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The Associate to Justice Ross AO
Fair Work Commission
Level 4, 11 Exhibition Street,
MELBOURNE VIC 3000

By email: *amod@fwc.gov.au;*

Dear Associate,

RE: 4 YEARLY REVIEW OF MODERN AWARDS — *HOSPITALITY INDUSTRY (GENERAL) AWARD 2010* (AM2014/272, AM2017/59) – SUBSTANTIVE ISSUES

We refer to the above matter and the decision of a Full Bench of the Fair Work Commission issued on 12 December 2018 ([2018] FWCFB 7263) (**Decision**), which contained a number of directions and attached draft determinations.

We provide the following submissions and responses in relation to the matters set out in the Decision.

(i) Attachment C: Draft variation determination – Hospitality Award

At paragraph [248] of the Decision, interested parties are invited to comment on Attachment C to the Decision, namely a draft determination for the Hospitality Industry (General) Award 2010 (**Hospitality Award**).

We provide the following comments and submissions:

Item 1 – definition of accrued day off

While the Draft Consent Determination filed by the AHA and United Voice used the terminology 'accrued rostered day off', the reference to 'accrued day off' more readily highlights the distinction between rostered days off and days accrued under clause 29 of the Hospitality Award. However, the definition has not been carried through the Attachment C of the Decision and the following amendments are required:

- Item 11 (page 99), third last dot point, remove the words "a rostered" and insert in their place "an accrued";
- Item 12 (page 99), paragraph (c), remove the words "a rostered" and insert in their place "an accrued";
- Item 12 (page 99) paragraph (ii), remove the word "rostered" where it first appears and insert in its place "accrued".

Item 2 – definition of junior employee

The definition of junior employee refers to an employee under the age of 20. The plain language exposure draft of the Hospitality Award published on 8 August 2018, defines a junior employee as an employee less than 21 years of age. It is our view that the definition refer to an employee less than 21 years of age notwithstanding that at the age of 20 years, 100% of the adult rate will apply (see Transcript dated 27 November 2018 at PN92).

Item 3 – Apprentice wages

In proposed clause 20.4 (a) (iii) (A) (page 93), there is a typographical error in the Stage 4 row, second column. The reference to "75^" should be deleted and replaced with "75%".

In proposed clause 20.4 (b) (iii) (A) (page 95), there is a typographical error in the Stage 2 row, second column. The reference to "traiing" should be deleted and replaced with "training".

In proposed clause 20.4 (d) (ii) (page 97), there is a typographical error. The reference to “ther” should be deleted and replaced with “their”.

In proposed clause 20.4 (e) (iii) (page 97), there is a typographical error. The reference to “entertaining” should be deleted and replaced with “entering”.

Item 5 – adjustment of expense related allowances

The proposed applicable consumer price index for equipment and tools allowance should read: *“Tools and equipment for house and garden component of the household appliances, utensils and tools sub-group of the CPI”.*

Item 21 – definition of food and beverage attendant grade 2

In the AHA Amended Draft Determination filed on 7 December 2018, we proposed the inclusion of the duties “taking reservations, greeting and seating guests” as part of the duties of a food and beverage attendant grade 2, and sought their deletion from the definition of a food and beverage attendant grade 3.

We acknowledge in our submissions dated 24 July 2018 that we did not seek to vary the definition of food and beverage attendant grade 3 (see paragraph [235]). However, the retention of the duties “*taking reservations, greeting and seating guests*” as part of the grade 3 definition is redundant due to the opening text of that definition which states: *“**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…”* (emphasis added)

Furthermore, and in light of the Decision, the unnecessary retention of those duties in the definition of a food and beverage attendant grade 3 will only lead to confusion as to the correct classification for an employee performing those duties.

Accordingly, we submit that the definitions of food and beverage attendant grade 2 and food and beverage attendant grade 3 be varied as set out in the AHA Amended Draft Determination filed on 7 December 2018.

(ii) Meal Breaks Provision

At paragraph [249] of the Decision, interested parties are invited to file submissions regarding the provisional view regarding meal breaks.

The meal breaks clause in the Hospitality Award is different to the meal breaks clause in the *Restaurant Industry Award 2010* (**Restaurant Award**). One significant difference is when the entitlement to an unpaid meal break arises.

Before responding to the matters identified at paragraph [207] of the Decision, we note that meal breaks provision in the Hospitality Award has not been subject to any wide-spread industrial disputation, and was subject to detailed review as part of the plain language re-drafting common issue (see *4 yearly review of modern awards – Plain language re-drafting – Hospitality Industry (General) Award 2010* [2018] FWCFB 4468 at [39]-[76]).

In response to the matters raised in paragraph [207] of the Decision, we respond as follows:

- The additional paid breaks for shifts exceeding 10 hours apply to all employees under the Hospitality Award (see clause 31.5);

- The ’10 ordinary hours in the day’ is to be worked continuously. The entitlement to meal breaks for broken shifts (where the break is at least 2 hours) involves an assessment of each part. For example a broken shift worked from 10:00am to 3:00pm (5 hours) and from 5:30pm to 8:30pm (3 hours) should not attract any additional break entitlements other than the 2.5 hour unpaid break between 3:00pm and 5:30pm;

- Any additional paid breaks for overtime are to be assessed in their own right and the overtime hours are not cumulative on the rostered shift hours.

- The penalty for not providing a break is the amount of 50% of the ordinary hourly rate (see both the Hospitality Award and the Plain Language Exposure Draft of the Hospitality Award), rather than 150% of the minimum hourly rate. That penalty is in addition to the applicable rate of the day.

- Despite minimum meal break requirements in industrial instruments, employers have duties under work, health and safety legislation to provide a safe place of work and safe systems of work taking into account, *inter alia*, working environments and hours of work.

Accordingly, it is our submission that the meal break provision, as set out in the Plain Language Exposure Draft of the Hospitality Award published on 3 August 2018 be maintained as the meal break provision for the Hospitality Award, as any change to the meal breaks provision in the Hospitality Award in line with the provisional clause contained in the Decision will alter established unpaid meal break entitlements, and significantly increase an employer's cost in the event an unpaid meal break cannot be taken.

(iii) Deductions for breakages or cashiering underings

At paragraph [255] of the Decision, interested parties are invited to file submissions in relation to the proposed deletion of clause 39 of the Restaurant Award which deals with deductions for breakages or cashiering underings. A similar clause is contained at clause 38 of the Hospitality Award.

In the *Award Simplification Decision* (P7500), a Full Bench of the Australian Industrial Relations Commission formed the view (albeit in the absence of a full argument on the merits) that such a provision afforded protections for employees.

In our submission, the provision should be retained in a modified form that requires:

- a deduction must only be made in cases of wilful misconduct; and
- any amount deducted must be from an employees' wages; and
- must not be unreasonable in the circumstances; and
- if the employee is under 18 years of age, must not be made unless the amount has been agreed to in writing by the employee's parent or guardian.

While there is no suggestion that this provision has been misused by employers, it is noted that if the provision was misused an employer would be at risk of prosecution for contravening a term of a modern award.

In the absence of the entitlement to deduct in the case of wilful misconduct, the only other option for an employer to recover an amount would be to commence proceedings in a court of competent jurisdiction.

Yours faithfully,

PHILLIP RYAN
National Director, Legal and Industrial Affairs