Loaded rates

10 December 2020

This document has been prepared by Fair Work Commission staff and does not purport to be a comprehensive discussion of the issues involved. It does not represent the views of the Fair Work Commission on any issue.

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Description of loaded rates

A loaded rate refers to a higher rate of pay intended to incorporate, in part or in whole, penalty rates and other monetary benefits for which separate provision is made in the applicable modern award. The loaded rate is then paid for all hours worked instead of certain penalty rates (such as the penalty rates for Saturday and Sunday work).

The Fair Work Commission (Commission) has considered and provided commentary regarding the inclusion of loaded rates in modern awards and enterprise agreements in the following matters:

- Modern Awards Review 2012 (the Transitional review)—Penalty rates;[1]
- 4 yearly review of modern awards—Penalty rates case (the penalty rates case);[2] and
- Loaded rates in agreements case.[3]

[1] [2013] FWCFB 1635

[2] [2017] FWCFB 1001

[3] [2018] FWCFB 3610

The Legislative Framework

Part 2-3 of the *Fair Work Act 2009* (the FW Act) provides for the Commission to make, vary and revoke modern awards. It can make a determination varying a modern award (otherwise than to vary modern award minimum wages or a default fund term of the award) if it is satisfied that making the determination is necessary to achieve the modern awards objective.[4] The Commission can make such a determination on its own initiative.[5]

Modern awards may, *inter alia*, include terms about minimum wages, overtime rates, penalty rates, annualised wage arrangements, allowances, leave and leave loadings.[6] Subject to satisfying the modern awards objective there appears to be no legislative barrier to the inclusion of terms about loaded rates in modern awards.

Consistent with the modern awards objective that modern awards provide a fair and relevant minimum safety net of terms and conditions, and noting that any loaded rate would replace existing award benefits, workers paid loaded rates should not be financially worse off than workers who are not. It follows that a loaded rate must result in workers being paid as much or more than they would have been paid if the loaded rate did not apply, including any overtime.'[7]

The Transitional review

Modern Awards Review 2012—Penalty Rates

In the context of the Transitional review, the Full Bench in the *Modern Award Review 2012—Penalty Rates* decision[8] acknowledged that the existing penalty rate regime produced some complexity in the application of award provisions and may be particularly challenging for small businesses.[9] As a means of addressing these issues, the Commission considered that there was merit in discussing the concept of incorporating loaded rates within the General Retail and Fast Food awards.[10]

The Commission stated that any such loaded rates would need to recognise the application of the existing penalty rates regime and apply fairly across the range of employees and working hours patterns that might be considered as applicable to the concept. The Commission expressed the preliminary view that, subject to those considerations, the establishment of loaded rates within these awards would have the capacity to reduce the complexity of their application, particularly for small businesses.[11]

To further explore those issues, the Full Bench referred the matter to Hampton C to facilitate conciliation discussions between the major parties.

Hampton C conducted a series of conferences to facilitate discussions about the potential incorporation of loaded rates within the General Retail and Fast Food Awards.

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[4] *Fair Work Act 2009* (Cth), s.157(1)(a).

[5] *Fair Work Act 2009* (Cth), s.157(3)(a). In *4 yearly review of modern awards* [2020] FWCFB 810, the Full Bench noted at [23] that the Commission can vary a modern award on its own motion if the variation is necessary to achieve the modern awards objective.

[6] *Fair Work Act 2009* (Cth), s.139.

[7] In a letter of 9 December 2020 from the Minister for Industrial Relations to the President of the Commission, the Minister stated: 'while ultimately the design of loaded rates would be up to the discretion of the Commission, it is the Government's view that these rates may be optimally structured in a way that ensures workers are not financially worse off over time…'

[8] [2013] FWCFB 1635

[9] [2013] FWCFB 1635 at [328].

[10] [2013] FWCFB 1635 at [329].

[11] [2013] FWCFB 1635 at [330].

At a report-back conference on 3 June 2013, the Commissioner was advised that only the National Retailers Association (NRA) had advanced a proposal in relation to the General Retail Award. The claim concerned the annualised hours proposal that had been considered and ultimately rejected by the Full Bench in the *Modern Award Review 2012—Penalty Rates* decision. The NRA subsequently withdrew the claim.

In a Report to the Full Bench, Hampton C recommended that, given the attitude of parties and in the absence of specific proposals, that no further action be taken in relation to loaded rates in the Transitional review.

Loaded rates in the penalty rates case

The Full Bench in the *4 yearly review of modern awards—Penalty Rates decision*[12] agreed with the view expressed by the *Modern Award Review 2012—Penalty Rates* Full Bench that there is merit in considering the insertion of appropriate loaded rates into the Hospitality and Retail awards.

In the decision handed down on 23 February 2017, the Full Bench stated that subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g), and allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.[13]

The Full Bench noted that, in reports prepared by the Fair Work Ombudsman, some businesses in the Hospitality and Retail sectors already provide for 'flat' (or loaded) rates of pay, in order to simplify their payroll process however they underestimate the additional premium (or loading) required in order to compensate employees for the loss of penalty rates, resulting in non-compliance. The Full Bench commented that insertion of 'loaded rates' schedules in these modern awards may have a positive effect on award compliance.[14]

Noting the potential complexity involved in the task of developing loaded rates schedules, the Full Bench stated consideration should be given to the following:

- Any loaded rate will remain part of the safety net and will have to be fair and relevant;[15]
- Determining an appropriate loaded rate would not be a straightforward task. For example, an employee working mostly on a weekend or late at night, when a penalty rate would apply, requires a higher loaded rate than an employee working mostly during the ordinary spread of hours, Monday to Friday;[16]
- A number of loaded rates may be required to match commonly used roster configurations in each particular industry. For example, one loaded rate for employees working no more than

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[12] [2017] FWCFB 1001

[13] [2017] FWCFB 1001 at [90].

[14] [2017] FWCFB 1001 at [91].

[15] [2017] FWCFB 1001 at [92] and [2081].

[16] [2017] FWCFB 1001 at [92] and [2080].

two Saturdays in any 28 day cycle, and another rate for employees working every Sunday, but not Saturdays;[17]

- Any loaded rate and the associated roster configuration should be relevant to the needs of industry and employees and there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries to develop appropriate rates.[18]

The Full Bench indicated that it envisaged the development of loaded rates would be an iterative process undertaken in consultation with interested parties once the transitional arrangements in respect of the reductions in Sunday penalty rates was complete. The transitional arrangements have now been completed.

Loaded rates in enterprise agreements case

Loaded Rates Agreements Case

In 2017, a Full Bench of the Commission considered the issue of loaded rates in enterprise agreements in the *Loaded Rates Agreements*[19] test case. Specifically, the issue before the Full Bench was how the 'better off overall test' (BOOT) should be applied to an agreement which rolls up penalty rate payments and other benefits into loaded rates of pay.

The matter concerned 5 applications; 3 substantially similar security industry agreements and 2 substantially similar ALDI supermarket agreements. The agreements all contained loaded rates which provided for specific work patterns rather than the hourly rate and penalty rates provided by the relevant modern award comparators.

The Full Bench set out two well-established general principles concerning the BOOT:

1. Each award-covered employee or prospective award-covered employee must be better off overall if the agreement applied to them, as opposed to the award.

- In an agreement containing loaded rates in whole or partial substitution for award penalty rates, it is not sufficient that the majority of employees - even a very large majority - are better off overall if there are any employees at all who would not be better off overall.[20]
- As an agreement containing loaded rates affects current employees and future employees differently according to their roster patterns, the task necessarily requires an examination of existing roster patterns.[21]
- In assessing the effect of loaded rates on future employees, this may involve a degree of conjecture.[22]
- Where there is a disparity between current employees and future employees, including in the type of work undertaken, the starting point must be an examination of the hours the agreement allows.[23]

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[17] [2017] FWCFB 1001 at [2082].

[18] [2017] FWCFB 10001 at [93].

[19] [2018] FWCFB 3610

[20] [2018] FWCFB 3610 at [100].

[21] [2018] FWCFB 3610 at [102].

[22] [2018] FWCFB 3610 at [103].

[23] [2018] FWCFB 3610 at [106].

2. The BOOT requires an overall assessment of terms more beneficial to an employee and terms less beneficial to an employee.

- The Full Bench noted the difficulty of assigning value to agreement entitlements that may not be accessed by all employees. The Commission quoted *Hart v Coles Supermarkets Australia Pty Ltd*[24], where the agreement in question provided benefits including blood donor leave and defence service leave:

> [20] It would not be appropriate to attribute a value to these benefits on the assumption that all employees would access these benefits. […] There are some groups of employees who will receive no benefit from these provisions; for example those who cannot give blood or who choose not to give blood or those who are not permitted to join the defence reserve or who choose not to join the defence reserve.

- The Commission considered that it was unlikely that a contingent or non-monetary benefit would compensate for a significant detriment in direct remunerations for all affected employees.[25]

In its decision, the Full Bench confirmed the relevant legal principles[26] regarding the operation of the BOOT in respect of loaded rates, and noted at paragraphs [120] and [121]:

> **'[120]** Where an agreement seeks to provide for a single loaded rate at a given classification level, but also provides that employees may be directed to work hours which may fit into any of the above scenarios, then it will be necessary for the loaded rate to be at least as high as the highest rate from all of the scenarios above. Alternatively, the agreement might provide for employees to be assigned specific roster patterns which contain express limitations on the number or proportion of hours to be worked at certain times (such as on evenings or weekends) which would attract the payment of penalty rates under the relevant award. Thus if an agreement provided that a full-time or part-time employee, as the case may be, could be assigned to any one of the above roster scenarios at any given time, then the employee would only need to be paid the loaded rate for the scenario while on the roster in order for the agreement to pass the BOOT. As we discuss later, this is, broadly speaking, the methodology used in the Allied Agreement, the JWT Agreement and the PSA Agreement.
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> **[121]** The position becomes more difficult with respect to casual employees. As discussed in the *Casual and Part-time Employment Case*, the contractual and practical incidents of casual employment under the FW Act may vary greatly. Casual employment may consist of engagement under hourly or daily fixed term contracts, and be used for the performance of short-term and/or intermittent work on an "on-call" basis. It may also consist of longer-term contracts or an ongoing contract of indefinite duration (terminable in either case on short notice), and be used for the performance of long term work with regular, rostered hours. In the former case, the casual employee is not guaranteed work on any specified days or for any specified duration. In an enterprise agreement which provides or permits casual employment of this nature, it is difficult to envisage how it would be possible to provide for a loaded rate for casual employees that was capable of passing the BOOT. This is because it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time

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[24] [2016] FWCFB 2887.

[25] [2018] FWCFB 3610 at [114].

[26] [2018] FWCFB 3610 at [115].

> which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times. In that circumstance, if the agreement provided for a loaded rate which was less than the highest penalty rate provided for in the relevant award, the employee would necessarily be disadvantaged as compared to the award. This result could only be avoided if the agreement provided for some other benefit to the casual employee which offset the disadvantage, and/or or imposed some restriction on when a casual employee could be engaged to work, and/or required the hours of work of a casual employee to be balanced over time between hours which would attract the payment of penalty rates under the relevant award and hours which would not. Any such additional provisions would amount to a significant departure from the concept of the "on-call" casual.

The Full Bench found that the 3 security agreements did not pass the BOOT due to the unlimited rosters that casual employees could work, with undertakings provided held to be incapable of resolving the issue.

ALDI agreements

The applications for the approval of the 2 ALDI agreements were remitted back to Vice President Catanzariti for hearing and determination.[27]

The Vice President considered the relevant principles for determining whether an agreement containing loaded rates passes the BOOT as outlined in the *Loaded Rates Agreements* case.

The Vice President noted that there was no roster in evidence that demonstrated that the loaded rates contained in the agreements resulted in an employee receiving a lower rate than they would have under the *General Retail Industry Award 2010*.[28] The Vice President was therefore satisfied that the requirements of s.193 of the Fair Work Act, requiring that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied, were met.

The agreements were approved with undertakings.

Fair Work Ombudsman investigations

In recent years, the Fair Work Ombudsman (FWO) has had a focus on the fast food, restaurant, cafe and retail sectors as key priority industries. For example, a campaign between November 2017 and March 2019 of 946 businesses found that the industry with the highest non-compliance rate (57 per cent) was Accommodation and food services.[29] This was consistent with another audit from the FWO, which commenced in April 2018, and found that hospitality was the least compliant industry with 61 per cent non-compliance.[30]

An Anonymous Report can be used by members of the community to notify the FWO of suspected breaches of workplace laws. The hospitality industry accounted for 36 per cent of all anonymous reports in 2018–19[31] and 34 per cent in 2019–20, which was nearly 3 times more than the second-highest industry—retail.[32]

The hospitality industry has also had the highest number of disputes that the FWO has assisted with for the 6 financial years to 2019–20, despite only accounting for 5 per cent of the labour

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[27] [2019] FWCA 6816.

[28] [2019] FWCA 6816 at [17].

[29] FWO (2020), *National Compliance Monitoring Report*, October.

[30] FWO (2020), *Workplace Basics: compliance activity report*, March.

[31] FWO and Registered Organisations Commission Entity (2019), 'Investigations', *Annual Report 2018–19*.

[32] FWO and Registered Organisations Commission Entity (2020), 'Investigations and activities', *Annual Report 2019–20*.

force.[33] Within this industry, fast food, restaurants and cafes accounted for half of the FWO's total litigations initiated in 2019–20.[34] This was up from one quarter for all of the hospitality industry in 2018–19.[35]

The FWO has found that barriers to addressing non-compliance in the fast food, restaurants and cafes sector include:

- high business turnover due to competition and low barriers to entry;
- a high concentration of young, vulnerable workers, many of whom are on migrant visas; and
- the transient nature of the workforce.[36]

Investigations across 171 businesses in the fast food, restaurant, cafe and retail sectors that had previous been found non-compliant found that 71 per cent were non-compliant between March 2019 and March 2020. Of these, half did not pay staff correctly; 34 per cent breached monetary and non-monetary obligations; and 16 per cent were non-compliant with pay slip and record-keeping requirements.[37] The most common breach was under/non-payment of penalty rates (40 per cent) and underpayment of minimum hourly rate (17 per cent).[38]

The main reasons given for non-compliance were: a lack of awareness of obligations (51 per cent); misinterpreting award requirements (17 per cent) and the payment of a flat hourly rate insufficient to compensate for award-based penalties (6 per cent).[39]

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[33] FWO and Registered Organisations Commission Entity (2020), 'Investigations and activities', *Annual Report 2019–20*.

[34] FWO and Registered Organisations Commission Entity (2020), 'Investigations and activities', *Annual Report 2019–20*.

[35] FWO and Registered Organisations Commission Entity (2019), 'Investigations', *Annual Report 2018–19*.

[36] FWO and Registered Organisations Commission Entity (2019), 'Investigations', *Annual Report 2018–19*.

[37] FWO (2020), *National Food & Retail Revisit report*, September.

[38] FWO (2020), *National Food & Retail Revisit report*, September.

[39] FWO (2020), *National Food & Retail Revisit report*, September.