

7 February 2020

Chambers of Vice President Hatcher, S.C.  
Fair Work Commission  
Level 10, 80 William Street  
EAST SYDNEY NSW 2011

By Email: [chambers.hatcher.vp@fwc.gov.au](mailto:chambers.hatcher.vp@fwc.gov.au)

Dear Associate

**RE: AM2016/13 – Annualised Wage Arrangements**

We thank you for the opportunity to respond to the decision (2019) FWCFB 8583.

Our Submission and a Draft Determination with proposed amendments in mark-up is attached for the Commission's consideration.

Yours faithfully



Dean Long  
Chief Executive Officer



IN THE FAIR WORK COMMISSION

Matter No:

AM/2016/13

FOUR YEARLY REVIEW OF MODERN AWARDS  
ANNUALISED SALARIES

ACCOMMODATION ASSOCIATION OF AUSTRALIA, and  
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION

## SUBMISSION

### INTRODUCTION

1. This submission is made on behalf of the Accommodation Association of Australia (Accommodation Association) and the Motor Inn and Motel Accommodation Association in response to the decision (2019) FWCFB 8583, which invites submissions concerning:
  - (a) technical and drafting matters with respect to the draft determinations: and
  - (b) the Commission's provisional determination of the outer limits in clauses 27.2(b) (i) and (ii) in the draft determination for the *Hospitality Industry (General) Award 2010 (HIGA)*.

### ABOUT THE ASSOCIATION

2. The Association's membership base is over 1000 properties and more than 100,000 guest rooms. Members include major hotels, resorts, motels, motor inns, serviced and holiday apartments, bed and breakfasts, guesthouses, backpackers and timeshare establishments in metropolitan, regional and rural Australia, across all states and territories.

### TECHNICAL AND DRAFTING MATTERS

#### Managerial exemption

3. The following paragraphs pertain to technical and drafting matters pertaining to the draft determination for HIGA (referred to below as the '**Draft Determination**').
4. The Accommodation Association does not oppose the relocation of the existing clause 27.2 applicable to Managerial Staff (Hotels) to clause 20.2.
5. There is an error in proposed clause 20.2(b)(iii) of the Draft Determination. The reference to clause 27.2(b)(i) should be replaced with a reference to clause 20.2(b)(i).

#### Annualised Wage arrangements for non-managers

6. The Accommodation Association supports the position of the Australian Industries Group (**Ai Group**) as set out at paragraphs 34 - 35 of its submissions dated 31 January 2020 regarding the preservation of the existing clause 27.3. The Accommodation Association echoes the Ai Group's concern that in deleting clause 27.3, the Commission is inadvertently removing the entitlement to pay employees (other than managerial employees) monthly.
7. The Accommodation Association also supports Ai Group's position as set out at paragraphs 36 – 40 regarding the Commission's proposal to limit the award derived monetary benefits that can be satisfied by an annualised wage arrangement to those benefits set out in proposed clause 27.2(a)(i) – (iv). The Accommodation Association proposes that the proposed clause 27.2(a) be amended as follows:
  - (a) *An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage of an amount that is at least 25% more than the minimum wage prescribed in clause 20 multiplied by 52 for the work being performed in satisfaction, subject to clause 27.2(b), of any or all of the following provisions of the award:*
    - (i) *clause 20—Minimum wages;*
    - (ii) *clause 21—Allowances;*
    - (iii) *clause 32—Penalty rates;*
    - (iv) *clause 33—Overtime;*
    - (v) *clause 34.2 – annual leave loading; and*
    - (vi) *any other award derived monetary entitlements.*
8. **Enclosed at Schedule A** is a copy of the Draft Determination with this proposed amendment in mark-up.
9. The proposed Clause 27.2(b) of the Draft Determination provides that an employee must not be required by an employer in '*any pay period or roster cycle*' to work in excess of the outer limits prescribed in sub clauses 27.2(b)(i) and (ii).
10. It is not clear what is the intended meaning of the word 'or' in proposed clause 27.2(b). For accommodation establishments, a pay period and a roster cycle do not always align and refer to two different periods. For example, a hotel may have a weekly pay period operating Wednesday through Tuesday. Whereas, the relevant roster cycle may operate fortnightly or monthly. In these circumstances, it is unclear whether in applying the outer limits in proposed clause 27.2(b) an employer:
  - (a) must apply the outer limits to both the applicable pay period and roster cycle; or

- (b) must prefer the pay period over the roster cycle or vis-a-versa; or
- (c) may elect between the pay period and the roster cycle.
11. Given that a full time employee (including those paid annualised wage arrangements) must work in accordance with a roster (see clause 30 of HIGA), the Accommodation Association proposes that the proposed clause be amended to remove the reference to a pay period and instead only refer to roster cycle.
12. In the accommodation industry, it is usual for roster cycles to range from between one and four weeks in length. To that end and in keeping with the intention of the outer limits provisions, the clause should also specify that a roster cycle must not exceed four weeks.
13. Accordingly, the Accommodation Association proposes that the words "*in any pay period or roster cycle*" be replaced with "*in any roster cycle (which may not exceed four weeks)*". This change is reflected in the mark-up at Schedule A.
14. Should the Commission adopt the amendment in paragraph 12 above, it is submitted that consequential amendments will need to follow in proposed clauses 27.2(c) and 27(d)(iii). These amendments are shown in the mark-up in Schedule A.

#### **OUTER LIMITS AMOUNTS**

15. The Accommodation Association makes the following submission with respect of the outer limits proposed by the Commission in the Draft Determination.
16. The Accommodation Association submits that the outer limits provisionally determined by the Commission are not appropriate for the accommodation sector and that it is a near impossible task to set the limits in a way that appropriately balances the needs of all stakeholders in the sector, including small to medium enterprises. Instead, the Accommodation Association submits that the outer limit amounts should not be fixed and instead be subject to agreement between the employer and the employee in the same way prescribed by model clauses 1 and 3.
17. The Commission has not given appropriate consideration to the fact that annualised wage arrangements are often the preferred or expected method of payment for full time employees and that such arrangements are used by employers to attract and retain talent, including in regional/remote areas, where the requirement to work overtime, or ordinary hours which attract penalty rates, varies significantly. Regardless, when agreeing to pay these arrangements, employers are obliged to pay the employee at a rate of at least 25% above the minimum rate of pay for the relevant classification. While this higher rate is notionally intended to compensate an employee for overtime and penalty rates over the course of a year, it doesn't necessarily follow that the employer will always be able to recoup these higher costs in the hours of work they can provide the employee. Accordingly,

in fixing the outer limit amounts which apply by reference to a pay period or roster cycle, the Commission is increasing the cost to the employer in circumstances where an employee is not always being disadvantaged on an overall basis. E.g. a small accommodation hotel in a regional area may prosper during peak periods of business during the spring/summer. During these periods an employee may be required to work on some weekends and may also have to do some overtime to content with peaks in demand. However, for the remainder of the year the employee does not perform a lot of overtime or work during hours where penalty rates are payable. While on an overall basis, the employee is earning more than what they would have earned had they been paid wages, the new arrangements proposed by the Commission would still require the employer to make additional top up/outer limit payments, increasing the over cost of employment. For many small to medium size businesses this is not a workable solution.

18. As a result of the above, employers are less likely to accommodate the request for annualised wage arrangements due to the increased cost. This in turn may lead to greater turn over or difficulty retaining talent in regional areas where smaller to medium sized businesses dominate the market.
19. If the Commission is not minded to revise the proposed outer limit provisions in circumstances where the minimum 25% increment is paid, then the Accommodation Association proposes that the Commission include a mechanism in the proposed clause for the outer limits to be agreed in circumstances where the employer agrees to pay the employee an amount in excess of the minimum 25% increment.
20. As highlighted by the Ai Group, the proposed clause provides that in order to pay an employee an annualised wage arrangement, the employer must pay the employee "an amount at least 25% more than the minimum wage prescribed in clause 20 multiplied by 52...". The same requirement appears in the existing clause 27.1. The importance of the words "at least" means that the employer and employee may agree to an arrangement whereby the employee receives an annualised wage arrangement in excess of the minimum 25% increment. The Accommodation Association submits that it is not out of the question for an employer in the industry to pay an employee at a rate above the minimum 25% increment having regard to:
  - (a) market rates and retention; and
  - (b) the existing requirements in clause 27.1. That being, in setting an employee's annual salary, the employer must have regard to the employee's pattern of work, occupation, industry, enterprise and more importantly, the agreement must not disadvantage the employee.
21. As a result, the inability to expand the outer limit amounts where an employer agrees to pay an employee in excess of the minimum 25% increment is counterintuitive and operates as a disincentive for employers to pay in excess of the minimum increment.

22. The fixing of the outer limit amounts also appears to be at odds with the Commission's decision in [2019] FWCFB 1289 at [46] where it maintained that the outer limit provisions are intended to protect an employee against financial disadvantage in a pay period or roster cycle. It also seems contrary to the methodology the Commission appears to have applied in setting the outer limit numbers in modern awards with model 4 clauses. That is, the higher the minimum increment, the higher the outer limit numbers.
23. The additional issue that arises from the inability to expand the outer limits by agreement means that employers are more likely avoid to annualised wage arrangements, instead preferring alternative arrangements which offer greater flexibility with a lesser administrative burden e.g. paying wages by the hour or contractual annualised salary arrangements supported by a common law offset provision. This only disadvantages employees where they otherwise wish to receive annualised arrangements, including for the purposes of gaining finance approvals. It also fails to meet the modern awards objective taking into account, the need to promote flexible modern work practices and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (see section 134(1)(d) and (1)(f)).
24. The Accommodation Association has not reflected the above-mentioned submission in Schedule A. In circumstances where the Commission is minded to accept the above submissions, the Accommodation Association would be seeking guidance from the Commission about how the current proposed clause 27 could be re-drafted.

#### Hours which would attract a penalty rate

25. The employee must not be required by the employer to work in excess of an average of 16 ordinary hours, which would attract penalty rates under the provisions of this award per week.
26. It is submitted that the average hours attracting penalty rates should not include the additional penalty when work is performed: Monday–Friday—7.00 pm to midnight; and Monday–Friday—midnight to 7.00 am (see clause 32.3 of HIGA).
27. The accommodation industry is a 24/7 industry with many employees working shifts in the evening and the early hours of morning to accommodate operational requirements. Indeed, there are several positions within the industry that mainly work during these hours e.g. Night Auditor, Front Office Attendants and In Room Dining Attendants. Often, employees may prefer these shifts because they offer flexibility to work around tertiary timetables and/or family responsibilities.
28. The effect of the proposed clause 27.2(b)(i) is that employees who regularly work in the evenings or mornings will regularly be required to work hours in excess of the outer limit amount prescribed by proposed clause 27.2(b)(i). For example: a full time Night Auditor works shifts commencing at 11:00pm and ending at 7:00am. If night auditor commences a roster cycle on a Tuesday working five consecutive days, the employee is likely to be required to work in excess of the outer limits on Thursday (i.e. only the third day of work in a roster cycle).

29. Accordingly, the Accommodation Association proposes that penalties prescribed in clause 32.3 of HIGA be expressly excluded from the ordinary hours which would attract a penalty rate for the purposes of the outer limit amount in proposed clause 27.2(b)(i).
30. Alternatively, in circumstances where the Commission accepts the Accommodation Association's submissions set out in paragraphs [13]- [19] and seeks to amend the proposed clause 27.2 to allow an employer and employee to independently agree to the outer limit numbers, then such an amendment may not be necessary. This is because the outer limits can be set by agreement between an employee and employer having proper regard to their position and foreseeable pattern of work.

#### Calculation of remuneration when payments are made when the outer limits are exceeded

31. Hours worked in excess of either of the outer limit amounts specified in clause 27.2(b) must separately be paid for in accordance with the applicable provisions of this award.
32. It is submitted that the proposed clause 27.3 should be amended to make it clear that when payments are made in accordance with clause 27.2(c), these payments should be treated as amounts actually paid to an employee for the purposes of the comparison requirement in proposed clause 27.3.
33. The Accommodation Association has incorporated amendments in **Schedule A** to provide clarity in this matter.



## SCHEDULE A

# DETERMINATION

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards - Annualised Wage Arrangements**

(AM2016/13)

### **HOSPITALITY INDUSTRY (GENERAL) AWARD 2010**

[MA000009]

Hospitality industry

VICE PRESIDENT HATCHER

DEPUTY PRESIDENT DEAN

DEPUTY PRESIDENT SAUNDERS

SYDNEY, XX FEBRUARY 2020

*Review of annualised salary provisions in modern awards – Hospitality Industry (General) Award 2010*

A. Further to the Full Bench decisions [\[2019\] FWCFB 4368](#) and [\[2019\] FWCFB 8583](#) issued by the Fair Work Commission, the above award is varied as follows:

1. By deleting clause 20.2 and inserting the following:

#### **20.2 Managerial staff (Hotels)**

(a) The minimum annual salary payable to employees within the Managerial Staff (Hotels) classification level within the Managerial Staff (Hotels) classification level within Schedule D, will be \$49,025 per annum.

#### **(b) Salaries absorption**

(i) Managerial Staff who are paid a salary of 25% in excess of the minimum annual salary rate of \$49,025 per annum as in clause 20.2(a) (in receipt of a salary of at least \$61,281 per annum), will not be entitled to the benefit of the terms and conditions within the following clauses:

clause 12—Part-time employment;

clause 21—Allowances;

clause 29—Ordinary hours of work (Full-time and part-time employees)



clause 31—Breaks;  
clause 32—Penalty rates;  
clause 33—Overtime;  
clause 34.2—Payment for annual leave;  
clause 37.1(b)(i)—Additional arrangements for full-time employees  
(on public holidays);  
clause 39—Provision of employee accommodation and meals.

- (ii) An employee being paid according to clause 20.2(b)(i) will be entitled to a minimum of eight days off per four week cycle.
- (iii) An employee being paid according to clause 20.2(b)(i) who works on a public holiday will be entitled to paid time off that is of equal length to the time worked on the public holiday. This time is to be taken within 28 days of accruing it.
- (iv) For the purpose of calculating the weekly equivalent of the annual salary rates prescribed by this clause, the divisor of 52 will be used and the resultant amount will be taken to the nearest 10 cents. All calculations required to be made under this award for the purpose of determining hourly amounts payable to an employee will be calculated on the weekly equivalent of the annual salary.
- (v) Managerial Staff will be reimbursed for all monies reasonably expended for and on behalf of the employer subject to hotel policy or approval.
- (vi) **Payment of salaries**

In such circumstances and despite clause 26.2, where an employee is being paid in accordance with clause 20.2(b) the employer may elect to pay the employee monthly.

2. By deleting clause 27 and inserting the following:

## **27. Annualised wage arrangements**

**27.1** Clause 27 applies to employees other than those classified as Managerial Staff (Hotels).

## **27.2 Annualised wage instead of award provisions**

- (a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage of an amount that is at least 25% more than the minimum wage prescribed in clause 20 multiplied by 52 for the work being performed in satisfaction, subject to clause 27.2(b), of any or all of the following provisions of the award:
  - (i) clause 20—Minimum wages;
  - (ii) clause 21—Allowances;

- (iii) clause 32—Penalty rates; ~~and~~
- (iv) clause 33—Overtime;
- (v) clause 34.2 – annual leave loading; and
- (vi) any other award derived monetary entitlements.

(b) The employee must not be required by the employer in ~~any pay period or any~~ roster cycle (which must not exceed four weeks) to work in excess of

- (i) an average of ~~16~~ XX ordinary hours which would attract a penalty rate under ~~this the provisions~~ clause 32.1 of this award per week; or
- (ii) an average of ~~10~~ XX overtime hours per week

without being entitled to an amount in excess of the annualised wage in accordance with clause 27.2(c).

(c) If in ~~a pay period or any~~ roster cycle (which must not exceed four weeks) an employee works any hours in excess of either of the outer limit amounts specified in clause 27.2(b), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) Where a written agreement for an annualised wage agreement is entered into, the agreement must specify:

- (i) the annualised wage that is payable;
- (ii) which of the provisions of this award will be satisfied by payment of the annualised wage;
- (iii) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a ~~pay period or~~ roster cycle under clause 27.2(b) without being entitled to an amount in excess of the annualised wage in accordance with clause 27.2(c).

(e) The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

(f) The agreement may be terminated:

- (i) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

- (ii) at any time, by written agreement between the employer and the individual employee.

### 27.3 Annualised wage not to disadvantage employees

- (a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases or the agreement terminates earlier over such lesser period as has been worked).
- (b) The employer must each 12 months from the commencement of the annualised wage arrangement or, within any 12 month period upon the termination of employment of the employee or termination of the agreement, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee (Note: amounts actually paid to the employee includes any amounts paid to the accordance with clause 27.2(c) in the same 12 month period).  
Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.
- (c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement agreement for the purpose of undertaking the comparison required by clause 27.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

### 27.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under this clause comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 20—Minimum wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

- 3. By deleting the words “annualised salaried” and “annualised salary” wherever they appear in Schedule H—Part-day Public Holidays and inserting “annualised wage arrangement”.
- 4. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation from **XX Month** 2020. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after **XX Month** 2020.

VICE PRESIDENT

