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Sent: Monday, 12 July 2021 12:51 PM
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Subject: AM2017/40 - 4 yearly review of modern awards – Hair and Beauty Industry Award 2010 - Penalty Rates

Dear Associate

In accordance with the amended directions relating to the above matter, the attached reply submission is filed on behalf of Hair and Beauty Australia (HABA).

As set out in HABA's reply submission:

- Over recent weeks, HABA and the Union Parties have engaged in discussions about the award variations proposed by the Union Parties and about relevant findings and decisions of the Commission in earlier proceedings. As a result of these discussions, the parties have reached an agreed position that is jointly proposed to the Commission.
- Given the agreed position reached, HABA does not intend to cross-examine any of the Union Parties' witnesses. Accordingly, for the convenience of the Commission, we advise that the scheduled second day of the hearing on 29 July 2021 can most likely be vacated.
- We would appreciate being permitted to appear at the hearing on 28 July 2021 remotely from Sydney.
- We intend to discuss arrangements for the conduct of the hearing with the Union Parties, and the parties will raise any relevant issues during the Mention on 21 July 2021.
- In response to the FWC's correspondence of 9 July 2021, we advise that HABA does not have any objection to the hearing being conducted via Microsoft Teams.

Yours sincerely

Stephen Smith
Legal Practitioner Director

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IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2017/40 - HAIR AND BEAUTY INDUSTRY AWARD 2010

REPLY SUBMISSION OF HAIR AND BEAUTY AUSTRALIA

1. INTRODUCTION

1. This reply submission is filed by Ai Group Workplace Lawyers on behalf of Hair and Beauty Australia (**HABA**) in relation to claims by the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Workers' Union (**AWU**) (**the Union Parties**) for the casual loading to be paid in addition to the standard weekend penalty rates in the *Hair and Beauty Industry Award 2010* (**HBI Award**).
2. HABA is the main registered organisation under the *Fair Work (Registered Organisations) Act 2009* which represents employers in the hair and beauty industry.
3. Over recent weeks, HABA and the Union Parties have engaged in discussions about the award variations proposed by the Union Parties and about relevant findings and decisions of the Commission in earlier proceedings. As a result of these discussions, the parties have reached an agreed position that is jointly proposed to the Commission.
4. The agreed position has two elements:
 - Firstly, it has been agreed that the 25 per cent higher remuneration for casuals who work on weekends under the HBI Award should be phased-in over a 2.5 year period up to 31 December 2023; and



Ai GROUP WORKPLACE LAWYERS

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- Secondly, it has been agreed that the Union Parties will withdraw their claim in these proceedings for higher public holiday penalties for casuals under the HBI Award.
5. The agreed phasing-in arrangements take into account the difficulties that businesses in the hair and beauty industry are currently facing as a result of the pandemic, as recognised by the Expert Panel in the *Annual Wage Review 2020-21 Decision*.
 6. HABA urges the Commission to adopt the proposal that has been agreed upon between HABA and the Union Parties. The proposal is consistent with the modern awards objective.
 7. Given the agreed position reached, we do not intend to cross-examine any of the Union Parties' witnesses. Accordingly, for the convenience of the Commission, we advise that the scheduled second day of the hearing on 29 July 2021 can most likely be vacated. We would appreciate being permitted to appear at the hearing on 28 July 2021 remotely from Sydney. We intend to discuss arrangements for the conduct of the hearing with the Union Parties, and the parties will raise any relevant issues during the Mention on 21 July 2021.
 8. In response to the correspondence of 9 July 2021 from Vice President Catanzariti's Associate, we advise that HABA does not have any objection to the hearing being conducted via Microsoft Teams.

2. AGREED TRANSITIONAL ARRANGEMENTS

9. The transitional arrangements that have been agreed upon between HABA and the Union Parties are set out in the following tables:

Saturday Penalty Rate for Casuals

Date	Loading	Explanation
31 January 2022	38%	5% increase. This increase would fall approximately 3 months after the 1 November 2021 Annual Wage Review increase in the HBI Award.
30 April 2022	43%	5% increase. 10% higher than the current rate
31 December 2022	48%	5% increase. 15% higher than the current rate
30 April 2023	53%	5% increase. 20% higher than the current rate
31 December 2023	58%	5% increase. 25% higher than the current rate

Sunday Penalty Rate for Casuals

Date	Loading	Explanation
31 January 2022	105%	5% increase. This increase would fall approximately 3 months after the 1 November 2021 Annual Wage Review increase in the HBI Award.
30 April 2022	110%	5% increase. 10% higher than the current rate
31 December 2022	115%	5% increase. 15% higher than the current rate
30 April 2023	120%	5% increase. 20% higher than the current rate
31 December 2023	125%	5% increase. 25% higher than the current rate

The agreed transitional arrangements recognise that hair and beauty industry businesses are currently struggling and need time to adjust to the new costs

10. There is no doubt that hair and beauty businesses are currently struggling due to the effects of the COVID-19 pandemic and Government measures to slow the transmission of COVID-19.
11. Businesses in the hair and beauty industry have experienced numerous Government orders to temporarily close and have, at times, had onerous restrictions placed upon their operations in various States.
12. For example, the NSW [Public Health \(COVID-19 Temporary Movement and Gathering Restrictions\) Order 2021](#) that was made on 26 June 2021 ordered the closure of “*business premises that are hairdressers, spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours*”¹ in Greater Sydney between 26 June 2021 and midnight on 9 July 2021. The Order was subsequently extended until midnight on 16 July 2021.
13. In various other States, restrictions are in place on how many customers and staff are allowed in hair and beauty salons, including:
 - In Victoria, hairdressing and beauty services can have 1 person per 2 square metres when using a COVID Check-in Marshal — otherwise a density limit of 1 person per 4 square metres applies.
 - In South East Queensland, businesses can have only one person per 4 square metres inside. For the rest of Queensland, hair and beauty premises can have up to 1 person per 2 square metres.
 - In South Australia, there is a density requirement for hair and beauty businesses of 3 people per 4 square metres for patrons.

¹ Clause 24(h).

- In the ACT, hair and beauty premises can have more than 25 people, but only if the premises has no more than 1 person per 2 square metres in each usable space, either indoors or outdoors.
- In Tasmania, hair and beauty premises can have no more than 1 person per 2 square metres.

14. The challenges that are currently being experienced by hair and beauty businesses were recognised by the Expert Panel in the *Annual Wage Review 2020-21 Decision*: (Emphasis added)

[48] The pattern in 2021 in respect to further cases of community transmission has seen comparatively brief lockdown periods comprised of stay-at-home orders generally localised to particular regions that have limited the reasons for people to leave their homes. Broadly, it has meant that only work deemed ‘essential’ has been allowed to operate during these periods. This has excluded many retail stores (unless able to operate ‘click and collect’) and jobs that do not accord with social distancing requirements, such as hairdressing and beauty services. These restrictions imposed in each state and territory, and nationally, have been documented in the Commission’s information note throughout the pandemic.

[49] The temporary lockdowns have included:

- Adelaide in mid-November 2020 (3 days);
- Sydney’s Northern Beaches in late December 2020, with fewer restrictions for the rest of Greater Sydney (including Wollongong, Central Coast, and Blue Mountains) that lasted for several weeks;
- Brisbane in January and late March/early April 2021 (both for 3 days);
- Perth and surrounding regions in late January/early February (5 days) and late April 2021 (3 days); and
- Victoria in mid-February 2021 (5 days) and the most recent lockdown in late May/early June 2021 (14 days), with restrictions easing in regional Victoria after 1 week.

15. Later in the Decision, the Expert Panel said: (Emphasis added)

[245] Professor Borland’s categorisation of industry sectors into ‘fully recovered’; ‘almost recovered’ and ‘lagging recovery’, and the data on which that categorisation is based, is relevant to our assessment of whether, in respect of a particular modern award, there are exceptional circumstances such as to warrant a delayed operative date. However, we note that the categorisation by industry sectors is likely to mask significant variation at the modern award level; a point to which we shall return shortly.

[246] Three further matters are also relevant to our assessment of exceptional circumstances:

1. Relevant industry specific data.
2. The period of time between successive Review increases.
3. The likelihood that future lockdowns will be of limited duration and localised; comprising of stay-at-home orders localised to particular regions with limited reasons for people to leave their home.

[247] In relation to point 3 above, the expected pattern of future lockdowns is likely to adversely impact hairdressing and beauty services; gyms; retail stores (other than food/essential supply retailers and those able to operate 'click and collect'); accommodation and hospitality businesses (other than those providing take away food services) and businesses operating in the tourism and entertainment/sport sectors.

16. The Expert Panel concluded: (emphasis added)

[279] Second, there are some businesses that can be broadly characterised as relating to the Retail trade sector which have plainly been impacted by the restrictions imposed to contain the virus, specifically:

- Dry Cleaning and Laundry Industry Award 2020;
- Hair and Beauty Industry Award 2010;
- Mannequins and Models Award 2020; and
- Nursery Award 2020.

[280] We are satisfied that there are exceptional circumstances justifying the variation determinations in respect of these modern awards coming into operation on 1 November 2021. We consider that the combination of factors at [245] – [246] applying to these awards is exceptional and justifies a delay until 1 November 2021.

17. Given the above factors, the phasing-in on the higher weekend penalty payments for casuals over a 2.5 year period, with the first increase being delayed until January 31, has obvious merit.

Consistency of the agreed transitional arrangements with other transitional arrangements for higher penalties and loadings for casual employees

18. The proposed transitional arrangements are not inconsistent with the approach that the Commission has taken when penalties and loadings for casuals have been increased under the HBI Award and in other awards.

Award Modernisation process

19. During the Award Modernisation proceedings under Part 10A of the *Workplace Relations Act 1996* (Cth), the Australian Industrial Relations Commission (**AIRC**) decided to pursue a consistent approach to the phasing-in of the increases and decreases in penalties and loadings that arose from the implementation of modern awards.
20. In a decision issued on 2 September 2009, the Full Bench of the AIRC said:² (Emphasis added)

[28] We have decided that phasing should apply both to increases in the specified wages and conditions and reductions in those wages and conditions and in most cases will be in five equal instalments. We have decided to utilise five instalments because that number was the one most commonly selected by parties who supported phasing. It also appears to us to be simpler on the balance to divide differential amounts or percentages by five, yielding five amounts of 20%, than to utilise any other figure. We have also decided to provide for 12 months between instalments. This will spread the impact of changes over almost the whole of the five year period permitted by s.576T of the WR Act.

21. Higher weekend penalty rates for casuals were phased-in over 4.5 years, between 1 January 2010 and 30 June 2014.
22. The phasing-in schedule (Schedule A) is still included in the HBI Award. The Schedule relevantly provides:

A.4 Loadings and penalty rates

For the purposes of this schedule loading or penalty means a:

- casual or part-time loading;
- Saturday, Sunday, public holiday, evening or other penalty;

² [2009] AIRC 800, [28], [33].

- shift allowance/penalty.

A.5 Loadings and penalty rates – existing loading or penalty rate lower

A.5.4 From the following dates the employer must pay no less than the loading or penalty in this award minus the specified proportion of the transitional percentage:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

A.5.5 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

Casual loading increase in the Business Equipment Award

23. In the *Annual Wage Review 2014–15 Decision*, the Expert Panel noted that the casual loading in the *Business Equipment Award 2010*, at 20 per cent, was inconsistent with the standard 25 per cent casual loading across all other modern awards.³
24. In the *Annual Wage Review 2015–16 Decision*, the Panel decided to increase the casual loading in the Business Equipment Award incrementally by one per cent from 1 July 2016 and one per cent in each subsequent year until it reached 25 per cent in 2020.⁴
25. The Expert Panel’s decisions to phase-in the five per cent increase in the casual loading under the Business Equipment Award over five years demonstrates the approach that the Commission has often taken in exercising significant caution when increasing penalties and loadings in modern awards. Such a cautious approach is necessary, considering the adverse impact that a sudden increase in employment costs would have upon businesses and the potential for

³ [2015] FWCFB 3500 at [560].

⁴ [2016] FWCFB 3500 at [640].

businesses to be forced to reduce employees' hours and/or reduce staffing levels.

General Retail Industry Award – Saturday and evening penalty rate increases for casuals

26. In a decision of 27 September 2018, the Commission determined to increase the weekday evening penalty for casual employees under the *General Retail Industry Award 2010 (GRIA)* from 25% to 50% and the Saturday penalty for casual employees from 35% to 50% (**GRIA Decision**).⁵
27. The Full Bench concluded that there was a need for “appropriate transitional arrangements” in order to ameliorate any adverse impact upon employers. The Full Bench said:⁶ (Emphasis added)

[281] Contrary to the SDA’s submission, there is a need for appropriate transitional arrangements in respect of these increases in order to ameliorate any adverse impact upon employers. The arguments advanced by the SDA in support of immediate implementation are unconvincing. While we accept—based on Professor Borland’s evidence—that the aggregate impact on labour costs of the increases will be ‘relatively small’, they are not properly characterised as ‘marginal’. Further, the quantum of the increase (an additional 25 per cent on week day evenings and on Saturdays before 7.00am and after 6pm for casual employees) is not a more significant quantum than the decrease in Sunday penalty rates for casuals arising from the Penalty Rates Decision, it too was 25 per cent.

[282] Nor does the fact of the SDA’s March 2015 application warrant the immediate implementation of the increases. Even if it is accepted that employers were put on notice as to the possibility of an increase one might ask, so what? Until such a possibility becomes a reality it is highly unlikely that any proactive steps would be taken by employers to ameliorate the effect of such increases. Indeed if accepted the same argument could be applied to the reduction in Sunday penalty rates for shiftworkers as the ARA filed submissions and a draft determination in respect of that issue in February 2015.

[283] We do think there is merit in the points raised in the SDA’s reply submission, in particular:

- a phase in period of almost 5 years is simply too long;
- the existing anomaly in respect of the Saturday penalty rates for casuals should be addressed as quickly as practicable (though we think the SDA overstates the extent of the anomaly, see [233] to [243] above); and

⁵ [2018] FWCFB 5897, [263].

⁶ [2018] FWCFB 5897, [281] – [282].

- contrary to the Retail Employers' proposal, the operative date of the phased increases should not be 1 July. The timetable proposed by the Retail employers would mean that employers may face an Annual Wage Review increase and an increase in casuals' penalty rates simultaneously. As the SDA submits 'it seems illogical to compound the potential change in wages'.

28. Ultimately, the Commission determined to increase the relevant loadings by five per cent at a time, leaving roughly half year increments between each increase. Such increases were timed to avoid coinciding with Annual Wage Review increases.
29. It is relevant in the current proceedings that the quantum of the proposed increase is the same as that awarded in the GRIA Decision.

3. AGREED WITHDRAWAL OF THE UNION PARTIES' PUBLIC HOLIDAY CLAIM

30. Late in the proceedings (i.e. late March 2021) the Union Parties sought to amend their claim to add a claim for a higher public holiday penalty rate for casuals.
31. As part of the agreement reached between HABA and the Union Parties, the Union Parties have agreed to withdraw their public holiday penalty rate claim.
32. The current public holiday penalty rate for casuals under the HBI Award (i.e. 250%) is same as the public holiday penalty rate for casuals under the six retail and hospitality industry awards which were the subject of the Commission's *4 Yearly Review of Modern Awards – Penalty Rates Decision*.⁷

⁷ [2017] FWCFB 1001.

Award	Public holiday penalty rate for casuals (including the casual loading)
<i>General Retail Industry Award 2020</i>	250%
<i>Fast Food Industry Award 2010</i>	250%
<i>Pharmacy Industry Award 2020</i>	250%
<i>Hospitality Industry (General) Award 2020</i>	250%
<i>Restaurant Industry Award 2020</i>	250%
<i>Registered and Licensed Clubs Award 2020</i>	250%

4. THE AGREED TRANSITIONAL ARRANGEMENTS ARE CONSISTENT WITH THE MODERN AWARDS OBJECTIVE

33. In the *4 Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements Decision*,⁸ the Full Bench acknowledged that any transitional arrangements must meet the modern awards objective. The Full Bench stated that this is the overriding statutory requirement and accordingly it is the Commission’s ‘central focus’.⁹ The Commission stated that it is required to perform its functions and exercise its powers in a manner which is ‘fair and just’ (s.577(a) of the *Fair Work Act 2009*) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).¹⁰
34. For the purposes of setting a ‘fair and relevant minimum safety net’, ‘fairness’ is to be assessed from the perspective of both employees and employers covered by the award.¹¹
35. It would be unfair to employers if significant increases to weekend penalty rates for casuals are implemented without appropriate transitional arrangements. Such an approach would impose a cost impost on employers that would not

⁸ [2017] FWCFB 3001.

⁹ [2017] FWCFB 3001, [65].

¹⁰ [2017] FWCFB 3001, [67].

¹¹ [2017] FWCFB 1001 at [117]–[119].

have been factored into periodic budgeting. The impact of any exercise of modern award powers on business, particularly with regard to employment costs, weighs heavily in favour of ensuring adequate transitional arrangements are put in place (s.134(1)(f)).

36. A significant increase in labour costs is likely to be met by reductions in expenditure in other areas if no appropriate transitional arrangements are implemented. This could include cutting hours of work for existing staff or decisions to engage fewer staff. The potential for employers to engage in various mitigation strategies if a significant increase was imposed without appropriate transitional arrangements should weigh heavily in favour of staggering the increase in weekend penalty rates over a significant period of time. This is relevant to the Commission's consideration under s.134(1)(a) of the Act to the needs of the low paid.
37. Also, the significant risk of disemployment effects resulting from a sudden increase in labour costs for casual employees should factor into the Commission's consideration of the need to promote social inclusion through increased workforce participation (s.134(1)(c)). Financial pressures resulting in staff reductions are likely to hit casual employees the hardest. The agreed transitional measures would assist in ensuring that employers are not disincentivised from engaging additional staff or retaining current casual employees.
38. The transitional arrangements that have been agreed upon between HABA and the Union Parties are fair to employers and employees. The arrangements are consistent with the modern awards objective and would result in a "fair and relevant minimum safety net of terms and conditions" (s.134(1)).

Date: 12 July 2021



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On behalf of HABA