the Full Bench of the Fair Work Commission¹ (**Commission**), which invites further submissions concerning the “outer limit” numbers of ordinary-time penalty rate and overtime hours that should apply in various modern awards.
2. We make these submissions the *Hospitality Industry (General) Award 2010* (**Hospitality Award**) and the *Restaurant Industry Award 2010* (**Restaurant Award**).

Outer Limits

3. The Commission has determined that annualised wage arrangements in the Hospitality Award and the Restaurant Award will be subject to an “*outer limit*” in relation to ordinary-time penalty rate hours and overtime hours, the exceeding of which, will attract additional penalty or overtime payments on top of the annualised wage.²

¹ *4 yearly review of modern awards – annualised wage arrangements* [2019] FWCFB 8583 (**December 2019 Decision**);

² *4 yearly review of modern awards – annualised wage arrangements* [2019] FWCFB1289 at [46]; *4 yearly review of modern awards – annualised wage arrangements* [2019] FWCFB 4368 at [32];

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4. In the December 2019 Decision, the Commission provisionally decided that the outer limit for penalty rate hours and overtime hours in the Hospitality Award and Restaurant Award will be 16 and 10 respectively.³
 5. In relation to the provisional decision of an average of 16 penalty rate hours and 10 overtime hours, the Commission has not provided any rationale or basis on how it arrived at those figures, nor does it define what a penalty rate hour is for the purposes of the outer limits threshold.

Outer limit – overtime hours

6. Any consideration of the outer limit for overtime hours must take into consideration the safeguards built into the proposed annualised wage arrangement provisions, in particular, the minimum of 25% wage uplift, the requirement to specify in writing the annualised wage and outer limits, and the reconciliation and rectification process.
7. As submitted throughout these proceedings, it is the AHA's position that the requirement to pay additional amounts for exceeding an outer limit, without getting the benefit of, or accounting for, pay periods where the employee works a number of hours less than what the annualised wage arrangement is based upon, will impact unfairly on those industries such as hospitality and restaurants, which are subject to a high degree of trading fluctuations and/or seasonality, and is at odds with the concept of an *annual* salary or wage.⁴
8. While we note the Commission has distinguished the difference between an outer limit and the average number of hours upon which the annualised wage is based⁵, the AHA remains concerned that the outer limit for overtime hours is too low should be increased.

³ December 2019 Decision at [2];

⁴ Submissions of the AHA dated 26 March 2018 at [13]; Transcript dated 8 June 2018 at PN360 to PN387;

⁵ *4 yearly review of modern awards – annualised wage arrangements [2019] FWCFB1289* at [46];

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9. During these proceedings, the Commission queried whether or not our concerns would be accommodated by setting a larger rather than smaller number.⁶
10. In our submission, the outer limit for overtime hours should be in the range of *12-17 hours* for both the Hospitality Award and Restaurant Award. This would accommodate, for example, a roster of five x 10 hour days during peak trading periods or seasons, without requiring additional payments and allow for some fluctuation, noting the annualised wage is required to be sufficient cover that working arrangement as well as the reconciliation safeguard at the end of each 12-month period.

Outer limit – penalty rate hours

11. In the December 2019 Decision, the Commission provisional determined that the outer limit for penalty rate hours would be an average 16 over the roster or pay period.⁷
12. The AHA submits this is too low, will make annualised wage arrangements unworkable, and warrants increasing for the following reasons.
13. *First*, a penalty rate hour under the Hospitality Award includes work performed:
- a. Monday to Friday between 12:00am and 7:00am (35 hours);
 - b. Monday to Friday between 7:00pm and 12:00am (25 hours);
 - c. Saturdays (24 hours);
 - d. Sundays (24 hours);
 - e. Public holidays (varying lengths due to part-day public holidays).
14. *Second*, the peak trading periods for the industries covered by the Hospitality Award and the Restaurant Award occur during penalty rate hour periods.

⁶ Transcript dated 8 June 2018 at PN384;

⁷ December 2019 Decision at [2];

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15. *Third*, the proposed outer limit of penalty rate hours can be reached by working two shifts over a weekend and does not take into account seasonality or the occurrence of public holidays or clusters of public holidays.
 16. *Fourth*, it is possible that an employee could exceed the 16 penalty rate hour outer limit during the Monday to Friday penalty rate periods, which would require additional payments to be made notwithstanding the minimum uplift of 25% is sufficient to cover all of the Monday to Friday late night and early morning penalties.
 17. *Fifth*, in circumstances where an employee works ordinary hours on one or more public holidays during a pay period and exceeds the penalty rate outer limit but does not exceed the overtime outer limit, this means the employer will be paying the full public holiday penalty (225%) on top of a salary which includes the ordinary rate component (100%), rather than the difference between the ordinary hourly rate and public holiday hourly rate (125%).
 18. Taking the above into consideration, it is our submission that the outer limit for penalty rate hours be increased to **32 hours** for both the Hospitality Award and the Restaurant Award, which allows for a combination of weekend, evening/morning work and public holidays as well as reasonable fluctuations throughout the annualised wage arrangement period. It is noted that the annualised wage must be **at least** 25% more than the minimum weekly wage multiplied by 52 and that employers must reconcile and make any shortfall that occurs.

Hospitality Award Draft Determination – other matters

19. In relation to the Hospitality Award draft determination, we make the following submissions with reference to the correspondence clause number in the draft determination:

Clause 20.2 (a): remove duplicated text “*within the Managerial Staff (Hotels) classification level*”;

Clause 20.2 (b) (i): insert the word “loading” after “*clause 34.2 – Payment for annual leave*”;

Clause 20.2 (iii): replace 27.2 (b) with 20.2 (b);

Clause 27.2 (a): include (i) clause 34 - annual leave loading; and (ii) other award clauses prescribing monetary entitlements; to the list of provisions which may be satisfied by the annualised wage;

Payment of salaries new sub-clause: the draft determination omits the ability for an employer to elect to pay an employee monthly. It is our submission that this be retained in clause proposed clause 27.

Restaurant Award Draft Determination – other matters

20. In relation to the Restaurant Award draft determination, we make the following submissions with reference to the correspondence clause number in the draft determination:

Clause 28.1: remove the list of provisions which may be satisfied by the annualised wage and insert in its place:

- (i) *Clause 20 – minimum wages;*
- (ii) *Clause 24 – allowances;*
- (iii) *Clause 33 – overtime;*
- (iv) *Clause 34 – penalty rates;*

(v) *Clause 35.2 – annual leave loading.*

Transitional Arrangements

21. We addressed transitional arrangements in our submissions dated 3 April 2019.

22. We maintain our position that any existing annualised wage arrangement is to comply with the new annualised wage arrangement provision from the first anniversary of the existing annualised wage arrangement falling on or after the date commencement of the new provision.

For the Australian Hotels Association

7 February 2020