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

Please note: the witness statements are no longer being relied up and have been removed in accordance with AHA correspondence of 16 November 2018

24 July 2018

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—AM2014/272, AM2017/59**

1. We refer to the above matter and the Fair Work Commission's (the "Commission") Statement and Directions of 21 May 2018 regarding the *Hospitality Industry (General) Award 2010* ("HIGA") Substantive Issues.

2. This correspondence is provided on behalf of the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn, Motel and Accommodation Association (the "Associations").

3. The Directions require the parties to file comprehensive written submissions and any witness statements and/or documentary material in relation to the variations to the HIGA that have been proposed.

**Introduction**

4. The Associations have proposed a number of variations to the HIGA.

5. In its correspondence of 13 October 2016, the Associations set out each of the variations sought at that time, and provided draft determinations for each proposed variation.

6. Some of those proposed variations have been addressed through plain language redrafting of the HIGA, matter number AM2016/15 and are not pressed by the Associations.

7. Those items are the following items as listed in the summary of proposed variations ("Summary") published by the Commission on 22 May 2018 - 5A, 6, 10, 12, 13, 14 (with respect to references to the standard hourly rate), 19B (with respect to clarifying reference to annual leave at clause 27.2(a) as annual leave loading), 25, 26, 29, 31, 32 and 37.

8. Several of those proposed variations are or have been the subject of other Common Issues proceedings that are ongoing.

9. There are some proposed variations that are no longer being pursued by the Associations which we withdraw. Those items, with reference to the Summary, are items 3, (with respect to a new definition of a catering employee and a motel employee), 4, 9, 15, 16, 19A, 19B (remaining item), 24 and 35.

10. The proposed variations that the Associations ask the Commission to make, are outlined in this submission. In summary, the items, as per the Summary, that the Associations continue to press are: 2 (which is the same as item 5), 3 (with respect to accrued rostered day off and liquor service employee), 7, 8, 18A, 19, 20, 21 (which is the same as item 22), 23, 27, 28, 34, 36A and 39.

11. The Associations note that a final version of the Plain Language re-draft of the HIGA has not been released at the time of making this submission, and advises that it may seek to raise items from that process that remain unresolved during these proceedings.

**The Proceedings - 4 Yearly Review of Modern Awards**

12. The Commission must conduct a 4 Yearly Review of Modern Awards as soon as practicable after each 4th anniversary of the commencement of modern awards (see s.156 (1) of the Fair Work Act 2009 ("the FW Act")).

13. These proceedings are part of the first 4 Yearly Review of Modern Awards being conducted by the Commission.

14. The 4 Yearly Review of Modern Awards are "the principal way in which a modern award is maintained as a fair and relevant safety net or terms and conditions" (see the Explanatory Memorandum to the Fair Work Bill 2008 at [600]).

15. In a 4 Yearly Review of Modern Awards, the Commission must review all modern awards and may make, inter alia, one or more determinations varying modern awards (see s.156 (2)(b)(i) of the FW Act).

16. The conduct of a 4 Yearly Review necessitates the performance or exercise of the Commission's modern award powers (see s.134 (2) (a) of the FW Act; 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [17] and [29]).

17. Where the Commission is exercising modern award powers, the modern awards objective applies (see s.134 (2) (a) of the FW Act; 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [29]) and the Commission must also take into account the objects of the FW Act (see s.3 and s.134 (2) (a) of the FW Act).

**The Modern Awards Objective**

18. The modern awards objective is set out at s.134 (1) of the FW Act as follows:

> ***134 The modern awards objective***
>
> *What is the modern awards objective?*
>
> *(1) The 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) relative living standards and the needs of the low paid; and*
> *(b) the need to encourage collective bargaining; and*
> *(c) the need to promote social inclusion through increased workforce participation; and*

*(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

*(da) the need to provide additional remuneration for:*

*(i) employees working overtime; or*

*(ii) employees working unsocial, irregular or unpredictable hours; or*

*(iii) employees working on weekends or public holidays; or*

*(iv) employees working shifts; and*

*(e) the principle of equal remuneration for work of equal or comparable value; and*

*(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*

*(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

*(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

*This is the **modern awards objective**.*

**Proposed Variations**

Item 2 - Multi-Hire Arrangements

19. The Associations seek a variation to clause 11 of the HIGA.

20. The proposed variation incorporates additional wording in the description of a full-time employee to facilitate the variation.

21. The nature of the variation sought is the introduction of what is commonly referred to as multi-hire or multi-hiring.

22. Multi-hiring could be aptly described as the ability for a full-time employee to perform hours of work in a different section of a business as a casual employee, in what could be considered a separate engagement.

23. The Associations propose that the variation would allow a full-time employee to request casual work, in addition to their full-time hours, in a different stream or area of business, which provides an opportunity for an employee to earn additional remuneration that might be available to them, and to gain new skills.

24. The Associations submit that clause 11 be deleted and replaced with the following:

**11. Full-time employment**

11.1 A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week.

11.2 Full-time employees may also be engaged on a casual basis for duties in a separate engagement in a separate section of the workplace. Such engagements shall be subject to the following conditions:

(a) the work required to be performed in the separate engagement is not within the usual job description of the employee concerned;

(b) the separate engagement is to meet a specific purpose;

(c) the separate engagement enables the employee to attain additional remuneration and/or skills;

(d) the separate engagement must be at the instigation of the employee and be subject to mutual agreement between the employer and the employee concerned;
(e) the separate engagement is not designed to avoid overtime obligations but genuinely meets the tests set out in clause 11.2(a) to (d);
(f) the separate engagement is limited to a maximum of 12 hours per week.

25. The Associations note that the issue of multi-hiring was the subject of a section 113 application to vary an award in accordance with the *Workplace Relations Act 1996 (Cth)* (the "WR Act").

26. This application, lodged by the Australian Hotels Association in 1996, sought to vary clause 16.1 of *The Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995 (the Federal Hotels Award)* to introduce multi-hiring.

27. The application, (C No. 90395 of 1996) was heard by a Full Bench of the then Australian Industrial Relations Commission across several dates in late 2016 and early 2017.

28. The decision, released on 9 October 1997 ("the 1997 Decision"), reference is Print P5546.

29. The AHA's application was not successful for the reasons given in the Decision.

30. Relevantly, the repeal of the WR Act and the introduction of the FW Act has changed the legislative framework.

31. The Modern Awards Objective provides the framework for the Commission to ensure that modern awards '*provide a fair and relevant minimum safety net of terms and conditions'* (s134(1)).

32. The Associations submit that while the Commission might have regard for the 1997 decision, in exercising its powers in accordance with the FW Act, the Commission must consider the proposed variation having regard for its obligations under the FW Act, mainly, ensuring that the objects of the FW Act and the Modern Awards Objective have been met.

33. The proposed variation sought in this submission differs to the one sought in 1997 in that the variation sought in these proceedings requires an employee to instigate any multi-hiring and places a 12 hours of work per week limit on the casual position.

34. In this regard the Associations submit that an employee is free to choose whether or not to pursue such an arrangement.

35. It is noted that in the 1997 Decision the Full Bench stated that:

> *"The material before us supports the general conclusion that the facilitation of multi-hiring may have the potential to provide benefits to employers and employees."*

36. The Associations submit that the benefits identified in the 1997 Decision are still relevant, particularly with respect to those identified as being a benefit to employees.

37. Meanwhile there has been a material change in circumstances in the time since that means the detriments outlined in the 1997 Decision should be reconsidered.

38. In the 1997 decision the Full Bench stated that:

> *"In our view the introduction of multi-hiring is properly a matter for bargaining between the parties at the workplace or enterprise level."*

39. The Associations note the need to encourage collective bargaining (s.134 (1) (b)), however the result of various legislative changes including Award Modernisation is that the HIGA covers a wider and more diverse range of employers than were covered by the Federal Award at the time of the 1997 decision.

40. It is not practical or viable for many hospitality employers to engage in collective bargaining, accordingly, it is submitted that the introduction of multi-hiring should no longer be limited to those employers with the resources available to engage in collective bargaining.

41. The Associations also note that in the time since the 1997 Decision the industrial relations landscape has changed dramatically through legislative change and award modernisation.

42. Certain employers now covered by HIGA were previously covered by pre-modern award instruments that provided for Multi-hiring.

43. In this regard, the Associations submit that a multi-hiring term within an Award that applies to the hospitality industry is not without precedent.

44. The Associations submit that those employers should not have to collectively bargain to achieve a term that was previously an appropriate award entitlement that reflected an industry practice.

45. The pre-modern award, the *Hotels, Motels, Resorts and Accommodation Award - State (excluding South-East Queensland) 2005* included a multi-hiring clause:

> *'2.4 MULTI-HIRING*
>
> *Full-time and part-time employees may be separately engaged as casual employees for duties in a separate section of the establishment from that in which the employee engages in their full-time or part-time employment. Such employees shall be paid the appropriate rate of pay for a casual employee engaged in the section of the establishment.*
>
> *For the purposes of clause 2.4 a "section of the establishment" means a work location other than the employee's usual work location, or alternatively, means a discrete set of duties other than the employee's usual duties, provided such duties are not wholly or substantially performed in the employees usual work location, and shall not apply to work where overtime would normally be performed'.*

46. The pre-modern award, the *Hotels, Resorts and Certain Other Licensed Premises Award - State (excluding South-East Queensland) 2003* also included a multi-hire clause:

> *'4.4 MULTI HIRE*
>
> *4.4.1 Full-time employees may also be engaged on a casual basis for duties in a separate engagement in a separate section of the establishment. Such engagements shall be subject to the following conditions:*
> *(a) the work required to be performed in the separate engagement is not within the usual job description of the employee concerned;*
> *(b) the separate engagement is to meet a specific purpose;*
> *(c) the separate engagement enables the employee to attain additional remuneration and/or skills and, to this end, where the employee does not possess the necessary skills, training must be provided;*
> *(d) the separate engagement must be at the instigation of the employee and be subject to mutual agreement between the employer and the employee concerned;*
> *(e) the separate engagement is not designed to avoid overtime obligations but genuinely meets the tests set out in clause 4.4.1(a) to (d)'.*

47. The 1997 decision cited reduced employment and a safety net reduction as detriments to the introduction of multi-hiring.

48. It is submitted that one material change in the time since the 1997 decision has been the increase in the use of labour hire.

49. The Associations submit that this has changed the manner in which many employer's access additional labour and which many employee's access additional work.

50. The Queensland Parliament Finance and Administration Committee conducted an inquiry into the practices of the labour hire industry in Queensland.[1]

51. It was commented in the inquiry overview that, with respect to the labour hire industry:

> *'The development of the industry has been attributed to employers' preferences for an agile and flexible workforce which can respond to changing work demands and support simplified and cost effective management practices'.*[2]

52. The Inquiry Report discussed the negative impacts of labour hire at pages [14-15].

53. The Associations submit that one consequence of this increasing trend could be that in many cases employers utilise a labour hire arrangement rather than hiring additional staff or paying overtime rates.

54. In this regard, the Associations submit that the detriments identified in the 1997 Decision in relation to reduced employment and a safety net reduction may have nevertheless occurred without any of the benefits being achieved for employees.

55. The Associations submit that the proposed multi-hiring variation could reduce the level of labour hire use within the Hospitality Industry and with it, achieve many of the benefits that were identified in the 1997 decision.

56. Namely, reduced turnover, greater flexibility, improved services and skill acquisition.

57. The Associations further submit that the opportunity to be cross trained and earn additional income may lead to an increase in full-time employment.

58. The Associations note that the *Alpine Resorts Award 2010* ("the Alpine Award") features a multi-hiring provision, as set out below:

> ***'19.3 Multi-hiring arrangement***
> *(a) As an alternative, or in addition to, dual-role employment, an employee may by agreement be engaged on a multi-hiring arrangement.*
> *(b) If an employer and an employee enter into a multi-hiring arrangement, the parties must agree on the primary role of the employee.*
> *(c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within Schedule B—Classification Definitions that they are qualified for, provided that:*
> *(i) any non-primary role is to be undertaken, and paid for, on a casual basis; and*
> *(ii) any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role.*
> *(d) Where clause 19.3 applies, clause 19.1 does not apply'.*

[1] Finance and Administration Committee, Parliament of Queensland, *Inquiry into the practices of the labour hire industry in Queensland* (2016).
[2] Ibid 5.

59. Seasonality and fluctuation is an aspect of the hospitality industry, as is regional and isolated locations, onsite staffing arrangements and venues that offer a wide mix of services.

60. The insertion of a multi-hire clause in the HIGA would, it is the Associations submission, achieve the following:

- Provide flexibility for employers to engage existing employees under a separate contract for a different role within their business to fulfil their labour requirements;
- Provide clear guidelines on the implementation of such arrangements to protect both the employer and the employee;
- Provide the ability for employees to increase their participation in the workforce and to earn additional income, which would otherwise be unavailable to them in the primary role/position with the employer;
- Provide ability for employees to learn new skills and knowledge to increase their job satisfaction as well as increase their ability for career progression.

61. Moreover, without such a clause in the HIGA, small and medium-sized enterprises that rely on the modern awards to provide flexibility, would not have access to such arrangements.

62. This is inequitable when compared with larger organisations that have resources to engage in collective bargaining.

63. The insertion of such a clause is permissible in accordance with Subdivision A Section 138 of the FWA which provides that:

*'A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective'.*

64. Section 134 of the FWA, which details the modern awards objective, provides at sub section (1) that:

*'The 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:*

*(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

*(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden';*

65. The Association's proposed multi-hire clause is consistent with the modern awards objective.

66. Further, Section 3 of the FWA which details the Objects of the Act provides that:

*'The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*

*(g) acknowledging the special circumstances of small and medium-sized businesses'.*

67. The Association's proposed multi-hire clause would be consistent with this Object of the Act.

68. Nothing contained within Subdivision D – Terms that must not be included in modern awards of the FWA prevents the inclusion of such a clause into the modern award.

69. Accordingly, it is the submission of AHA that the inclusion of such a clause is both permissible by and consistent with the objects of the FWA for the reasons stated above.

Item 3 - Liquor service employee definition

70. The Associations make no specific submission with regard to the *liquor service empl*oyee definition, but seek to highlight that the definition at clause 3 of the HIGA, and at clause 15.1 differ. The definition at clause 15.1 includes the words "as well as cellar employees or other places where liquor is sold" after the word "shops", whereas the definition at clause 3 uses the words "and includes a cellar employees" after the words "shops".

71. The Associations note that in the current Plain Language Exposure Draft ("PLED") of the HIGA, published on 22 May 2018, the definition at clause 3 has been replicated at clause 3 of the PLED, and the definition at existing HIGA clause 15.1 removed. If it is the Commission's intention to retain the definition provided at clause 3 of the HIGA, the Association's make no further comment.

Item 3 - Junior employee

72. The Associations submit that a junior employee definition be inserted into HIGA clause 3.1. It is noted that a definition was included in the PLED, and refers to a junior employee as being an employee who is less than 21 years of age.

73. The Associations submit that for clarity of the application of junior rates of pay, currently provided at clause 20.5, it is necessary and relevant to expand the definition to the below proposed definition:

> *'**junior employee** means an employee who is less than 21 years of age and who is not undertaking a nationally recognised traineeship or apprenticeship'.*

74. An employee who is undertaking a traineeship receives the relevant rate of pay as per the *Miscellaneous Award 2010,* and an employee who is undertaking an apprenticeship received the relevant rate of pay as detailed at clause 20.4 or Schedule G. A junior is a different class of employee to an employee undertaking a traineeship or an apprenticeship.

75. The Associations submit that for the purposes of a clear application of the junior rates of pay the above definition be inserted at clause 3.1. The need for clarity has been accepted by the Commission in the plain language re-drafting of the HIGA.

76. The Associations further submit that inclusion of its proposed junior definition is consistent with the modern awards objective, specifically section 134(1)(g), for ensuring a simple and easy to understand application of the junior rates of pay.

Items 3 and 23 - Accrued rostered day off

77. The Associations have raised two HIGA clause matters relating to the term *accrued rostered day off.*

78. The first is that the Associations submit that an accrued rostered day definition be inserted at clause 3.1 of the HIGA (item 3). Secondly, the Associations submit that this term be inserted into specified sub clauses of clause 29.1 to clarify entitlements in circumstances

where, as per clause 29.1(a), second last dot point in the list, a full time employee accrues a paid day off by working 160 hours over a 4 week period (item 23).

79. The Associations raised the concept of accrued rostered day off during matter AM2016/15.

80. The sub clauses of clause 29.1 are:
- Clause 29.1(c)
- Clause 29.1(c)(ii)
- Clause 29.1(c)(iii)
- Clause 29.1(c)(iv)
- Clause 29.1(c)(v)
- Clause 29.1(c)(vi)
- Clause 29.1(c)(vi)(B)

81. The Associations submit that the current use of the word *rostered day off* in the above sub clauses does not accurately reflect the intention of the rostered day off entitlement. Where an employee works an average of 38 hours per week by working 160 hours each four week cycle, with a minimum of eight days off each four week period, the employee does not receive another rostered day off. Rather, the employee has accrued a day off that is paid at the employee's ordinary hourly rate.

82. Currently the HIGA contains a definition, at clause 3.1, of a rostered day off. The definition is:

> *'**rostered day off (RDO)** means any continuous 24 hour period between the completion of the last ordinary shift and the commencement of the next ordinary shift on which an employee is rostered for duty.'*

83. A rostered day off is unpaid and is simply a day an employee is not rostered to work. The meaning of this term is not consistent with the intention of the paid day off that is accrued when a full time employee works an average of 38 hours per week by working 160 hours each four week cycle.

84. The Association's submission in AM2016/15 to insert the word "accrued" in the plain language version of 29.1(a) second last dot point (PLED clause 15.1(vi)) and in the redrafting clause 29.3 (PLED clause 15.3(i) was accepted.

85. The Association's submit in addition to the changes made in the PLED, where the term *rostered day off* appears in the above listed sub clauses (as appearing in the existing HIGA) it should be replaced with the words *accrued rostered day off*.

86. The Associations submit that the term accrued rostered day off more appropriately describes the circumstances in the above clauses where an employee works an average of 38 hours per week in a manner that allows them to accrue one paid day off per four week cycle.

87. Amendment of the term as proposed is consistent with the modern awards objective, and it also consistent with the intention of the Plain Language Guidelines, as published by the Commission.

88. In addition to the amendments sought to clause 29.1, the inclusion of a definition of *accrued rostered day off* is appropriate to clearly define the concept. The Associations submit the following definition be inserted at HIGA clause 3.1:

> '***accrued rostered day off*** means a paid rostered day off accrued in accordance with clause 29.1(a)'.

Item 7 - Competency Based Wage Progression

89. The Associations seek a variation to Clause 14 and Clause 20.4 of the HIGA.

90. Clause 20.4(a) and (b) of the HIGA regulate the minimum wages payable to apprentices.

91. Clause 14 regulates specific terms and conditions applicable to apprentices.

92. This variation relates to the employment and payment of apprentices.

93. The proposed variation is the introduction of competency based wage progression ("CBWP") to the HIGA.

94. The minimum wage payable to an apprentice is expressed as a percentage of the Standard Weekly Rate that is defined in Clause 3 – Definitions, of the HIGA, as the weekly wage for a level 4 employee.

95. With respect to a cooking apprenticeship, the percentage that an apprentice receives relative to the standard weekly rate increases with each year of the apprenticeship in four intervals on the anniversary of the commencement of the apprenticeship with the Employer. This is commonly referred to as a nominal term or nominal term progression.

96. With respect to a waiting apprenticeship, these increases relate to four six month intervals.

97. CBWP could be simply described as a wage progression that:

> "means that upon the acquisition of the competencies associated with a particular year or stage of the apprenticeship, the apprentice is entitled to be paid the minimum wage rate associated with the next year or stage".[3]

98. While wages and employment conditions are, for the most part, regulated by modern awards, the apprenticeship system is regulated by state and territory governments.

99. CBWP has been a feature of apprenticeship training arrangements in various states and territories, including Queensland and Victoria.

100. All apprenticeships in Queensland are competency based.

101. CBWP was a feature of training in Queensland prior to Award Modernisation.

102. In its referral of its Industrial Relations powers to the Commonwealth in 2009, the Queensland government sought the preservation of CBWP arrangements for certain employers.[4]

103. The result was a complicated set of preserved arrangements that bound certain employers to pre-modern award wages and conditions of employment.

104. These arrangements, thought to be ongoing, were found to be no longer applicable for most affected employers as a result of the Decision of Spencer C of 12 August 2016 [2016] FWC 2832.

---

[3] *Modern Awards Review 2012—Apprentices, Trainees and Juniors* [2013] FWCFB 5411, [270].

[4] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth); *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (Cth); *Fair Work Legislation Amendment Regulations 2009 (No.2)* (Cth); *Fair Work Legislation Amendment Regulations 2009 (No.3)* (Cth).

105. This Decision was affirmed on Appeal (*Appeal by All Trades Queensland P/L against decision of Spencer C of 12 August 2016 [[2016] FWC 2832] Re: Construction, Forestry, Mining and Energy Union and Ors* [2017] FWCFB 132 (7 February 2017)).

106. An application to the Federal Court to continue using those preserved arrangements was also dismissed (*All Trades Queensland Pty Limited v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 189).

107. The result is the loss of the CBWP arrangements that were the reason for the preserved arrangements being put in place.

108. A small subset of unincorporated Queensland employers remain bound to those preserved arrangements for apprentices and trainees.

109. The Associations submit that the proposed variation that allows for either CBWP or nominal term progression would address any inconsistencies between the training arrangements in a particular jurisdiction and the modern award.

110. The Commission has already addressed the concept of CBWP in substantial detail.

111. In its Decision regarding Apprentices, Trainees and Juniors in the Transitional Review of Modern Awards, [5] a Full Bench of the Fair Work Commission considered CBWP.

112. The Commission stated at Paragraph 295 that:

> ***[295]*** *We are satisfied that it is consistent with the modern awards objective for the Commission to facilitate the introduction of CBWP for apprentices in awards where it is not already provided for. We agree with the submission of the Commonwealth that the adoption of CBWP in awards supports the modern awards objective of promoting flexible modern work practices and the efficient performance of work (s.134(1)(d) of the Act). We are also satisfied that such a provision will promote productivity in that it will facilitate a more skilled workforce (s.134(1)(f)).*[6]

113. The Associations submit that the Commission's Decision[7] is particularly persuasive in relation to these proceedings and the variation being sought.

114. The proposed variation to the HIGA is similar to the term found in the *Manufacturing and Associated Industries and Occupations Award 2010* which was the subject of a variation ([2014] FWCFB 1675) as a result of the Commission's Apprentices, Trainees and Juniors Decision in the Transitional Review of Modern Awards.[8]

115. In its decision in [2014] FWCFB 9156 (4 yearly review of modern awards — Apprentice conditions (AM2014/192)), the Commission established that it was appropriate to vary modern awards subject to the Four Yearly Review in accordance with its Decision regarding Apprentices, Trainees and Juniors in the Transitional Review of Modern Awards[9] arising from the Transitional Review of Modern Awards.

116. Accordingly, the Associations submit that the proposed variation is appropriate and will promote flexible and efficient workplaces *(s.134(1)(d)* and will promote productivity *s.134(1)(f))*.

---

[5] *Modern Awards Review 2012—Apprentices, Trainees and Juniors* [2013] FWCFB 5411.
[6] Ibid [295].
[7] *Modern Awards Review 2012—Apprentices, Trainees and Juniors* [2013] FWCFB 5411.
[8] Ibid.
[9] Ibid.

Item 18A - Fork Lift Driver Allowance

117. Clause 21.2(a) of the HIGA applies as an all purposes allowance for full-time employees, while part-time employees and casual employees are paid a daily amount for a maximum of five days.

118. For the reasons that follow, it is the Association's view that this clause is not simple and easy to understand, when read in conjunction with other provisions in the HIGA or the proposed provisions in the PLED.

119. Accordingly, the Associations seek to amend clause 21.2(a) so that the fork lift driver allowance is expressed as an amount per hour that applies to all employees.

***Full-time employees***

120. Clause 21.2(a) provides that a full-time fork lift driver "*must be paid an additional allowance, per week, equal to 1.5% of the standard weekly rate for all purposes*". This equates to $12.56 per week.

121. The correct approach to applying an all-purpose allowance is to add the all-purpose allowance to the employee's minimum hourly rate, which results in the employee's ordinary hourly rate. It is the ordinary hourly rate which is then used for the purposes of calculating penalty and overtime rates (see clauses 20.1 and 21.2 (a) of the HIGA; see clauses 2, 26.2, 28 and 29 of the HIGA PLED).

122. However, there is no guidance as to how to convert the allowance of 1.5% of the standard weekly rate (currently equal to $12.56) into an hourly amount in order to calculate the ordinary hourly rate.

123. It is submitted that the requirement to add an allowance expressed as weekly amount to the employee's minimum hourly rate is not simple and easy to understand.

124. In our view, the fork lift driver all-purpose allowance should be expressed as an *amount per hour* to be added to the minimum hourly rate. This would make the provision clearer and easier to understand, and obviate the need to undertake the additional step of converting the weekly allowance into an hourly figure. It would also remove any ambiguity as to whether the all-purpose allowance applies to hours in excess of 38 per week.

125. We calculate the current value of the fork lift driver allowance to be 33 cents per hour, which presents 1.5% of the standard hourly rate, which would be an appropriate method of adjustment going to forward.

***Part-time and casual employees***

126. The fork lift driver allowance for part-time employees and casual employees was varied by consent on 15 August 2013 to incorporate an amount payable per day up to a maximum of five days (see *Luxury Lodges of Australia Ltd and others* [2013] FWC 5736; PR540249).

127. While the provision was varied by consent, the AHA accepts the effect of the variation is that it no longer truly operates as an all-purpose allowance, but rather operates as an additional allowance per day up to a maximum of five days per week.

128. The interaction of this provision with the provisions in the HIGA (and the HIGA PLED) which require an all-purpose allowance to be added to the employee's minimum hourly rate creates an ambiguity and results in an outcome that is not simple or easy to understand. For example, the reference to the fork lift driver allowance as an all-purpose allowance for part-time and casual employees is not an accurate description. Alternatively, if it is an

accurate description, then the expression of that allowance as a daily payment, up to a maximum of five days conflicts with the provisions of the HIGA (and HIGA PLED) which require the all-purpose allowance to be added to the employee's minimum hourly rate.

129. Another example which creates ambiguity is how the allowance applies in circumstances where a part-time employee (working a fortnightly or four weekly roster cycle) or casual employee works a 6th day in a week.

130. In our view, if the fork lift driver allowance for part-time and casual employees is to be a true all-purposes allowance (consistent with the HIGA and the HIGA PLED), the allowance should be expressed as an *amount per hour* to be added to the employee's minimum hourly rate.

Item 19 - Payment of Wages

131. The Associations seek a variation to clause 26 of the HIGA.

132. The variation sought relates to the payment of wages to full-time employees employed as per an arrangement of hours in accordance with clause 29.1(a) that averages ordinary hours of work over a period of more than one week.

133. Those averaging arrangements are:

- *152 hours each four week period with a minimum of eight days off each four week period;*
- *160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off;*

134. The Associations have proposed, at Item 21, two additional averaging arrangements that would also represent an arrangement of hours that averaged ordinary hours of work over a period of more than one week.

135. The Associations seek the introduction of a new sub clause in clause 26 that would apply to a full-time employee being paid wages and working their hours in accordance with one of the mentioned averaging arrangements outlined in clause 29.1(a).

136. The proposed additional sub clause, clause 26.6, is as follows:

> *'A full-time employee who works an average of 38 hours per week in accordance with an averaging arrangement as specified in clause 29.1(a), may be paid as if the employee worked 38 hours each week, irrespective of whether the employee worked more or less hours, provided that, subject to clause 33.4, at the end of the averaging period the employee shall receive payment for all overtime worked'.*

137. The effect of this new sub clause would be that a relevant employee is paid the average of 38 hours per week for each week of a 4 week cycle, as demonstrated in the below example for a full-time employee:

| **Week** | **Hours Worked** | **Hours Paid** |
|---|---|---|
| **1** | 35 | 38 |
| **2** | 45 | 38 |
| **3** | 30 | 38 |
| **4** | 42 | 38 |
| **Total hours** | 152 | 152 |

138. An example for a part-time employee who has a guarantee of 20 hours per week:

| Week | Hours Worked | Hours Paid |
|---|---|---|
| **1** | 25 | 20 |
| **2** | 10 | 20 |
| **3** | 18 | 20 |
| **4** | 27 | 20 |
| **Total hours** | 80 | 80 |

139. The Associations submit that new sub clause 26.6 provides clarity and simplicity of payment where an average of hours in excess of an average of one week is worked.

140. It is noted that clause 26 of the HIGA is subject to the Payment of Wages Common issue (AM2016/8), however the Associations submit that the variation sought is not inconsistent with the purpose and intent of the matters being considered in AM2016/8.

141. In its decision handed down on 1 December 2016, the Full Bench of the Fair Work Commission [2016] FWCFB 8463 (AM2016/8), proposed at Paragraph 34, a provisional model term for timing of payment of wages:

> ***[34]*** *Our provisional 'payment of wages and other amounts' model term is as follows:*
>
> ***X. Payment of wages and other amounts***
>
> ***x.1 Pay periods and pay days***
> *(a) The employer must pay each employee no later than 7 days after the end of each pay period:*
> *(i) the employee's wages for the pay period; and*
> *(ii) all other amounts that are due to the employee under this award and the NES for the pay period.*
> *(b) An employee's pay period may be:*
> *(i) one week;*
> *(ii) two weeks; or*
> *(iii) subject to paragraph (e), one month.*
> *(c) The employer must notify each employee in writing of their pay day and pay period.*
> *(d) Subject to paragraph (e), the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.*
> *(e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to [insert date of commencement of this clause], the employer may continue to pay employees in that classification monthly without further agreement.*
> *(f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.*
>
> ***x.2 Method of payment***
> *Payments under clause x.1(a) must be made by electronic funds transfer to the account at a bank or financial institution nominated by the employee, or by cash or cheque.*

142. In its further decision handed down on 17 July 2018, the Full Bench of the Fair Work Commission [2018] FWCFB 3566 (AM2016/8) finalised the 'Payment on termination of employment' model term.

143. The Associations submit that the proposed variation does not detract from or contradict the model terms.

144. The Commission stated at Paragraph 47 of the 1 December 2016 Decision that:

> ***[47]*** *Our provisional view is that there would be benefit in either replacing the existing provision for payment in all modern awards with the model term (once finalised), or alternatively with a version of the model term appropriately adapted to the existing award payment arrangements. Following are two examples of how the provisional model term might possibly be adapted to existing arrangements.*

145. In its 1 December 2016 decision the Commission provisionally indicated that the model term does not have to be unconditionally applied to each modern award.

146. The Associations note that as is reflected in a summary of submissions regarding the payment of wages issue, posted on the Commission's website on 30 November 2017, most parties support the adaptation of the model clause on an award by award basis.

147. It is submitted that the Hospitality Industry consists of diverse working arrangements that arise as a result of hours of work that encompass late nights, weekends and periods of trade that can fluctuate due to seasonal demand.

148. The HIGA, through the averaging arrangements provided for in clause 29.1(a), provides for working arrangements that differ to the traditional 5 day 38 hour working week.

149. Accordingly, it would be appropriate, having regard for the Commission's views and the existing arrangements in the industry, for the HIGA to feature an adapted model term consisting of the variation proposed in these submissions.

150. The remaining issues arising from the 1 December 2016 Decision relates to accrual of wages.

151. In its 1 December 2016 decision the Commission addressed accrual of wages at paragraphs [123-136].

152. The Commission in its Statement and Directions of 19 September 2017 FWCFB [2017] 4817 sought submissions from the parties having regard for the submission of Irving and Stewart on the payment of wages model term and how wages are accrued.

153. The Irving and Stewart submission discusses how and when wages are accrued and seeks the introduction of the term 'accrued' into the model clause with respect to when wages are due.

154. In the 17 July 2018 Decision, the Full Bench stated at paragraph 66;

> "***[66]*** *We propose to deal with the issue of accrual of wages in the course of finalising the provisional 'Payment of wages and other amounts' model term. We will consider whether to insert 'accrued' into paragraph (a)(i) of the model term at that time."*

155. Although this issue has not yet been determined, the Associations submit that the proposed variation to Clause 26 of the HIGA would not be inconsistent with the submission put forward by Irving and Stewart.

156. Where an employee performs their ordinary hours of work in a manner that averages hours of work over a period of more than 1 week, overtime is determined having regard for the total hours worked over that roster cycle, therefore, any overtime payment is only accrued in the final week of the roster cycle.

157. Further, an agreement between an employer and employee to perform the ordinary hours of work as an averaging arrangement is an agreement to perform an average of 38 ordinary hours per week.

158. Accordingly, the Associations submit that an employee accrues an entitlement to payment of 38 ordinary hours each week, therefore, the Associations proposed variation that an employee be paid 38 hours per week of a roster cycle irrespective of fluctuations in the actual ordinary hours worked is consistent with the Irving and Stewart submission.

159. The Associations submit that the proposed variation has a benefit for the employees that it would apply to.

160. The proposed variation would result in a stable and consistent payment of wages each week, providing applicable employees with more certainty in relation to managing their financial commitments, and may alleviate the impact of any excessive taxation in a particular pay week.

Items 20 and 28 - Time off accrued for time worked on a Public Holiday

161. The Associations seek a variation to clause 27.2(c) and clause 32.2(b) of the HIGA.

162. The nature of the changes sought to these respective clauses are materially the same.

163. Clause 27.2(c) applies to employees classified as Managerial Staff (Hotels) as per the definition at Schedule D.2.9, who are in receipt of a salary that is at least the amount specified in clause 27.2(a).

164. Clause 27.2(c) states:

> *'(c) An employee being paid according to clause 27.2(a) 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.'*

165. The Associations note the Annualised Salaries Common Issue [AM2016/13] proceedings before the Commission, and submit that the amendment proposed to the existing HIGA clause 27.2(c) does not materially affect the progress of the Common Issue.

166. Clause 32.2(b) applies to employees (other than casual employees) entitled to the payment of penalty rates in accordance with clause 32.1 and that have agreed, in accordance with clause 32.2(b), to substitute the payment of penalty rates with the entitlement provided for in accordance with clause 32.2(b).

167. Clause 32.2(b) states:

> *'(b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due'.*

168. The variation sought with respect to both clause 27.2(c) and clause 32.2(b) relate to the 28 day period in which the time worked on a public holiday to be taken as time off.

169. The Associations submit is that the words 'or at other such time as agreed by the employer and the employee' be added to clause 27.2(c) and 32.2(b) in relation to the 28 day period.

170. Clause 27.2(c) would, upon variation, read as:

> *'(c) An employee being paid according to clause 27.2(a) 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, or at other such time as agreed by the employer and the employee.'*

171. Clause 32.2(b) would, upon variation, read as:

> *'(b) Employees (other than casuals) who work on a prescribed holiday may, by agreement, perform such work at their applicable ordinary hourly rate plus 25% additional loading rather than the penalty rate prescribed in clause 32.1, provided that equivalent paid time is added to the employee's annual leave or one day instead of such public holiday will be allowed to the employee during the week in which such holiday falls. Provided that such holiday may be allowed to the employee within 28 days of such holiday falling due, or at other such time as agreed by the employer and the employee '.*

172. The Associations submit that the effect of the amendments to clauses 27.2(c) and 32.2(b) is to allow an employee who has accrued paid time off to agree with their employee to take that time off at a time beyond the 28 day timeframe.

173. The Associations submit that operationally, the existing 28 day timeframe can be impractical as it may not be possible for time off to be taken, for example, during busy work periods.

174. The Associations also submit that the current 28 day timeframe may also be impractical for employees who would rather take the time off in conjunction with a planned period of leave that is beyond the 28 day period immediately after accruing the paid time off.

175. For example, some States and Territories prescribe four public holidays each year in the period between Good Friday and Easter Monday.

176. This is often followed by a prescribed public holiday on 25 April (Anzac Day) and in some states and/or territories, a prescribed public holiday in early May (labour or May day).

177. For example, in 2019 Anzac Day will fall three days after Easter Monday.

178. Where an employee works on a number of these public holidays, this cluster of public holidays can make it difficult for employers to meet its ongoing operational requirements while complying with the 28 day period, and providing an employee with his or her normal rostered days off.

179. The Associations submit that the variation provides additional flexibility for both employers and employees, and would enable this accrued paid time to be taken at a later time if that later time was more suitable.

180. It is also submitted that by making the extension beyond the 28 day period contingent on mutual agreement, the employee is not disadvantaged by the variation.

181. An employee would retain the right to be provided with that paid time off within the 28 day period.

182. Accordingly, the Associations submit that the proposed variations meet the modern awards objective, specifically, Section 134 1(d).

Item 21 - Averaging Hours of Work

183. The Associations seek a variation to clause 29.1(a) of the HIGA.

184. Clause 29.1(a) provides for the different ways in which the average of 38 ordinary hours per week can be performed by a full-time employee.

185. Clause 29.1(a) states:

> ***'29.1 Full-time employees***
> ***(a)*** *The average of 38 hours per week is to be worked in one of the following ways:*
> - *a 19 day month, of eight hours per day;*
> - *four days of eight hours and one day of six hours;*
> - *four days of nine and a half hours per day;*
> - *five days of seven hours and 36 minutes per day;*
> - *152 hours each four week period with a minimum of eight days off each four week period;*
> - *160 hours each four week period with a minimum of eight days off each four week period plus a rostered day off;*
> - *any combination of the above'.*

186. The variation sought by the Associations is to include two additional ways in which an average of 38 hours per week can be worked.

187. The first additional averaging way is:

- *76 hours over a two week period;*

188. It is submitted that an averaging arrangement of this nature is permitted by section 63(1) of the FW Act, and is consistent with section 134(1)(d) of the modern awards objective.

189. The HIGA allows employers to pay employees on a fortnightly basis at clause 26.2, and rostering practices to enable a full time employee to average their hours over a two week period complements this fortnightly payment basis.

190. The Associations submit that many hospitality employers use a fortnightly pay cycle.

191. The Associations submit that this arrangement simply creates an option between the arrangements currently available that average hours of a four week cycle and those that provide for the performance of work over a single week.

192. The introduction of this arrangement has no impact on other entitlements or protections available to an employee in accordance with the HIGA nor does it have an impact on the HIGA meeting the modern awards objective, specifically s.134 (1) (da).

193. The second additional averaging way sought is:

- *by averaging the hours worked over a 26 week period;*

194. Many hospitality employers operate within the Tourism industry either solely, or in addition to, the corporate and leisure markets.

195. For hospitality employers reliant on international and domestic tourism, such as hospitality operators located in regional or semi regional areas, hours of work can fluctuate significantly over the course of a day, week, and a season.

196. This results in periods of substantially increased trade and periods of substantially reduced trade.

197. Substantial fluctuations in trade will influence in increased or decreased demands on labour.

198. The Associations believe that it is appropriate for the HIGA to feature an averaging arrangement that is greater than the current maximum of 4 weeks, and submits that the FW Act at section 63(1) enables a modern award to contain averaging of hours terms, and further, as per section 64(1) effectively restricts an averaging mechanism to 26 weeks in duration.

199. A copy of section 63 is below:

> ***63 Modern awards and enterprise agreements may provide for averaging of hours of work***
>
> *(1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:*
> *(a) for a full-time employee—38 hours; or*
> *(b) for an employee who is not a full-time employee—the lesser of:*
> *(i) 38 hours; and*
> *(ii) the employee's ordinary hours of work in a week.*
> *(2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).*
>
> *Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).*

200. With regard to 63(1), the Associations propose to insert a 26 week averaging period is not inconsistent with this section, as the Associations are not seeking to vary the average to be any greater than 38 hours per week for a full-time employee.

201. The FW Act at section 64 provides for the averaging of hours of work for award/agreement free employees may be for a period that does not exceed 26 weeks:

> ***64 Averaging of hours of work for award/agreement free employees***
>
> *(1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:*
> *(a) for a full-time employee—38 hours; or*
> *(b) for an employee who is not a full-time employee—the lesser of:*
> *(i) 38 hours; and*
> *(ii) the employee's ordinary hours of work in a week.*
> *(2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).*
>
> *Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with an agreed averaging arrangement (whether the arrangement complies with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging arrangement will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).*

202. Read together, the Associations submit that an averaging period of 26 weeks is permitted by section 64(1), and, via section 63(1), can be an averaging mechanism in the HIGA.

203. The Associations submit that averaging periods of greater than four weeks are already characteristics of several modern awards due to the circumstances of the businesses covered by each award.

204. It would be appropriate for an averaging mechanism in excess of four weeks to be inserted in the HIGA due to the unique circumstances of hospitality employers whose workload demands are driven by external forces such as tourism.

Item 27 - Minimum Payment on Public Holidays

205. The Associations seek a variation to clause 32.2(a) of the HIGA.

206. Clause 32.2(a) states:

> *'(a) An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work'.*

207. Clause 32.2(a) proscribes a minimum number of hours for payment in relation to work performed on a public holiday. Further, an employee is entitled to the minimum number of hours payment specified in clause 32.2(a) even where they do not work those minimum hours.

208. Clause 32.2(a) does not state that the payment must be either four hours' (for permanent employees) or two hours' (for casual employees) at the applicable public holiday hourly rate.

209. The Associations submit that where an employee performs work immediately prior to a public holiday and continues to work on the actual public holiday, or performs work immediately after a public holiday after having started work on the actual public holiday, the work performed on the non-public holiday is counted toward the minimum number of hours for payment.

210. For example, an employee commences work at 10pm on Thursday, 25 January 2018. The following day is Australia Day; a public holiday, and the employee works until 2am on 26 January. The employee will receive four hours payment for work performed, with only two of the hours paid at the applicable public holiday rate.

211. The Associations seek to vary clause 32.2(a) to provide clarity on the operation of this clause.

212. The Associations propose that clause 32.2(a) be deleted and the following be inserted:
> *'An employee other than a casual working on a public holiday will be paid for a minimum of four hours' work. A casual employee working on a public holiday will be paid for a minimum of two hours' work. Hours of work performed on the day immediately before or immediately after a public holiday and that form part of one continuous shift are counted as part of the employee's minimum payment'.*

213. It is submitted that by clarifying the operation of clause 32.2(a), the proposed variation makes this clause more efficient and effective.

214. Accordingly, the Associations submit that the proposed variation meets the modern awards objective having regard to section 134.1(g).

Item 34 - Public Holidays falling on Rostered Days Off

215. The Associations note that the content of clause 37.1 (b) is replicated at clause 34.3 (a) of the *Registered and Licensed Clubs Award 2010.*

216. The Associations also note that Clubs Australia Industrial have applied to remove this provision as part of the Public Holidays Common Issue (AM2014/301)..

217. The Associations support the removal of clause 37.1(b) from the HIGA or any composite modern award that might arise from AM2017/39.

Item 36A – Deductions for the Provision of Meals

218. Clause 39 of the HIGA permits an employer to deduct an amount of money from an employee's wages for the provision of accommodation, meals or both.

219. While the amount an employer can deduct may differ depending upon the nature of the service provided, and whether or not the employee is paid adult or junior rates, the amount that can be deducted for the provision of a meal is the same for all employees.

220. It is the Associations' view that the amount that may be deducted for the provision of a meal is $8.37 per meal, subject to the qualifications in clause 39.4 of the HIGA.

221. However, the tables in clause 39.2 and 39.3 of the HIGA place the amount of $8.37 under a heading "*Deduction $ per week*". The Associations submits this is an error and that the deduction for a meal should read $8.37 per meal.

222. In support of this view the Associations provide the following historical overview.

223. Clause 35.2 of the *Hotels, Resorts and Hospitality Industry Award 1995* (Print M2100) contained the following table:

| *Service Provided* | *Deduction* |
|---|---|
| *1. Single room and 3 meals a day* | *$119.30/week* |
| *2. Shared room and 3 meals a day* | *$118.70/week* |
| *3. Single room only; no meals* | *$114.70/week* |
| *4. Shared room only; no meals* | *$113.90/week* |
| *5. A meal* | ***$4.34/meal*** |

(emphasis added)

224. That provision was replicated in *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 (*"the 1998 Award"), with the deductible amounts remaining unchanged until an application was made by the Australian Hotels Association in 2004 ("the 2004 Application").

225. The 2004 Application was determined by consent order of the Australian Industrial Relations Commission ("the AIRC") on 31 August 2004 (see PR949495)[10] which varied the 1998 Award to update the deductible amounts, as well as incorporate a mechanism to ensure the amounts were automatically adjusted as part of the annual safety net wage reviews.

226. The rationale for the automatic adjustment mechanism was explained in the proceedings before the AIRC, which made it clear the deductible amount for a meal was 1% of the trade rate (see *Matter C2004/4556 Transcript dated 31 August 2004* at PN30-PN38).

[10] AIRC Print P913, 31 August 2004 (The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 – Consent Order).

227. The Associations submit that during the Award Modernisation process, the reproduction of clause 35.2 from the 1998 Award into the HIGA resulted with the current concern of the Associations, being the reformatting of the service provided and deductions table and removal of '/meal' after the deductable amount for a meal.

228. The reproduction error is displayed below:

| **The 1998 Award** | | **HIGA** | |
|---|---|---|---|
| **Service Provided** | **Deduction** | **Service Provided** | **Deduction $ per week** |
| 1. Single room and 3 meals per day | $140.30/week | 1. Single room and 3 meals per day | 209.35 |
| 2. Shared room and 3 meals a day | $136.70/week | 2. Shared room and 3 meals a day | 204.12 |
| 3. Single room only; no meals | $133.30/week | 3. Single room only; no meals | 198.88 |
| 4. Shared room only; no meals | $129.80/week | 4. Shared room only; no meals | 193.65 |
| 5. A meal | $5.60/meal | 5. A meal | 8.37 |

229. As can be noted from the above table, specific reference to a deduction in the 1998 Award was per week or per meal. The HIGA changed the specific reference to a general deduction per week heading in the table at clause 39.2.

230. At the time the HIGA was made, there were no submissions from any parties to vary the application of the meal deduction, and it appears the change in the reference from per meal to per week arose from a drafting error.

231. The Associations submit this error be rectified for clarity within the HIGA to ensure this provision is simple and easy to understand and apply, consistent with the modern awards objective.

232. The Associations seek to vary clause 39.2 by deleting the table and replacing it with the below table:

| **Service Provided** | **Deduction $ ~~per week~~** |
|---|---|
| 1. Single room and 3 meals a day | 209.35 per week |
| 2. Shared room and 3 meals a day | 204.12 per week |
| 3. Single room only; no meals | 198.88 per week |
| 4. Shared room only; no meals | 193.65 per week |
| 5. A meal | 8.37 per meal |

Item 38 - Classification Definitions

233. The Associations seek a variation to classification definition applicable for a Food and Beverage Attendant Grade 2 ("F&B2") at Schedule D.2.1.

234. The Associations seek the insertion of the words "*taking reservations, greeting and seating guests*" as a new dot point duty for a position classified as F&B2.

235. This duty is currently in the Food and Beverage attendant grade 3 ("F&B3") classification, and the Associations do not make any submissions to vary this classification.

236. The inclusion of this duty in F&B2 is viewed as appropriate inclusion as the duty of "*taking reservations, greeting and seating guests*" could be accurately described as a duty that front of house employees undertake at most levels.

237. The Associations submit that the amendment sought to the F&B2 classification is not a material one, but rather is reflective of the actual duties likely to be performed by an employee employed as a F&B2.

238. The Associations highlight the Classifications Structure found at Schedule B of the *Restaurant Industry Award 2010* ("RIA") in which the F&B2 classification reflects the duty of "*taking reservations, greeting and seating guests*".

239. When comparing the F&B2 classifications in the HIGA to the RIA, the duties in the classifications are almost identical:

| **HIGA** | **RIA** |
|---|---|
| **Food and beverage attendant grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:<br>• supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;<br>• assisting in the cellar or bottle department;<br>• undertaking general waiting duties of both food and/or beverage including cleaning of tables;<br>• receipt of monies;<br>• attending a snack bar; and<br>• engaged on delivery duties. | **Food and beverage attendant grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:<br>**(a)** supplying, dispensing or mixing of liquor;<br>**(b)** assisting in the cellar;<br>**(c)** undertaking general waiting duties of both food and/or beverage including cleaning of tables;<br>**(d)** receipt of monies;<br>**(e)** attending a snack bar;<br>**(f)** delivery duties;<br>**(g)** taking reservations, greeting and seating guests. |

240. As can be noted in the above table, the duties in the HIGA also reflect duties that may be undertaken in a bottle shops that are either attached or detached from the hospitality venue. A restaurant does not have a bottleshop, therefore, when the duties related to a bottleshop are removed from the HIGA classification, the duties of an F&B2 under the HIGA and RIA are the same.

241. Inclusion of the duty "*taking reservations, greeting and seating guests*" in the RIA F&B2 classification was the subject of a Full Bench Appeal Decision.[11] The matter involved an application by the Restaurant and Catering Association of Victoria (RCAV), together with Australian Business Industrial (ABI).

242. At Paragraph 153 of the Decision, the Full Bench commented:

> *"**[153]** We are satisfied on the evidence that the taking of reservations and greeting and seating guests is a function which may ordinarily be expected to be performed by persons who would otherwise be classified as a Food and Beverage Attendant Grade 2, and that the failure to include this work function in the definition of that classification means that such persons may have to be paid at the higher rate for a Food and Beverage Attendant Grade 3 for that reason alone …*
>
> *"The purpose of the Food and Beverage Attendant Grade 3 classification was not, we consider, to provide a higher rate of pay just for waiting staff who take reservations and greet and seat guests; as earlier explained the main justification for the Grade 3*

[11] *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996.

*classification was that, unlike Grade 2, it applies to a person who has "achieved the appropriate level of training", being (as the definition of "appropriate level of training" in clause 3.1 makes clear) the completion of relevant AQF Certificate II qualifications.*

*"Because the Restaurant Award has classifications which cannot in practical terms be utilised by employers, we conclude that it is clearly not operating effectively because of an anomaly arising from the award modernisation process, and we further find that the Restaurant Award is not meeting the modern awards objective in that it is not providing a "relevant" minimum safety net of terms and conditions. We will vary the Restaurant Award to include the work function of "Taking reservations, greeting and seating guests" in the definition of the classification of Food and Beverage Attendant Grade 2 in clause B.2.2. Again, that variation will make it clear that no existing employee can have his or her classification reduced as a result of the variation. The variation shall take effect on 1 July 2014.*

243. The Associations submit that the circumstances relating to F&B2 in the RIA are similar to the circumstances for F&B2 in the HIGA. While the difference between an F&B2 and F&B3 in the HIGA does not turn on the holding of appropriate level of training, as it does in the RIA, the tasks and responsibilities of the HIGA F&B3 classification are significantly different to those of a F&B2 classification.

244. The below table provides a comparison of duties and responsibilities:

| **HIGA F&B2** | **HIGA F&B3** |
|---|---|
| **Food and beverage attendant grade 2** means an employee who has not achieved the appropriate level of training and who is engaged in any of the following:<br>• supplying, dispensing or mixing of liquor including the sale of liquor from the bottle department;<br>• assisting in the cellar or bottle department;<br>• undertaking general waiting duties of both food and/or beverage including cleaning of tables;<br>• receipt of monies;<br>• attending a snack bar; and<br>• engaged on delivery duties. | **Food and beverage attendant grade 3** means an employee who in addition to the tasks performed by a **Food and beverage attendant grade 2** is engaged in any of the following:<br>• the operation of a mechanical lifting device;<br>• attending a wagering (e.g. TAB) terminal, electronic gaming terminal or similar terminal;<br>• full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);<br>• mixing a range of sophisticated drinks;<br>• supervising food and beverage attendants of a lower grade;<br>• taking reservations, greeting and seating guests; and<br>• training food and beverage attendants of a lower grade. |

245. The duties and responsibilities of a F&B3 classification include the supervision, and training, of food and beverage attendants at a lower grade, and full control of a bottleshop.

246. The taking of reservations, greeting and seating of guests is a duty that the Associations submit should be included in the F&B2 classification.

247. The Associations further submit that it is not practical or realistic for those tasks and the seating of guests to only be assigned to a Grade 3 employee given that this duty, and exclusion of this duty from the F&B2 classification is inconsistent with the modern awards objective.

Item 39 – Clerical grade 3

248. The Associations seek a variation to the clerical grade 3 classification in Schedule D.2.4 of the HIGA.

249. This classification is a lengthy classification covering close to two pages of the HIGA. It is considerably longer than any other classification in the HIGA.

250. The classification is that length due to the then Australian Industrial Relations Commission ("AIRC") replicating the equivalent classification from *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* into the HIGA during the AIRC's Award Modernisation process.

251. Parties to the Award Modernisation process did not raise the length of the classification at the time, resulting with the classification in the HIGA remaining as it appeared in *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998*.

252. The Associations submit that Clerical grade 3 classification is outdated, particularly in its reference to the use of certain technologies. The technologies that were current at the time the classification was developed are not the same technologies used in 2018, and will not be the same as technologies used in the future.

253. Accordingly, the Associations seek to vary this classification to make it relevant for, and reflective of, modern hospitality businesses, modern hospitality business practice, and modern technology.

254. The proposed new change ensures, the Associations submit, that there is a 'fair and relevant minimum safety net of terms and conditions' which provide modern work practices that are simple and easy to understand. The modern awards objective will therefore be met in approving this amendment.[12][1]

255. The Associations propose the following new classification for Clerical grade 3:

> ***Clerical Grade 3*** *means an employee who has the appropriate level of training and who performs any of the following:*
>
> - *Clerical duties of an advanced nature. This may include:*
>  - *advanced use of office equipment including a personal computer, devices attached to a personal computer, photocopiers and any other like equipment;*
>  - *advanced use of one or more computer software packages, whether general or specific to the employer;*
>  - *use of advanced keyboard functions;*
>  - *creating and generating reports;*
>  - *maintaining a records system whether computer based or otherwise;*
>  - *operation of a reception switchboard in order to respond to enquiries or direction to the relevant person or department;*
>
> - *Assistance with accounting processes. This may include:*
>  - *maintaining financial records such as cash payment summaries (petty cash), banking reports;*
>  - *preparing time and wage records;*
>  - *assisting with accounts payable/receivable queries;*
>
> - *Arrangement of travel bookings and making of appointments;*

[12] *Fair Work Act 2009* (Cth) ss 134(1), 134(1)(d), 134(1)(g).

- *Providing general or specialist advice and information about the organisation and its services.*

256. The replacing of the Clerical grade 3 classification with the above wording does not change the structure or the scope of the classification.

257. The Associations are proposing a necessary modernisation of the classification.

258. The Associations are mindful of the fact that technology is ever changing and therefore submits the new classification is:
    a. broad enough that it still applies to those employees who currently fall within the classification;
    b. does not have an effect on the level or complexity of tasks and duties required to be undertaken at this level.

**New Proposed Variations**

Apprentices – other than cooking and waiting trades

259. The Associations note that a variation proposed by the Associations at paragraph 7 of its submission of 8 February 2018 is not included in the Summary. Paragraph 7 stated:

> *[7] The Associations raise a new item for consideration as part of this matter. It is the Associations position that where an award provides for a trade qualified classification, that award should also provide provisions dealing with apprenticeship wages that are related to that trade qualified classification. For example, the HIGA does not include an apprentice wages table for persons in an apprenticeship that leads to becoming a trade qualified Gardener.*

260. The Associations propose a variation to clause to 20.4 of the HIGA.

261. Clause 14 of the HIGA permits the employment of apprentices in accordance with the relevant apprenticeship legislation.

262. An apprentice is to be paid in accordance with clause 20.4 of the HIGA.

263. Schedule D of the HIGA sets out the classification coverage and includes trade qualified classifications in the following streams:

    a. food and beverage;
    b. kitchen; and
    c. maintenance and trades – other than the cooking trade.

264. The overarching provision which permits the employment of apprentices does not limit the occupational scope of apprenticeships which may be undertaken. However, clause 20.4 of the HIGA sets the minimum wages for apprentices (including adult apprentices) in the cooking and waiting trades only.

265. There is no minimum wages provision for employees apprenticed in the maintenance and trades – other than cooking trade stream, suggesting the combined effect of clauses 14.1 and 20.4 of the HIGA, is that those employees apprenticed in the maintenance and trades – other than cooking trade stream are not covered by the HIGA, but are likely to be covered by *the Miscellaneous Award 2010*.

266. The best example of this inconsistency is a gardening apprenticeship.

267. This has arguably occurred as a result of the Commission's initial Award Modernisation Decision *[2008] AIRCFB 717*, regarding trades other than cooking and waiting. It is best summarised at paragraph 51:

> *"[51] Some parties sought the inclusion of additional trades classifications for maintenance and repair work in order to provide full coverage of work undertaken in the industry. We have decided not to include classifications for trades other than cooking and waiting in the draft award. It is not clear, from the consultations, what type of maintenance trades work is undertaken by directly employed persons in the industry.*
>
> *Before including additional trades level classifications, to accommodate maintenance and repair work by directly employed persons, we would require additional information as to the type and extent of such work. Only then could a determination be made as to the type of trades, the classifications and the levels to be included and the additional terms and conditions that might be required for the relevant employees in the hospitality industry context."*

268. The Decision of Raffaelli C, on 4 October 2011 in *Australian Business Industrial*[13] resulted in the insertion of gardener classifications into the HIGA. The Commission found at paragraph 4:

> "*an error has occurred when making the Award, in that gardener classifications were omitted*."

269. The wording currently contained in Clause 20.4 reflects the Commission's decision in [2008] AIRCFB 717, and this was not suitably updated to reflect the possibility of an apprenticed gardener when the gardener classifications were included in the HIGA in 2011.

270. It is submitted by the Associations that the HIGA should provide minimum wages for any apprenticeship which may lead to a trade qualified classification that falls within the scope of the coverage clause of the HIGA.

271. It is further submitted that this can be accommodated by varying clause 20.4(a) of the HIGA so that it refers to "*Apprenticeships Other Than Waiting"* rather than simply referring to "Cooking Apprenticeship".

272. It is noted that the minimum wages currently provided for in clause 20.4(a) of the HIGA are the same as those provided for under *the Miscellaneous Award 2010*.

<u>Consistency of Term Usage</u>

273. The Associations raise a further item for the Commission's consideration. This new item has arisen as a result of preparing submissions on item 3 and 23, accrued rostered day off.

274. The Associations note that different terminology is used to describe an employee's rostered day (as per clause 3.1) off at the following clauses:

    a. Clause 26.5 – use of the words "their day off";
    b. Clause 27.1(d), 29.1(a) at dot points 5 and 6, and 29.1(b)(iii) – use of the words "days off"
    c. Clause 29.1(c)(ii) – the use of the words "normal days off"
    d. Clause 29.3(e) – use of the words "paid accrued days off"
    e. Clause 29.1(c)(vi) – use of the words "rostered day off on full pay"
    f. Clause 29.3(a) and (f) – use of the words "non-working days"

[13] [2011] FWA 6578.

275. The Associations submit that in the above clauses, the appropriate term for explaining the employee's day off is *rostered day off* and the current words used in those clauses listed above be amended to 'rostered day off'.

276. The Associations note that the PLED at clause 15 has addressed the terminology differences highlighted for HIGA clause 29 above with the exception of two clauses. Those clauses are 15.1(d) and (e) where the words "days off" are used instead of *rostered day off.*

277. It is also noted that the PLED at clause 23.5 has addressed the terminology difference at HIGA clause 26.5.

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,

**PHILLIP RYAN**
**NATIONAL DIRECTOR, LEGAL AND INDUSTRIAL AFFAIRS**