AUSTRALIAN HOTELS ASSOCIATION

27 Murray Crescent, Griffith ACT 2603
PO Box 4286, Manuka ACT 2603

T 02 6273 4007
E aha@aha.org.au
W aha.org.au

5 September 2017

The Honourable Justice Ross AO
President
Fair Work Commission
11 Exhibition Street
MELBOURNE VIC 3000

By email: amod@fwc.gov.au

Dear Justice Ross

4 yearly review of modern awards—plain language re-drafting
(AM2016/15 and AM2014/272)

1. We refer to the above matter and hereby confirm the Australian Hotels Association ("the AHA"), acts on behalf of the Accommodation Association of Australia ("AAoA"), and the Motor Inn, Motel and Accommodation Association ("MIMA").

2. This submission relates to the plain language re-drafting of the *Hospitality Industry (General) Award 2010* ("HIGA") and the Commission's request for submissions as per the Commission's statement of 22 August 2017; [2017] FWCFB 4118.

3. The AHA notes the purpose of the plain language re-drafting pilot in the Commission's statement [2015] FWC 6555, and its subsequent application to a number of awards including the HIGA is to create a document (award) that is simpler and easier for both employers and employees to understand without changing the substantive legal effect of any specific term of an award.

4. As the peak association for the hotels and hospitality industry, the AHA provides the following submissions with respect to:

   A. The eight items where further information has been sought from the AHA;

   B. The Revised Plain Language HIGA Exposure Draft ("Revised ED") released on 22 August 2017; and

   C. The matters the AHA raised in its submissions of 13 June 2017 in response to the Exposure Draft of 27 April 2017 that continue to remain matters the AHA presses as part of the plain language re-drafting of the HIGA.

A. Items for Further Information

Appropriate Level of Training

5. The AHA submitted on 13 June 2017 the existing HIGA *appropriate level of training* definition be retained, with the exception being the retention of the Exposure Draft new dispute resolution reference in Note 1.

6. This submission was made due to the wording in the Exposure Draft, as retained in the Revised ED, impacting on the intention and interpretation of what an *appropriate level of training* is. The AHA submits the intention and interpretation of the clause has been changed as:

    I. The definition in the Exposure Draft excludes a casino gaming employee from the definition of *appropriate level of training* while the current copy of the HIGA the definition does not exclude a casino gaming employee. It is noted that current Schedule D (casino gaming stream) contains an *appropriate level of training* definition for casino gaming employees, however the Exposure Draft does not include this, or any, definition.

    The exclusion of casino gaming employees from the *appropriate level of training* definition in the Definitions clause is significant as employees employed in any of the following streams must have completed an appropriate level of training for the position held in the following streams:

    - Casino Table Gaming;
    - Casino Electronic Gaming;
    - Casino Equipment Technicians

    This training must be relevant to the position held and the duties undertaken as part of the position. The absence of a clear definition of appropriate level of training will have implications for classification and wage level purposes.

    I. With respect to paragraph (a) in the definition, the AHA has noted the change in the word 'designated' to 'appropriate', and raises a concern that the word change impacts on the intention and interpretation of the competency units that form part of the training package. The word designated reflects a definite unit that must be completed versus a unit that may have an elective element to it.

    II. With respect to Note 1 in the Exposure Draft definition, it is the AHA's position that the word 'utilises' refers to the direct application of a skill and should be retained in lieu of the redrafted words 'makes use of'; words which could be interpreted more broadly.

Casual Employment

7. The AHA submitted on 13 June 2017 that clause 11.1 in the Exposure Draft be removed as it alters the intention and interpretation of when an employee can be classified as a casual employee. In response to the Fair Work Commission's invitation to explain this position, the AHA notes that clause 11.1 appears to be a preferred clause for the plain language re-drafting process as the same wording appears in other awards selected for the plain language re-draft.

8. The AHA also notes the concerns held by the AHA with regard to clause 11.1 changing the intention and interpretation of the first sentence of existing clause 13.1 are concerns expressed by parties in the other re-drafting proceedings.

9. Currently the HIGA provides that a casual employee is an employee who is engaged as a casual employee, thereby confirming that employment on a casual basis is a genuine employment option. Such an option is a practical one for the hospitality industry where a guarantee of hours of work is not always possible.

10. The Exposure Draft and the Revised ED changes this intention by suggesting that an employee can only be employed as a casual if the employment does not meet the definition of a full-time or part-time employee. Such an intention is not necessary and the ability for an employee to be engaged as a casual, as per the existing HIGA casual employment clause should be retained.

11. Casual employment is not a default employment arrangement; it is a genuine employment category that has existed for many years and will continue to exist in the future.

Apprentices

12. At paragraph 14 of the AHA's submission of 13 June 2017, the AHA expressed the view that the existing clause 14.4 of the HIGA be retained in lieu of Exposure Draft clause 12.3. In response to the Fair Work Commission's invitation to explain why clause 14.4 is preferable, the AHA submits that clause 12.3 does not specifically consider that an Apprentice may be engaged as a part-time employee, in which case the relevant part-time provisions of the HIGA would otherwise be applicable. The AHA notes that Exposure Draft clause 12.3 notionally limits apprentice employment to full-time employment, and, as a result prefers the wording of existing HIGA clause 14.4 which provides for this manner of engagement.

Ordinary hours of work

13. With respect to the AHA's submission dated 13 June 2017 regarding Exposure Draft clause 15.1(e)(ii), the AHA advises that it no longer seeks to press its position in this regard.

Breaks

14. With respect to paragraph 24, dot point one of the AHA's submission dated 13 June 2017, the Fair Work Commission has invited the AHA to comment on the insertion of the word 'rest' in clause 16 of the Exposure Draft. The AHA advises that it no longer seeks to press its position in this regard.

15. With respect to paragraph 24, dot point four, the AHA submits in response to the Fair Work Commission's invitation to further explain the AHA's position, the phrasing of Exposure Draft clause 16.6 alters the calculation of the payment for an unpaid break not taken.

16. Currently, when an employee has not been released for an unpaid break, the additional payment due to the employee is based on the employee's Ordinary Hourly Rate. This rate, as per the existing HIGA definition, is the Monday to Friday, permanent hourly rate (as referred to in existing clause 20.1). The wording at clause 16.6 of the Exposure Draft provides that payment is at 150% of the employee's ordinary hourly rate.

17. The AHA submits that this revised wording combined with the revised definition of 'ordinary hourly rate' as found in clause 2 (which no longer refers to the relevant minimum wages clause), changes the long established calculation basis of the payment, and results in a higher payment that is to the detriment of employers.

18. In the case of a food and beverage grade 2 casual employee working on a Saturday for 8 hours and who is not released for a break, the effect of the existing clause would be that the casual employee receives payment for:

- 8 hours at 150% (inclusive of the casual loading) or $29.30 per hour for the shift = $234.40

- An additional payment at 50% of the Monday to Friday permanent hourly rate per hour ($19.53/2) from the sixth to the eighth hour = $19.53

TOTAL = $253.93

19. Payment in accordance with the Exposure Draft, using the calculation basis at clause 16.6 with the same scenario above equals $263.70, and this is an additional cost of $9.77 for the employer in this example alone. This change in wording represents an additional cost for employers; an unintentional impact of the plain language re-drafting, and for this reason the AHA submits the original wording for the additional penalty payment be retained.

Apprentice rates

20. The AHA noted in its 13 June 2017 submissions its concern that Exposure Draft clauses 19.3 and 19.4 have been significantly reworded to the extent that the intention and interpretation of those clauses have changed. The AHA submits that the current clauses in the HIGA provide for proficiency payments where an apprentices has achieved the necessary standard of proficiency. The AHA is concerned clauses 19.3 and 19.4 do not adequately reflect this, and notes that these clauses make no reference to the achievement of proficiency other than in the title of those respective Clauses.

21. The AHA also submits that the new wording in Clauses 19.3 and 19.4 provides that the higher payment results from the apprentice having 'completed their schooling for a year'. The AHA submits that the omission of the application of the proficiency payments sub clause in the Exposure Draft alters the eligibility for payment.

Schedule A

22. In its Statement of 22 August, the Fair Work Commission has invited the AHA to respond to paragraph 60 of its submission of 13 June 2017. The AHA advises that it no longer presses a concern with respect to the Front Office definitions.

23. At paragraph 63 of the AHA's submission dated 13 June 2017, the AHA expressed a preference that the existing HIGA classification definition for a Storeperson grade 3 (in Schedule D) be retained. The AHA advises that it no longer presses a concern with respect to the definition of a Storeperson Grade 3.

B. <u>Revised Plain Language HIGA Exposure Draft</u>

The AHA submits the following with regard to the Revised ED released on 22 August 2017:

24. At clause 15.4(b) and (e) of the Revised ED, the plain language re-draft includes the new words 'ordinary hours'. The AHA submits the word 'their' should be inserted before the words 'ordinary hours' where they appear.

25. At clause 18 of the Revised ED, there is a drafting error where the new text starting with 'NOTE 3: Provisions….' appears. The words 'Junior rates' appearing on the line below should appear before this new text.

26. The new definition of shiftworker appearing in the Revised ED at clause 30.2(a) has altered the intention and interpretation of the definition of shiftworker, as it currently appears at clause 34.1 in the HIGA. An essential element to receive an additional week of annual leave is that the shiftworker must be a seven day shiftworker. This element (relefected with the words 'seven day') has been left out of the definition in the Revised ED. The AHA submits this omission alters the intention and interpretation of the term shiftworker, and will likely result with more employees being viewed as a shiftworker for the purposes of the extra annual leave entitlement; an unintentional impact of the plain language re-drafting.

27. At Schedule B.4 of the Revised ED there is a drafting error where the new text starting with 'NOTE 3: Provisions….' appears. The words 'Junior rates' appearing on the line below at clause B.4.1 below should appear before this new text.

C. AHA Matters to Press

Casual Employment

28. At paragraph 13, dot point one, of its submission of 13 June 2017, the AHA submitted that current HIGA clause 13.1 be retained in the Exposure Draft as the existing clause provides clarity with respect to the compensation elements of the 25% casual loading.

29. The AHA notes the Revised ED clause 11.2 has not been amended and continues to appear in the same form as the Exposure Draft of 27 April.

30. The AHA submits that existing HIGA clause 13.1 wording, being 'The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.' is preferable wording to clearly articulate the compensation make-up of the 25% casual loading. The absence of this detail will mean that an employer or employee will need to refer outside of the HIGA to the National Employment Standards in the *Fair Work Act 2009* for details of what the casual loading incorporates.

31. In addition, a change to entitlements in the National Employment Standards in the future may impact on the stated value of the casual loading.

Apprentices

32. Clause 12.7 of the Exposure Draft replaces the existing HIGA clause 14.10 wording that 'An apprentice is entitled to be released from work' with the wording 'An employer must release'. The AHA submits this creates a different intention to HIGA clause 14.10, and the original wording should be retained.

33. With respect to clause 12.8(b) in the Exposure Draft the word 'excess' as found in HIGA clause 14.5 and referenced in clause 14.6 does not appear. Its omission alters the intent and interpretation that clause and potentially imposes additional costs on employers that don't currently exist.

Ordinary hours of work

34. The AHA restates its concern with the change to the intention and interpretation of clause 15.2 in the Exposure Draft due to the removal of the clarification, currently in HIGA clause 29.3, that provisions of the clause apply only to catering employers. The AHA submits the omission of the word '"catering" before the text "employers providing catering…" widens the application of the clause to employers other than catering employers whose primary purpose is catering.

35. Such a change will impose obligations on non-catering employers that do not currently exist. For example, in some circumstances, a hotel will provide catering to a local event, yet not be a catering employer for the purposes of HIGA clause 29.3. The AHA submits that the original wording of the HIGA clause 29.3(a) be used in the Exposure Draft.

36. The AHA submits the inclusion of new words "other than rostered days off" in 15.2(i) alters the intent and interpretation of the clause. A rostered day off has a particular definition as provided for in the Exposure Draft clause 2, which is, a rostered day off represents an unpaid non-working day for employees. Clause 15.2(h) provides that a rostered day off accrues where an employee works a roster in accordance with clause 15.1(b)(vi) – this is, in practice, a paid accrued rostered day off. The existing wording in HIGA clause 29.3(f) should be

retained to avoid the unintentional impact of, and confusion with, the additional words at clause 15.2(i). In the alternative should the words be retained, the concept of the rostered day off as referred to should be clarified to be a paid accrued rostered day off as per clause 15.1(b)(vi).

37. The AHA has made submissions as part of the general HIGA review stage (which has not commenced yet) to clarify the use of the words rostered day off with respect to a work cycle of 160 hours per 4 weeks. The AHA's draft determinations, lodged in October 2016, propose a new term to explain that where an employee works a work cycle as per current HIGA clause 29.1, dot point 6 (Exposure Draft clause 15.1(b)(vi)), the rostered day off that is accrued should be referred to as an Accrued Day Off. The AHA believes that such a clarification will avoid confusion as to the application of the term rostered day off.

Breaks

38. In its submission of 13 June 2017, the AHA submitted that with respect to the Breaks clause, the re-drafted clause in the Exposure Draft (clause 16) has changed the intent and interpretation of the provision of 30 minute unpaid break. Specifically, table 2 provides employees with a new entitlement to a 30 minute unpaid beak for shifts between 5 and 6 hours.

39. In addition, clauses 16.4 and 16.5 in the Exposure Draft have also failed to reflect the existing provisions that provide that an employee may elect to receive a 30 minute unpaid meal break for shifts between 5 and 6 hours. This election to take an unpaid meal break is not an entitlement to be released for an unpaid meal break.

40. In 2013 the HIGA was varied by Deputy President Sams in decision [2013] FWC 5736 to provide that an employee was only entitled to be released for a 30 minute unpaid meal break where required to work a shift of more than 6 hours. The current wording of the breaks clause, appearing at clause 31 of the HIGA, reflects a consent position of the AHA and United Voice, as accepted by the Deputy President as an appropriate clause for the HIGA.

41. The AHA restates its position that table 2 and clauses 16.4 and 16.5 in the Revised ED must be amended to reflect the existing unpaid meal break entitlements so as to avoid an unintentional change to the legal effect of the unpaid breaks entitlement for shifts between 5 and 6 hours.

Apprentice rates

42. With respect to ED Clause 19, specifically 19.1(a), 19.2(a) and their respective tables, Table 7 and Table 8 and Clause 19.5(a)(i), the AHA is of the belief that the reference to weekly rates only does not adequately take into account the employment of part time apprentices. The AHA submits that clauses 19.1, 19.2 and 19.5 should include a formula for calculating part time apprentice hourly rates, or, in the alternative, should clarify that the rates contained in the clause are the rates payable to a full-time apprentice.

43. Consistent with the aim of the plain language drafting process, the AHA restates paragraph 27 from its 13 June 2017 submission that clauses 19.1 and 19.2 should make it clear that the clauses and rates in tables 7 and 8 do not apply to adult apprentices.

44. The AHA confirms its submission of 13 June 2017 that in the interests of consistency in wording clause 19.1(b) should include the words "as a qualified tradesperson" after the word "apprenticeship" as is found in the Exposure Draft clause 19.2(b).

Payment of wages

45. It is also noted that at Exposure Draft clause 21.5 the words "if they so desire" do not appear as they do in Clause 26.5 of the HIGA. The removal of these words alters the intention and interpretation of this clause to make the requirement a definitive requirement, as opposed to one that an employee may seek if they wish to. These words should be retained in the Exposure Draft.

Allowances

46. The AHA restates its concerns with the rewording of a number of allowances, specifically:

47. The broadening of the definition of special clothing for the purposes of an entitlement to receive a ***special clothing allowance.*** The AHA submits that the existing definitions of special clothing (clause 21.1b(i)), black and white attire (clause 21.1b(v)), and waterproof or other protective clothing (clause 21.1b(vi)), be retained in the Revised ED for the purposes of clause 26.6. The existing clauses are not ambiguous.

48. The AHA also submits that the redrafting of the existing HIGA clause 21.1(b) and (c) into Exposure Draft clause 26.6 has effectively expands the application of the ***laundry allowance*** to employers who have not previously been subject to a set dollar laundry allowance figure. The existing HIGA reference to a "catering employer" must be retained in lieu of the redrafted reference to a catering employee.

49. With respect to the ***airport catering travel allowance*** at Revised ED clauses 26.11 and the ***airport catering supervisory allowance*** at clause 26.13(a), the AHA submits the clauses do not properly reflect the existing description of the employer and employee to which these allowances apply. There is a distinction between an "airport catering employee" and an employee of an airport catering employers, and as such, the AHA restates its submission that the existing terminology in HIGA clauses 21.1(i) and 21.2(c) respectively, be retained.

Overtime

50. Existing HIGA clause 33.3(c) states "overtime worked on any day stands alone". This clause was not replicated in the Exposure Draft, nor the Revised ED, and the AHA submits that it should be retained as a clause in the Revised ED as its omission will change the way overtime is calculated.

Annual Leave

51. With respect to Revised ED clause 30 (clause 28 in the first Exposure Draft), the AHA is of the view that the Note that appears before Clause 30.1 is not necessary.

52. The AHA notes that 30.5(a) in the Revised ED has been varied to better define the application of clause 30.5, and the amended wording almost mirrors the corresponding application clause in the existing HIGA (clause 34.4(a)). The AHA submits that two important words remain missing from clause 30.5(a) and they should be included in the Revised ED in order to fully recognise the established application of clause 30.5. Those words are "at or" and they are to be inserted after the words "Clause 30.5 applies to an employee who is employed".

53. The AHA also submits that with respect to clause 30.5, references to "leave without pay" has been incorrectly interpreted as "unpaid leave". Unpaid leave is not an entitlement in the HIGA, nor is it an entitlement in the National Employment Standards in the *Fair Work Act 2009.* Reference to unpaid leave in the Revised ED could be incorrectly viewed as an entitlement to a particular form of leave, and should be replaced with the original term of *leave without pay*.

Schedule A

54. The AHA submits that the rewording of the Food and beverage attendant grade 3 definition to combine the two existing tasks currently appearing as the fifth and seventh dot points in the definition broadens the application of this grade beyond its original intention of when this grade applies. The existing two tasks have been re-worded as the one task of *"Assisting in the training and supervision of food and beverage attendants of a lower classification".* The inclusion of the additional words *"Assisting in the…"* at the start of the task alters the intention and interpretation of this task. The AHA restates this concern with the re-draft and submits the original wording be retained.

55. The words "or who has the appropriate level of training" has still been included in the Revised ED definitions of Cook grade 3 (tradesperson), Cook grade 4 (tradesperson) and Cook grade 5 (tradesperson). The AHA submits that this materially alters the definitions of these classifications and opens its application to persons who have not completed an apprenticeship or have not passed a trade test. The above classifications have only applied to a person who has completed an apprenticeship, or passed a trade test, and the additional wording changes the intent and interpretation of the classifications. The AHA submits the additional wording must not be included in future versions of the Revised ED.

Schedule B

56. With regard the Schedule B, the AHA restates its submissions from 13 June 2017 that:

57. The existing definition of an "Ordinary Hourly Rate" in the HIGA should be retained in this Schedule.

58. Throughout Schedule B reference is made to "general employees". This is a new term in the HIGA that is without definition elsewhere in the Revised ED. The AHA submits the word "general" is unnecessary, is confusing, and should not be included.

59. Where relevant, the Tables outlining the respective Ordinary, Saturday, Sunday and Public Holiday rates should include an additional note referencing that allowances may be applicable, including a reference to the applicable clause and Schedule.

Schedule D

60. With regard the Schedule B, the AHA restates its submissions from 13 June 2017 that:

61. In Schedule D.2 and D.6 the words "or contract of training" as found in the current version of the HIGA should be reinserted after the words "training agreement" in each respective clause. The removal of this phrase alters the intent and the application of this Schedule, and fails to recognise the varied terminology used across states and territories to describe training arrangements.

62. The wording found in the existing HIGA Schedule G.12 should be wholly retained in ED Schedule G. Its removal potentially alters the intent and application of this Schedule.

General Comments

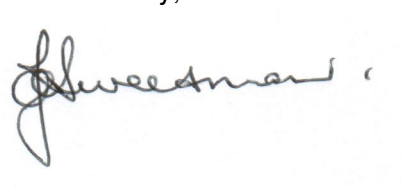
63. The AHA provided details of the variations it seeks in the HIGA in its submission of 13 October 2016 and those general variations proceedings are still pending. Due to several of the AHA sought variations having the potential to impact on clauses re-written in the Exposure Draft, the AHA submits that those general variations be considered prior to the finalisation of the Exposure Draft.

Summary

The AHA seeks to assist the Commission with respect to the plain language re-draft of the HIGA, and will participate in the Conference on 12 September 2017.

Any query in relation to this matter should be directed to Ms Joanna Minchinton at the AHA (Queensland Branch). Ms Minchinton can be contacted on (07) 3221 6999 or by email at jminchinton@qha.org.au.

Yours faithfully,



JOHN SWEETMAN AM
NATIONAL DIRECTOR, WORKPLACE RELATIONS
Email: j.sweetman@ahavic.com.au
Phone: 03 9654 7100