



# STATEMENT

*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

## **Australian Hotels Association**

(AM2021/73)

Hospitality industry

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

MELBOURNE, 26 AUGUST 2022

*Application to vary modern award – Schedule J—Loaded Rate Arrangements – Hospitality Industry (General) Award 2020.*

### **1. Introduction**

[1] [Schedule J](#)<sup>1</sup> of the *Hospitality Industry (General) Award 2020* (Hospitality Award) provides for the payment of loaded rates to full-time employees classified at Level 3 or above in satisfaction of the requirement to pay overtime, penalty rates (except public holidays penalties) and the split shift allowance.

[2] During the hearing of the application which resulted in the insertion of the loaded rates into the Hospitality Award the United Workers' Union (UWU) submitted that the loaded rate percentages would need to be recalibrated each year to deal with any potential increase to the split shift allowance flowing from the Annual Wage Review (AWR).

[3] In response to that issue we indicated that a conference would be convened by Commissioner Bissett following the publication of the 2021-22 AWR decision to discuss whether the loaded rates in Schedule J require adjustment to ensure that employees are not worse off.

[4] The Commission issued its decision in the Annual Wage Review 2021–22<sup>2</sup> on 15 June 2022 and a [determination](#)<sup>3</sup> was published on 28 June 2022 to varying the Hospitality Award.

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<sup>1</sup> Previously Schedule K

<sup>2</sup> [2022] FWCFB 3500

<sup>3</sup> PR740684

[5] Commissioner Bissett issued a [Statement](#)<sup>4</sup> in respect of these issues and listed the matter for conference on 16 August 2022.

[6] Commissioner Bissett's [Statement](#)<sup>5</sup> outlined that Commission staff had undertaken a BOOT analysis of the loaded rates contained in Schedule J which indicated that some employees would be worse off following the decision in the Annual Wage Review 2021–22<sup>6</sup>

[7] Correspondence was then received from the:

- [Australian Hotels Association](#); and
- [United Worker's Union](#)

[8] **Attached** to this Statement is the Report to the Full Bench prepared by Commissioner Bissett which states:

[15] Arising from this review it is proposed that the rates be recalibrated such that the Level 3, 40 hour, Monday to Friday rate only increase from 110.20% to 110.30% and that clauses J.5.1 and J.5.2 be amended as per Schedule A.

[16] As the determination issued in the Annual Wage Review 2021–22 will commence operation on 1 October 2022, the Full Bench may consider that the determination in this matter should come into effect on 2 October 2022 to avoid any confusion as to the timing of the adjustments.'

## 2. Consideration and next steps

[9] The change proposed in Commissioner Bissett's Report is agreed between the parties as a suitable resolution to the problem identified in our initial decision inserting the loaded rates.

[10] It is our *provisional* view that the variation should be made in the terms set out in the Report to the Full Bench. A draft determination has been prepared and will be published with this statement.

[11] Any submissions opposing our *provisional* view are to be filed by **4pm on Friday 9 September 2022**. Any submissions are to be sent to [Chambers.Ross.J@fwc.gov.au](mailto:Chambers.Ross.J@fwc.gov.au). In the absence of any opposition, we will confirm our *provisional* view and the variation will be made in the terms set out in the draft determination, operative 2 October 2022.

## PRESIDENT

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<MA000009 PR745179>

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<sup>4</sup> [2022] FWC 1967

<sup>5</sup> [2022] FWC 1967

<sup>6</sup> [2022] FWCFB 3500



# REPORT TO FULL BENCH

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*Fair Work Act 2009*

s.158—Application to vary or revoke a modern award

## **Australian Hotels Association**

(AM2021/73)

Hospitality industry

COMMISSIONER BISSETT

MELBOURNE, 25 AUGUST 2022

*Application to vary modern award – Hospitality Industry (General) Award 2020.*

## **Background**

[1] On 19 July 2021 the AHA made an [application](#) to vary the *Hospitality Industry (General) Award 2020*<sup>7</sup> (Hospitality Award) to “*incorporate a new schedule to provide a simplified pay arrangement in the form of loaded rates to reduce administrative costs and risks arising from existing pay complexities*”.

[2] A BOOT analysis of the loaded rates contained in the AHA draft determination was conducted by Commission staff on 20 July 2021. That analysis indicated that the rates in Schedule K (as it was then) at both clauses K.6.1 and K.6.2 of the Hospitality Award would result in employees earning more under the loaded rate when compared to the hourly rates and loadings applicable under the Hospitality Award when working within the parameters set out in clause 6.

[3] In a [Statement](#)<sup>8</sup> issued by the Full Bench on 27 July 2021 (*July 2021 Statement*) the Full Bench indicated its provisional view that the application in relation to the proposed loaded rates arrangement had merit.

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<sup>7</sup> MA000009.

<sup>8</sup> [\[2021\] FWCFB 4513](#).

[4] In a Decision<sup>9</sup> issued on 3 September 2021 (*September 2021 Decision*) the Full Bench said:

[58] Finally, we turn to the proposition that the loaded rates will need to be ‘recalibrated’ in the event that there is an increase in the quantum of the split shift allowance following an Annual Wage Review decision. Commissioner Bissett will convene a conference of all interested parties following the publication of the 2021-22 Annual Wage Review decision to discuss whether the loaded rates require adjustment to ensure that employees are not worse off. [Emphasis added]

...

[125] As we have noted (at [58] above) a conference will be convened after the publication of the 2021-22 Annual Wage Review decision to discuss whether the loaded rates require adjustment to ensure that employees are not worse off.

### **AWR Determination**

[5] The Commission issued its decision in the Annual Wage Review 2021–22<sup>10</sup> on 15 June 2022. Subsequently a Determination<sup>11</sup> was published on 28 June 2022 to vary the Hospitality Award relevantly as follows:

58. By deleting the table appearing in clause J.5.2 and inserting the following:

	<b>Loaded Rate Percentages</b>					
	<b>110.20%</b>	<b>120.00%</b>	<b>116.95%</b>	<b>123.40%</b>	<b>126.85%</b>	<b>131.05%</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Level 3	25.92	28.22	27.51	29.02	29.84	30.82
Level 4	27.29	29.71	28.96	30.55	31.41	32.45
Level 5	28.99	31.57	30.77	32.47	33.37	34.48
Level 6	29.78	32.42	31.60	33.34	34.27	35.41

59. By deleting the table appearing in clause J.5.3 and inserting the following:

	<b>Loaded Rate Percentages</b>					
	<b>110.20%</b>	<b>120.00%</b>	<b>116.95%</b>	<b>123.40%</b>	<b>126.85%</b>	<b>131.05%</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Level 3	27.29	29.71	28.96	30.55	31.41	32.45
Level 3A	28.56	31.10	30.31	31.99	32.88	33.97
Level 4	28.99	31.57	30.77	32.47	33.37	34.48
Level 5	29.86	32.52	31.69	33.44	34.38	35.51
Level 6	30.72	33.46	32.61	34.40	35.37	36.54

<sup>9</sup> [2021] FWCFB 5371.

<sup>10</sup> [2022] FWCFB 3500.

<sup>11</sup> PR740684.

## Review of the loaded rates

[6] In accordance with the *September 2021 Decision*, the revised loaded rates in the Hospitality Award were subject to analysis to ensure that they continued to leave workers not financially worse off than they otherwise would be if the loaded rate did not apply.

[7] That review found that the 110.20% Monday to Friday 40 hour loaded rate in clause J.5.1 of the Hospitality Award is no longer suitable for standard Level 3 Award employees. This employee will be 6 cents worse off on the worst-case roster pattern that can be worked under this loaded rate.

### Monday to Friday 40hrs – Loaded Rate at 110.20%

Loaded Rate	\$25.92	Level 3 Loaded Rate	
	Hours	Loading	weekly total
Loaded Rate	40	100%	\$1,036.80
			\$0.00
Allowances	Amount	Value	
Allowance			\$0.00
Allowance			\$0.00
<b>Totals</b>	<b>40.00</b>	<b>Hrs</b>	<b>\$1,036.80</b>

Award Ordinary Rate	\$23.52	Level 3	
	Hours	Loading	weekly total
M-F Rate	38	100%	\$893.76
Yes [ ] No [ ]	2	150%	\$70.56
Allowances	Amount	Value	
Split Shift - Clause 26.14(b)(i)	5	\$3.10	\$15.50
Late Night Penalty (7pm - midnight M-F)	23	\$2.48	\$57.04
<b>Totals</b>	<b>40.00</b>	<b>Hrs</b>	<b>\$1,036.86</b>

[8] The 110.20% Monday to Friday 40 hour loaded rate remains suitable for all other classifications subject to the loaded rates scheme in Schedule J (previously Schedule K).

[9] The remaining 5 loaded rates in clause J.5.1 remain suitable for all classifications subject to the loaded rates scheme in Schedule J.

### Loaded rates adjustment

[10] In accordance with the *September 2021 Decision* I issued a Statement on 26 July 2022 (*July 2022 Statement*)<sup>12</sup> in which I outlined the background and provided the analysis of the loaded rates against the unloaded rates as prepared by Commission staff. A conference of the interested parties was scheduled for Tuesday 16 August 2022. The parties were also asked to express any preliminary view they may have on how the identified issue might be addressed.

<sup>12</sup> [2022] FWC 1967.

[11] In response to the analysis provided in the *July 2022 Statement* the AHA provided a response to the Commission which said:

1. We note that the statement:
  - a. Attached BOOT analysis undertaken by the FWC (**FWC BOOT Analysis**); and
  - b. Invited interested parties to submit preliminary views as to any required recalibration of the loaded rate percentages.
2. The Australian Hotels Association (**AHA**) provides the following preliminary view on the matter.
3. The FWC BOOT Analysis identifies only one scenario in which an employee would be disadvantaged, being that of a Level 3 employee on the 40 Hour, Monday to Friday Loaded Arrangement (110.20%). In this instance the FWC BOOT Analysis identifies that the employee would be disadvantaged by \$0.06 per week.
4. The AHA submits that this scenario represents an outlying example of an indicative pattern of work. Notwithstanding the AHA also acknowledges that the loaded rates arrangement in Schedule L should not operate to the disadvantage of employees.
5. Accordingly, to alleviate the risk identified in the FWC BOOT Analysis, which is limited to level 3 employees on one particular working arrangement, the AHA submits that if the FWC considers an increase necessary, such an increase should be to the Level 3, 40 Hour, Monday to Friday rate only, and be an increase of 110.20% to 110.30%.
6. If this increase were to occur, from the first full pay period on or after 1 October 2022 the rate would increase from \$25.92 per hour to \$25.94 per hour. Over a 40 hour week, this would result in a weekly wage of \$1,037.60.
7. With reference to the FWC BOOT Analysis and the indicative scenario, the BOOT result would be altered to advantage the employee to \$0.74 per week.

[12] The UWU provided its view to the Commission as follows:

UWU accepts that the proposal made by AHA to recalibrate the loaded rates set out in Schedule L (sic) of the Award will solve the problem identified by the Commission's analysis of those rates set out in the Statement issued on 26 July 2022 ([2022 FWC 1967]).

We do not object to this approach being taken to resolve this problem in respect of the 2021-22 AWR decision.

[13] No further views were expressed by any other party with no party indicating a wish to be heard on the subject. The AHA and UWU agreed that, in the circumstances, a conference was not required and the views of the parties could be provided in the Report to the Full Bench.

[14] The proposal of the AHA has been subject to further review by the Commission staff. There is no remaining concern with this adjusted loaded rate that any employee would be worse off under the loaded rate compared to the non-loaded rates in the Hospitality Award.

**Proposal**

[15] Arising from this review it is proposed that the rates be recalibrated such that the Level 3, 40 hour, Monday to Friday rate only increase from 110.20% to 110.30% and that clauses J.5.1 and J.5.2 be amended as per Schedule A.

[16] As the determination issued in the Annual Wage Review 2021–22 will commence operation on 1 October 2022, the Full Bench may consider that the determination in this matter should come into effect on 2 October 2022 to avoid any confusion as to the timing of the adjustments.

The image shows a handwritten signature in blue ink to the left of a circular official seal. The seal features the text 'THE SEAL OF THE FAIR WORK COMMISSION' around the perimeter and 'AUSTRALIA' at the bottom. In the center of the seal is the Australian coat of arms, which includes a kangaroo and an emu flanking a shield, topped with a crown. The signature and seal are both stamped in blue ink.

COMMISSIONER

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**SCHEDULE A**

<b>Loaded Rate Percentage (% of ordinary hourly rate)</b>	<b>Loaded Rate Range of Days</b>	<b>Loaded Rate Maximum Weekly Hours</b>
110.20 (Levels 4-6)	Monday to Friday	40
110.30 (Level 3 only under J.5.2)	Monday to Friday	40
120.00	Monday to Friday	45
116.95	Monday to Saturday	40
123.40	Monday to Saturday	45
126.85	Monday to Sunday	40
131.05	Monday to Sunday	45

X. By deleting the table appearing at clause J.5.2 and inserting the following:

	<b>Loaded Rate Percentages</b>						
	<b>110.20%</b>	<b>110.30%</b>	<b>120.00%</b>	<b>116.95%</b>	<b>123.40%</b>	<b>126.85%</b>	<b>131.05%</b>
	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>	<b>\$</b>
Level 3	–	25.94	26.95	26.27	27.72	28.49	29.43
Level 4	26.08	–	28.40	27.68	29.21	30.03	31.02
Level 5	27.73	–	30.19	29.42	31.05	31.92	32.97
Level 6	28.46	–	31.00	30.21	31.87	32.77	33.85