FAIR WORK COMMISSION

Matter No.: AM2021/73

Australian Hotels Association

SUBMISSIONS - UNITED WORKERS UNION

Introduction

1. On 9 December 2020 the Federal Minister for Industrial Relations (**the Minister**) wrote to the Fair Work Commission (**FWC**) and asked that a process be undertaken to "ensure several priority modern awards in sectors hardest hit by the pandemic be amended"[1] (**the Minister's letter**)**.** One of those awards was the *Hospitality Industry (General) Award 2020* (**the award**). In summary, the Minister's letter provided as follows:

    a. It expressed the Government's view that in the "extraordinary circumstances that have been caused by the COVID pandemic it would be in Australia's economic best interest for the Fair Work Commission to use its powers under s.157(3)(a) of the *Fair Work Act 2009*" to undertake a process to consider the potential for amendment.

    b. The potential amendments identified by the Minister included:

        i. potentially simplified pay arrangements in the form of "loaded rates" and / or "exemption rates; and

        ii. further simplified streamlining of present classification structures, and a broad banding exercise.

    c. The Minister also relevantly said:

    "A Commission process would also provide parties and the Commonwealth with an opportunity to make submissions providing relevant statistical labour

[1] Letter from The Hon Christian Porter MP, to the Hon Justice Ian Ross AO, 9 December 2020 (**the Minister's letter**)

Lodged by: United Workers Union	Telephone:	(03) 9235 7777
Address for Service:	Fax:	(03) 9235 7770
833 Bourke Street, DOCKLANDS VIC 3008	Email:	Ben.redford@unitedworkers.or.au

market and economic data that support the case for these changes. I envisage that these submissions would focus on the need for …

Any changes to simplify pay arrangements or classifications being available on an 'opt in' basis, to avoid imposing unnecessary changes on business that do not wish to adopt them …

Providing that payment by loaded rates are subject to agreement between employers and employees as a protection against disadvantage …"[2]

2. On 10 December 2020, following the Minister's letter, FWC issued a Statement[3] in which it announced the commencement of a process on its own motion to consider the inclusion of loaded rates, exemption rates and whether any changes could be made to simplify the classification structures in the priority modern awards (**the award review process**).

3. The award review process was conducted by FWC during December 2020 and throughout the first half of 2021. During that period of time, FWC convened several conferences of interested parties, interested parties submitted various proposals for amendments to awards (and amended proposals) and some of the proposals were analysed by, for example, the FWC agreements team. A proposal made by the Australian Hotels Association (**AHA**) to insert a "loaded rates" scheme into the award was one such proposal.

4. On 19 July 2021 AHA filed an application pursuant to section 157 of the *Fair Work Act 2009* (**the FW Act**) proposing to vary the award to insert a loaded rates schedule into the award which would be known as Schedule K (**the application**). The key terms of the variation sought by the application are as follows (**the variation**):

    a. to vary the award to provide a mechanism by which an employer can elect to pay a full-time employee classified at Level 3 or above a percentage of the employee's ordinary hourly rate in satisfaction of the split shift allowance, overtime and penalty rates (with the exception of penalty rates in relation to public holidays) (**loaded rates**)**;**

[2] The Minister's letter, page 2
[3] [2020] FWC 6636

b. to vary the award to introduce "loaded rate parameters" which operate such that loaded rates will only apply to and be in satisfaction of work performed and the allowances specified within the loaded rate parameters;

c. to vary the award to provide that six different loaded rates could be used, depending on an employee's maximum weekly hours;

d. to vary the award to provide that if an employee performs work beyond the scope of the loaded rates parameters, the employee may be entitled to the relevant allowances, penalty rates or overtime for the period of time worked outside the scope of the loaded rates parameters;

e. to vary the award to provide that a loaded rate arrangement made under the award is not valid unless it contains a notice that the employer consents to a dispute arising from the arrangement being settled by FWC through arbitration.

5. On 21 July 2021 AHA filed Supplementary Submissions in support of the application (**the Supplementary submissions**).

6. On 27 July 2021 FWC issued a Statement in relation to the application in which it, among other things, expressed the provisional view that the Application has merit[4] (**the Statement**).

7. UWU makes these submissions in relation to the application.

The relevant statutory principles.

8. The object of the FW Act relevantly includes:

"… to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by …

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

[4] Statement [2021] FWCFB 4513 (**the Statement**), at [49]

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system …"[5]

9. Part 2-3 of the FW Act establishes a scheme by which FWC may make, vary and revoke modern awards. FWC may make a determination varying a modern award if it is satisfied that making the determination is necessary to achieve the modern awards objective[6]. This power is constrained by section 136 of the FW Act, which limits or prescribes those terms that are permitted or required to be included in a modern award. Section 139 of the FW Act sets out a general list of terms that may be included in modern awards.

10. Section 134 of the FW Act sets out the modern awards objective. The modern awards objective provides FWC must "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions …" taking into account a number of specified factors.

11. The power to vary a modern award is a discretionary power[7]. The exercise of the discretion requires FWC to take into account each of the factors listed in section 134(a) - (h) (to the extent they are relevant) as a matter of significance in the decision making process[8]. "Take into account" requires these matters to be given weight as fundamental elements in the determination[9].

12. In considering whether to vary a modern award, a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action[10].

13. Variations to modern awards must be justified on their merits. A variation to a modern award that is significant will require a more substantial case to be made out in its

[5] Section 3 of the Act
[6] FW Act, section 157(1)
[7] *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (***SDA Case***) [2012] FCA 480 at [35]
[8] *4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* (***General Retail Industry Award Case*****)** [2020] FWCFB 6301 at [16]
[9] *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [56]
[10] *SDA Case* at [46]; *General Retail Industry Award Case* at [22]

favour, than a variation whose industrial merit is more obvious and less contestable[11].

14. Section 139 of the FW Act provides that a modern award may include terms including:

"(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

…

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers …

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations …"

15. Section 139(2) of the FW Act provides:

"Any allowance included in a modern award must be separately and clearly identified in the award …".

[11] *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [52]; *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWC 1788 at [23].

16. Section 142 of the FW Act provides that a modern award may include terms that are incidental to a term that is permitted or required to be in the modern award and essential for the purpose of making a particular term operate in a practical way.

The case brought in favour of the variation

17. In support of the application, the applicant submits as follows:

    a. The AHA submits the variation does not disadvantage or leave employees worse off when compared to the Award[12].

    b. The award's dispute resolution procedure is open to be enlivened by any employee aggrieved by a loaded rate arrangement[13], and any 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 FWC oversight[14].

    c. Four of the modern awards objective factors are said to weigh in favour of the variation sought (these are referred to below)[15].

    d. 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[16].

Does FWC have the power to make the variation sought under the Act?

18. No other modern award operating within the Australian modern awards system contains a loaded rates mechanism of the kind proposed by the variation. The applicant does not, whether in the grounds identified in the application or its Supplementary Submissions, identify the basis upon which it says a loaded rates scheme sits within the compass of the matters identified by section 139 of the Act, that are terms which may be included in modern awards.

[12] Supplementary Submission at [20]
[13] Supplementary submission at [25]
[14] Supplementary Submission at [26]
[15] Supplementary Submission at [27] - [39]
[16] Supplementary Submission at [40] – [41]

19. FWC has made reference to the possibility of a loaded rates scheme operating within the modern award on two occasions[17]. Neither occasion involved a detailed consideration as to whether section 139 would permit such a term to be include within a modern award.

20. In the Statement, FWC observed there appears to be no legislative barrier to the inclusion of terms about loaded rates in modern awards[18].

21. Section 139 does not contain a provision which provides that a modern award may include a term to facilitate "loaded rates". It does, for example, contain a provision to the effect that a modern award can contain a term about minimum wages. However, a loaded rate is not a minimum wage – it is a loaded rate. Similarly, section 139 contains a provision to the effect that a modern award can contain a term about penalty rates. But a loaded rate is not a penalty rate – it is a loaded rate. It is a means by which a number of entitlements including minimum rates, penalty rates, overtime and allowances might be aggregated.

22. Section 139(f) of the Act specifically provides that a modern award may include terms about "annualised wage arrangements". The power to include such a term in a modern award is specifically limited to annualised wage arrangements that (i) have regard to the patterns of work in an occupation, industry or enterprise; and (ii) provide an alternative to the separate payment of wages and other monetary entitlements and (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged (emphasis added).

23. Section 139 does not provide that a modern award might include a term about "loaded rates" providing an alternative to the separate payment of wages and other monetary entitlements.

24. If section 139 is intended to permit the inclusion of a term within a modern award providing for loaded rates, then the legislation must be read as intending that, in addition to annualised wage arrangements, other arrangements, such as loaded rates could be included within a modern award as an alternative to the separate payment of wages and other monetary entitlements. The permissibility of such schemes, such as loaded rates, which might operate in a similar manner to an

[17] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [329] – [332]; *4 yearly review of modern awards – Penalty Rates* (***The Penalty Rates Decision***) [2017] FWCFB 1001 at [88] – [94]
[18] The Statement at [21]

annualised wage arrangement, must be read into the legislation as being either "about" a term referred to in section 139 or "incidental" to one.

25. In *4 yearly review of modern awards*[19] FWC considered the proper approach to section 139. The salient principles set out by the Full Bench in relation to section 139 are as follows:

    a. It is appropriate to characterise section 139 as a remedial or beneficial provision, which is intended to benefit national system employees[20];

    b. The proper approach to the construction of remedial or beneficial provisions include:

        i. They should not be construed so strictly as to deprive the worker of the protection which Parliament intended that [they] should have[21].

        ii. Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow provided that the interpretation adopted is restrained within the confines of the actual language employed that is fairly open on the words used[22].

        iii. Beneficial and remedial legislation is to be given a liberal construction – a "fair, large and liberal" interpretation rather than one which is "literal or technical"[23].

        iv. A Court or Tribunal is not at liberty to give such a provision a construction that is unreasonable or unnatural[24]

    c. There is no warrant for a restrictive construction to be placed on any of the words in section 139[25].

    d. The use of the words "about" in section 139 should be given a liberal construction but more than an incidental connection is required between a proposed award term and one of the subject matters set out in section 139[26].

[19] [2017] FWCFB 5258 (***The termination of employment decision***)
[20] *The termination of employment decision* at [62]
[21] *The termination of employment decision* at [63]
[22] *The termination of employment decision* at [63]
[23] *The termination of employment decision* at [63]
[24] *The termination of employment decision* at [63]
[25] *The termination of employment decision* at [65]
[26] *The termination of employment decision* at [66]

e. Section 142(1) is not in itself an additional power for the inclusion of terms in a modern award that cannot be appropriately linked to a permitted term[27].

f. A term which is "essential" for the purpose of making a particular term operate in a practical way is to be contrasted with what may be "desirable"[28].

26. Even a liberal reading of section 139 and section 142 of the Act might not permit a loaded rates term to be included within a modern award, as a term which is incidental to the terms envisaged by section 139(1)(a), (d), (e) and (g). UWU concedes it is a fine balance. But the following weigh against such a construction:

a. A provision permitting a term to provide for aggregation through a loaded rates scheme is not contained within section 139 of the FW Act, but a provision permitting a term to provide for aggregation through an annualised wage arrangement is;

b. A loaded rates scheme or a facility for the aggregation of minimum rates, penalties, overtime and allowances is not *essential* for the practical operation of those terms of an award (such terms being expressly permitted by section 139 of the FW Act);

c. A loaded rates scheme is not designed to benefit employees. It is intended to benefit employers, by providing simplicity and relief from the regulatory burden, including resultant cost-savings.

27. Even if a loaded rates term is a term which may be included in a modern award pursuant to section 139 of the FW Act, the inclusion of such a term in a modern award will result in a significant departure from the scheme of minimum rates and separately identified entitlements including allowances, penalty rates and overtime envisaged by part 2-3 of the Act. In particular:

a. employees receiving loaded rates will not receive separately identified <u>additional</u> remuneration for working overtime, or for working unsocial, irregular or unpredictable hours or weekends, or public holidays, or for working shift work[29];

[27] *The termination of employment decision* at [150]
[28] *The termination of employment decision* at [144]
29 Section 134(1)(da) of the Act

b. for employees receiving loaded rates, some or all allowances are not separately and clearly identified[30];

c. the loaded rate arrangement which is the subject of this application is envisaged to be implemented through a mechanism described as a "Loaded Rate Arrangement" which is facilitated by a Form described as a "Loaded Rate Arrangement Form" which by its terms is plainly a form of individual arrangement as between the employer and an individual employee[31].

28. If FWC is of the view that there is no legislative barrier to the inclusion of a term about loaded rates in a modern award (of the kind proposed by the application) it should take the view that a variation giving effect to such a term is a variation of significant effect both with respect to this award and the awards system. FWC should therefore take an approach to the exercise of its discretion which is cautious and should require a substantive merits based case to be made out in favour of such a variation.

Should FWC make the variation?

29. If the inclusion of the term sought be the application is permitted by section 139 and 142 of the FW Act, UWU submits FWC should not vary the award to introduce the loaded rates scheme sought. The considerations against the variation, which are set out as follows, outweigh any factor in its favour:

a. It is difficult to predict with certainty that the loaded rates mechanism will not result in some workers being worse off, when compared to the terms of the existing award.

b. The loaded rates mechanism proposed in the variation is extremely complex, and may increase the incidence of non-compliance with this award, not reduce it.

c. For this and other reasons (outlined below) the weight of factors associated with the modern awards objective is against the variation, not for it.

d. The scheme is compulsory for employees whose employers chose to use it, and is not "opt in" or "by agreement.

30 Section 139(2) of the Act
[31] Section 3(c) of the Act

e. The variation would have little practical effect: in circumstances whether there are factors weighing against it the potential practical benefit does not outweigh the potential negatives.

f. Overall, the case is not made out; the case put in favour of the application is not a substantial merits based case of the kind required to be put in favour of a variation to an award of this significance.

The potential negative effect of the loaded rates scheme for employees

30. Throughout the award review process, UWU has consistently raised concerns in relation to the loaded rates concept, to the effect that the myriad of circumstances in which the award operates makes it difficult to predict with absolute certainty that the aggregation of minimum rates, penalties and allowances would not result in any employee being worse off under the loaded rates arrangement than if they were paid under the terms of the current award.

31. An application to vary an award to introduce a loaded rates scheme should not be made if workers paid loaded rates under such a proposed scheme would be financially worse off than workers who are not[32]. This is particularly so in the hospitality industry, where there are current challenges facing the sector in relation to the attraction and retention of staff[33], and in this particular matter, the genesis of which was a request by the Minister that included the suggestion that any loaded rates scheme should be structure in such a way as to ensure workers are not financially worse off over time[34].

32. The FWC agreements team has conducted an analysis of the proposed variation[35]. While the analysis concludes that the rates in the proposal result in employees earning more under the loaded rate when compared with the hourly rates and loadings applicable under the award when working under the parameters specified, the team's modelling shows that in some cases, it is a very fine margin. For example:

    a. Annexure A shows an advantage of $0.5 cents per week

    b. Annexure C shows an advantage of $0.42 cents per week

    c. Annexure D shows an advantage of $0.27 cents per week

[32] The Statement, at [22].
[33] *Restaurant & Catering Industrial*, [2021] FWCFB 4149 at [47]
[34] The Minister's letter, page 2
[35] AM2020/103 Award Flexibility – Hospitality, Agreements Team FWC, 20 July 2021

d. Annexure E shows an advantage of $0.13 cents per week

33. It will only take a minor unforeseen variable to make the scheme unfavourable for and employees. For example, clause 15 of the award creates scenarios in which employees under the award might be entitled to a rostered day off or an accrued day off. Clause 28.2(d) of the Award provides that a full time employee must be paid overtime for any time that the employee is required to work on a rostered day off or an accrued day off. Clause 28.2(e) requires that an employee required to work on their rostered day off or accrued day off must be paid for minimum of 4 hours even if they work less than 4 hours (with an exception provided in sub-clause 28.2(f)). Proposed clause K.14 contains a note which provides that an employee being paid a loaded rate will be entitled to be paid overtime in accordance with clause 28 of the award "for work which exceeds the daily and / or shift maximum hours, the Loaded Rate Range of Days o the Loaded Rate Maximum Weekly Hours each week. This means an employee who works on their rostered day off but remains within the daily and / or shift maximum hours, the Loaded Rate Range of Days or the Loaded Rate Maximum Weekly Hours is not entitled to an overtime payment, as they would be under clause 28.2(d) of the award. The result will be a deficiency as between what the employee earns under the loaded rate, as compared with the award in its current form.

34. In circumstances where in some cases the margins as modelled are so fine, FWC cannot be confident that no worker will be worse off under the variation proposed by the application. It should be refused on that basis.

35. Alternatively, taking into account the concerns raised in these submissions UWU submits that if FWC is inclined to make the variation sought, it is appropriate that the following course be adopted (which was the course adopted by FWC in relation to recent variations made to the *Restaurant Industry Award 2020*[36]:

    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.

[36] *Restaurant and Catering Industrial* [2021] FWCFB 4149 at [152] – [153]

Compliance and complexity

36. In *The Penalty Rates Decision*, FWC observed that the insertion of "loaded rates schedules" into modern awards "may have a positive effect on award compliance". This observation was made in the context of material before the Bench from the Fair Work Ombudsman which mentioned that some business in the Hospitality and Retail sectors "already provide 'flat' (or loaded) rates of pay, in order to simplify their payroll process …"[37].

37. In the Statement, FWC refers specifically having had regard to these comments in forming its provisional view[38].

38. In the Supplementary Submissions, it is asserted that the proposed variation will simplify and make the Award easier to understand for both employers and employees[39]. The basis for this assertion is not elaborated upon.

39. Award non-compliance is a significant issue in the hospitality industry[40]. In this circumstance, FWC should be particularly careful not to inadvertently increase award non-compliance by any variation made to the award.

40. The observations made by FWC that a loaded rates term might improve award compliance are based on the idea that loaded rates might create a simplicity, particularly with respect to payroll process[41]. UWU does not cavil with these observations. A loaded rates term could conceivably create simplicity with respect to a payroll process.

41. The loaded rates term that is the subject of this application is not such a term. It is inconceivable that the loaded rates scheme proposed by the application results in the simplification of payroll processes:

    a. The loaded rates scheme only applies to full time employees classified at level 3 or above. A payroll process would need to be maintained in its current form for other employees.

[37] *The Penalty Rates Decision* at [91]
[38] The Statement at [26]
[39] Supplementary Submissions at [39]
[40] *Restaurant & Catering* Industrial [2021] FWCFB at [78];
[41] *The Penalty Rates Decision* at [91]

b. For an employer who uses the scheme, to accommodate employees being paid loaded rates, an existing payroll process would need to be significantly enhanced to deal with:

    i. a new means by which some employees could be paid (in addition to those based on existing methodologies (some are described in the Supplementary Submissions at [35]));

    ii. six different loaded rates, which align to six different roster configurations;

    iii. at least eight different variables arising from the loaded rate parameters which could give rise to the loaded arrangements arrangement being voided, or could give rise to payments additional to the loaded rate payment becoming required (namely, (i) a roster cycle not operating weekly; (ii) a roster cycle not commencing on a Monday; (iii) work performed beyond a maximum of 11.5 hours Monday to Friday; (iv) work performed before 7:00AM, (v) work performed past 12:00 midnight; (vi) work performed on a Saturday past 10 hours, (vii) work performed on a Sunday past 10 hours; (viii) a break in shifts of 3 hours or less (note further that because work which exceeds the daily and / or shift maximum hours, the loaded rate range of days or the loaded rate maximum weekly hours attracts overtime rates, and overtime under the award is paid at 150% for the first 2 hours and 200% after 2 hours[42], further complexity arises in relation to such work exceeding 2 hours).

    iv. The system must also be careful to add all purpose allowances to minimum rates before the loaded rate percentage is applied[43].

42. It is asserted in the Supplementary Submissions that the award "without the Proposed Variation is a complex industrial instrument" and "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". UWU suggests this over-simplifies the cause of the high incidence of award non-compliance in the hospitality industry which is more likely to occur because of a

[42] Clause 28.4 of the award
[43] See the Note to proposed sub-clause K.11

range of factors. However, if it is the case that the award's diversity of legal requirements is a contributing factor to award non-compliance in the hospitality industry, the variation proposed by this application is unlikely to assist with that problem and more likely will contribute to it. 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. Some of those circumstances are not even evident from the clauses of the Schedule, but are rather contained within notes (for example, K.14, notes 3 and 4, and the example provided). For employers who think they are getting the simplicity of a single aggregate rate of pay, there is a significant risk of inadvertent non-compliance as soon as variable outside the parameters occurs.

43. Finally, it is likely this risk of non-compliance will be refreshed each year, when presumably, the loaded rates calculations must be re-calibrated to deal with the impact of the increase to the split shift allowance, part compensation for which is included within the loaded rate percentage (assuming an increase to the split shift allowance flows as a result of Annual Wage Review decisions). The means by which this re-calibration will occur is not clear. In any event employers will need to ensure to alter the loaded rates they are using to respond to this annual change.

The modern awards objective

44. Some of the principles relevant to the application of the modern awards objective are outlined above. With those principles in mind, UWU makes the following submissions in relation to the factors outlined in section 134 of the FW Act.

45. The matter raised by section 134(1)(a) weighs neither for or against the proposed variation:

    a. The intention of the variation is not to provide for higher wages for low paid workers. While it is conceivable in some cases a loaded rate could result in higher wages than would apply under the current award, the variation should not be assessed as one that has the intent of providing higher remuneration for work performed under the award. The is no benefit intended to be provided to low paid workers, in terms of remuneration, with respect to the variation.

    b. In any event, as mentioned above, any incidental benefit is marginal at best.

c. It is submitted in support of the application that the fact workers will be not worse off under a loaded rate is a factor relevant the matter raised by section 134(1)(a) and weighs in favour of the variation sought[44]. UWU submits this is not a matter that weighs in favour of the variation sought, in the context of section 134(1)(a). If the result of the variation was that workers would be worse off than they would be under the present award, this would be a significant factor against the proposed variation. But the assertion that workers would not be worse off weighs neither for or against.

d. It is further submitted, in the context of section 134(1)(a) that the variation provides 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[45]. There is an internal inconsistency in this submission. A loaded rate might provide greater certainty in relation take home pay with respect to work performed within the loaded rate parameters. But there would still be variability in take home pay in relation to "entitlements owned for work in excess of the loaded rate arrangement".

e. In any event, generally, a benefit which might arise for a worker any greater consistency in take home pay, from week to week, under a loaded rate (if there is any at all) is extremely marginal, and not a matter which should weigh in favour of the variation.

46. The matter raised by section 134(1)(b) might weigh marginally against the proposed variation. During the course of the award review process, FWC commissioned research from the Attorney General's Department in relation to the use of loaded wage rates in enterprise agreements[46]. The research found there were 69 enterprise agreements that contain loaded rates where the parent award is the *Hospitality Industry (General) Award 2020*. This in turn suggests that collective bargaining is used by industrial parties to fashion loaded rates schemes. If the award is varied to incorporate such a scheme, industrial parties will be dissuaded from using collective bargaining as the means to achieve this. In this sense, the variation does not promote collective bargaining, and might discourage it.

[44] Supplementary Submissions at [20], [28]
[45] Supplementary Submissions at [29]
[46] Australian Government, Attorney-General's Department, Loaded Wage Rates in Enterprise Agreements, 22 January 2021

47. The matter raised by section 134(1)(c) weighs neither for or against the proposed variation.

48. The matter raised by section 134(1)(d) may weigh in favour of the proposed variation, in so far as a loaded rate arrangement could be said to constitute a “flexible modern work practice”. The promotion of the “efficient and productive performance of work” is not relevant.

49. The matter raised by section 134(1)(da) weighs neither for or against the proposed variation. Presumably, it would be said that employees who would be paid loaded rates are still receiving the same compensation for working overtime, or unsocial, irregular or unpredictably hours, or working on weekends or public holidays or shifts through the loading in the rate as they would if they received separately identified payments under the award..

50. The matter raised by section 134(1)(e) weighs neither for or against the proposed variation.

51. For the reasons raised above the matter raised by section 134(1)(f) weighs against the proposed variation. The variation would, in particular, increase the regulatory burden, because:

    a. the variation would not change, in any way, the entirety of the regulatory burden required to be borne in relation to an employer’s employees who are not paid loaded rates;

    b. as outlined above, for those employers who pay some employees loaded rates, a different and significant additional regulatory burden must be borne to administer the loaded rates scheme, including the loaded rates parameters and the range of variables that can arise as a result of those parameters.

52. For the reasons raised above the matter raised by section 134(1)(g) weighs against the proposed variation. The proposed variation is neither simple nor easy to understand. If the award, without the proposed variation, is a complex industrial instrument it is a more complex industrial instrument with it.

53. The matter raised by section 134(1)(h) weighs neither for or against the proposed variation. It may be that it is this factor which might be relevant to the impact of the COVID-19 pandemic, and the significant challenges being faced by this industry as a result. We note the Supplementary Submissions refer to this matter at [40] – [41]

under the heading “Changes in light of the COVID-19 pandemic” (albeit not on the context of section 134(1)(h)). In relation to this, UWU submits as follows.

54. Below, we make submissions to the effect that the practical effect of the variation is minimal with respect to the proportion of employees working in the industry it might apply to. If these assertions are accepted, the logical extension is that if there is any economic benefit associated with the variation (which is unclear) the benefit would be extremely marginal, and not of sufficient weight to bear in favour of the variation in the context of the modern awards objective.

The scheme is compulsory for employees whose employer elects to use it

55. The variation to the award sought by the application permits an employer to elect to pay an employee a loaded rate. An employee is not entitled to refuse the arrangement.

56. Accordingly, the proposed change is proposed to be available on an opt in basis with respect to employers, but not employees. Nor is the arrangement proposed to be subject to agreement between employers and employees.

57. Further, if the proposed variation is made in its current form Schedule K, within which it would be located does not include a specific obligation that an employer consult with an employee who is affected by the employer’s election to use the loaded rates scheme.

58. We make two submissions about the fact that the scheme is compulsory for employees whose employer elects to use it:

    a. Firstly, UWU submits this is another factor relevant to FWC’s discretion as to whether or not to vary the award and should carry significant weight against granting the application.

    b. Secondly, if FWC is inclined to make the variation sought, then a specific obligation to consult should be included. The form of the obligation should be adopted from the recent variation made to the *Restaurant Industry Award 2020* as words inserted into the proposed schedule as follows:

K.X Consultation

K.X.1 *Prior to initiating any of the provisions in this Schedule the employer must consult with all employees affected by the proposed change and their representatives (if any).*

K.X.2 *For the purpose of the consultation, the employer must:*

(a) *Provide to the employees and their representatives (if any) information about the proposed change (for example, information about the nature of the change and when it is to begin); and*

(b) *Invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also their representative (if any) to give their views about that impact.*

K.X.3 *The employer must consider any views given under clause K.X.2(b).*

c. A consequential amendment should also be made to proposed clause K.19:

K.19. In arbitrating a dispute the Fair Work Commission may:

(a) terminate an agreement made under Schedule K if it determines that the employer failed to consult as required by clause XX

(a) require an employer to pay an employee the difference between what they were paid under the Loaded Rate Arrangement and what they would otherwise have received under this Award if the Fair Work Commission determines that the arrangement entered into under this Schedule was unfair to the employee; and

(b) terminate a Loaded Rate Arrangement if the Fair Work Commission determines that the arrangement entered into under this Schedule was unfair to the employee.

The practical effect of the variation compared

59. When considering an application to vary an award, it is appropriate FWC take into account the practical or direct operative affect if the variation was made[47].

60. The variation proposed by the application is intended only to apply to full time employees classified under the award at level 3 and above excluding employees earning junior rates, supported wages rates or performing catering in remote locations.

61. It is likely that significantly less than half the employees working in sectors of the hospitality is covered by the award are engaged on a full time basis. This assertion is based on the following:

    a. The Australian Bureau of Statistics (**ABS**) publishes data on Characteristics of Employment[48]. This ABS data set distinguishes between those employees with a paid leave entitlement and those which do not have a paid leave entitlement, who, for the purposes of the analysis, are assumed to be casual employees. It further splits employees who have a paid leave entitlement into a full time or part time category.

    b. The dataset can be further separated into "accommodation" (which is likely to be covered by the award), "Clubs" (which is more likely to be covered by the *Registered and Licensed Clubs Award 2020*), pubs, taverns and bars, (which is likely to be covered by the award) and "café's restaurants and takeaway food services" (which are more likely to be covered by the *Restaurant Industry Award 2020* or the *Fast Food Award 2020*).

    c. The dataset is as attached at **UWU-1**.

62. The dataset shows that full time workers might make up about half the workforce in accommodation, about 35% in clubs, about 28.9% in pubs, taverns and bars and about 18% in cafes, restaurants and takeaway food services[49].

63. UWU is not in possession of any further breakdown of the nature of the work performed by employees in these categories that might allow for a categorisation in relation to classification levels. However, FWC is entitled to assume, and we submit

[47] *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [116]
[48] Australian Bureau of Statistics, Characteristics of Employment, Australia, Released 11 December 2020
[49] In relation to this data set, it should be noted there is a high relative standard of error for some estimates - mostly part-time data for accommodation, clubs and pubs - with some of them high enough for the ABS to advise to use 'caution' or even regarded 'too unreliable for use'.

should assume that those employees within these categories that are classified at level 3 or above or are only a proportion of their number.

64. It does appear that the level of award reliance in the hospitality industry is high.

65. However, there may be a high proportion of employees who perform job roles which are encompassed within levels 3 and above under the award who are not paid according to the award, but are rather paid according to an above-award arrangement. Some of the job roles classified at level 3 and above under the award include Cook grade 3, Cook grade 4 and Cook grade 5 (known as commi chef, demi chef and chef de partie respectively). During the award review process, FWC commissioned research from the Attorney General's Department about earnings for chefs[50].The research showed that median hourly earnings for chefs is $28.15 per and the mean average, $29.45 per hour. This compared against the highest rate in the award (at the time), level 6, $24.77. This may suggests that at least some chefs are not being paid award rates of pay pursuant to some kind of above-award arrangement.

66. Accordingly, the loaded rates schedule contemplated by the application will be limited in its application only to:

    a. Full time employees, which might comprise between 30% and 50% of the workforce (or less);

    b. Of these, only those employees performing a role classified at level 3 or above;

    c. Of these, only those employees who are award-reliant;

    d. Of these, only those employees who are paid according to the award, and not some above-award arrangement.

67. In circumstances where the variation sought is significant and there are several factors weighing against it, the limited potential for practical benefit (if any) weighs against the exercise of the discretion to make the variation sought.

[50] Australian Government, Attorney General's Department, Earnings for chefs 26 February 2021

The case has not been made out

68. The case brought in favour of this application is not a strong merits based case of the kind required in relation to an award variation of some significance. A limited case has been brought in its favour. The case in favour submits the variation is desirable, from the perspective of the applicant, but does not make out the basis upon which it is necessary. UWU submits it should be dismissed.

Ben Redford

United Workers Union

20 August 2021

UWU-1

Australian Bureau of Statistics – Characteristics of Employment 2014 – 2020

Industry of Main job, Whether had paid leave entitlements and Full-time or part-time status in main job by Reference year

Counting: Persons

		August 2014	August 2015	August 2016	August 2017	August 2018	August 2019	August 2020
Accommodation	Full-time	41.9%	39.3%	39.4%	50.6%	40.5%	46.1%	50.7%
	Part-time	8.2%	11.7%	9.4%	9.1%	17.9%	12.0%	16.7%
	Casual	49.9%	49.0%	51.2%	40.3%	41.6%	41.9%	32.6%
Clubs (Hospitality)	Full-time	40.6%	41.7%	36.9%	33.3%	21.2%	39.4%	35.7%
	Part-time	13.2%	4.5%	10.8%	9.3%	6.2%	15.5%	25.9%
	Casual	46.2%	53.8%	52.2%	57.4%	72.6%	45.1%	38.4%
Pubs, Taverns and Bars	Full-time	25.9%	34.6%	31.1%	27.9%	34.3%	31.0%	28.9%
	Part-time	5.6%	6.9%	4.4%	6.8%	5.1%	4.5%	12.1%
	Casual	68.5%	58.4%	64.5%	65.3%	60.5%	64.4%	59.0%
Cafes, Restaurants and Takeaway Food Services	Full-time	20.4%	17.5%	20.8%	19.0%	21.0%	18.5%	18.3%
	Part-time	13.2%	11.8%	9.7%	10.3%	13.5%	14.2%	16.1%
	Casual	66.4%	70.6%	69.6%	70.7%	65.5%	67.3%	65.6%