



AUSTRALIAN HOTELS ASSOCIATION

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19 May 2016

Vice President Hatcher
Fair Work Commission
Level 10
80 William Street
EAST SYDNEY NSW 2011

By email: amod@fwc.gov.au; chambers.hatcher.vp@fwc.gov.au

Dear Vice President,

RE: FOUR YEARLY REVIEW OF MODERN AWARDS: PART-TIME AND CASUAL EMPLOYMENT COMMON ISSUE (AM2014/196 AND AM2014/197)

The Australian Hotels Association (AHA) refers to United Voice's correspondence dated 16 May 2016, which sought the issuing of orders for the production of documents in this matter.

The AHA opposes the issuing of orders in the terms proposed by United Voice and makes the following submission in support.

The Proposed Orders

1. The proposed orders are addressed to 10 lay hospitality witnesses for the AHA.
2. The Schedule to each proposed order states, in reference to the statement of the particular witness that the "*column on the left hand side of the following table identifies the paragraphs to which the documents on the right hand side of the table relate*" (emphasis added).
3. It is submitted that, with few exceptions, the proposed orders seek the production of documents that are neither referred to in, or relevant to the issues addressed in the statement of the particular witness. Furthermore, in many cases, the proposed order would impose an unnecessary and oppressive burden.
4. The absence of reference/relevance can be shown by comparing the description of the documents in the Schedule with the nature/substance of the evidence

given by the witness in the particular paragraph. The lack of relevance is particularly apparent with respect to annual financial statements.

Rule 54

5. Rule 54 of the *Fair Work Commission Rules 2013* (Cth) deals with orders for production of documents and states that a party may '*request that the Commission inform itself in relation to the matter by requiring a person to provide copies of documents or records...*'.
6. Thus, it is the Commission itself that benefits from any documents or records produced. In view of this, it is submitted that the Commission would wish to be satisfied about (a) the relevance and existence of documents sought in a proposed order; and (b) the extent to which the documents are relevant, such that the documents will assist the Commission in its deliberations. It is submitted that the Commission would be concerned to ensure that its coercive power to compel production does not impose an unnecessary burden.

Documents demonstrating trade fluctuation

7. United Voice has sought an order which would require the provision of:
 - a. Documents showing the particulars of any bookings made in relation to any event or function during 2014 and 2015; and
 - b. Records showing the patronage of the Venue for the period of January 2014-January 2016 on a week by week basis, if unavailable month by month basis.
8. In some cases the schedule to a particular draft order states that this material "*can be provided in summary form*".
9. The AHA submits that the scope of the documents and the time range is oppressive and is likely to impose an unnecessary burden.
10. In order to comply with the proposed order in 7 (a), a Respondent would be required to produce for a two year period documents including, but not limited to:
 - a. Preliminary booking requests and correspondence;
 - b. Function/Event Terms and conditions, contracts or other documentation;
 - c. Tax invoices and merchant receipts;
 - d. Room seating and theme set-up; and
 - e. Food and beverage packages.

11. In order to comply with the proposed order in 7 (b), a Respondent would be required to produce for a two year period documents including, but not limited to every sale or transaction, such as tax invoices and merchant receipts for accommodation room guests, food and beverage (restaurant/bistro/bar/mini-bar/in-room dining); spa and beauty treatments, car parking (valet or otherwise) and other services.
12. The number of documents would be voluminous and the AHA submits that no legitimate and proportionate forensic purpose would be served by such an exercise.
13. Furthermore, the requirement for the provision of this material in summary form would require collation and analysis of those documents and the creation of a summary document. Such an order would likely impose an unnecessary and oppressive burden.

Documents showing regularity of engagement

14. United Voice seeks an order which would require the provision of:
 - a. Rosters issued for the period of January 2014 – January 2016 for all staff (including any alterations made after issue);
 - b. Pay summaries for the period January 2014 – January 2016 for all casuals and part-time employees;
 - c. Documents showing the commencement date of each casual employee, their role or position, and any indication of the nature of their tenure at the Venue.
15. In relation to the proposed order in 14 (a), the AHA makes the following submissions:
 - a. The AHA's proposal in these proceedings is limited to the *Hospitality Industry (General) Award 2010* ("the Award");
 - b. In most, if not all Schedules, the identified paragraph of the particular witness statement does not correlate to the breakdown of employees covered by the Award set out in the particular witness statement. The effect of this is that the proposed order to produce rosters for "*all staff*" is not limited to staff covered by the Award, and would apply to other employees such as award-free employees and employees covered by other modern awards.

- c. Furthermore, the rosters for full-time employees are not relevant to the claim being advanced by the AHA.

16. In relation to the proposed order in 14 (b), this is unrelated to the issues addressed in the witnesses statements and therefore lacks a legitimate forensic purpose. Furthermore, it is not clear whether the order is limited to those casual and part-time employees covered by the Award.

17. In relation to the proposed order in 14 (c), the AHA makes the following submissions:

- a. The proposed requirement to provide any indication of the nature of their tenure is likely to require document creation;
- b. The proposed requirement to provide the information in summary form is likely to require document creation; and
- c. In some cases the proposed order is not related to the evidence of the particular witness (See for example the Schedule addressed to Michele Morcos and Elizabeth Cleaves)

Documents showing the administrative burden

18. United Voice seeks an order which would require the provision of:

- a. Timesheets filled out for all casuals and part-time employees for the period of January 2014 – January 2016. This material can be provided in summary form.

19. In relation to the proposed order in 18 (a), the AHA makes the following submissions:

- a. The requirement to produce two years of timesheets for casual and part-time employees is oppressive. If based on the number of casual employees alone in each of the witness statements (674 casual employees) and applying a weekly time sheet cycle over a two year period (104 weeks), this would require the production of approximately 70,000 documents across the hospitality witnesses.
- b. Alternatively, the requirement to collate, analyse and produce a summary would require document creation and likely impose a highly oppressive and unnecessary burden.

Documents showing the profitability of the enterprises

20. United Voice seeks an order which would require the provision of:

- a. Annual financial statements for the Venue for the financial years ending 30 June 2011, 30 June 2012, 30 June 2013, 30 June 2014 and 30 June 2015.

21. The basis upon which United Voice seek the proposed order in 19 (a) is that *“the witnesses assert or intimate that they would be unable to meet overtime obligations of workers do not agree to a variation”* (emphasis added).

22. That is misleading.

23. First, such an argument does not form part of the AHA’s basis for seeking the proposed variation to the Award. Indeed the submissions filed on behalf of the AHA on 12 October 2015 clearly state that the *“consequence of not employing part-time employees under the HIGA is a high reliance on casual labour, which results in higher employment costs”* (see Paragraph 33 (f)). (emphasis added)

24. The relevance of profitability as explained by Your Honour (as referred to in the Submissions of United Voice) was, to our understanding, given specifically in the context of the claim by the Australian Council of Trade Unions for increased minimum engagements for casual and part-time employees and the direct cost impact of that claim.

25. Second, none of the witnesses expressly assert or intimate that they would be unable to meet overtime obligations or otherwise refer to these documents. This can be illustrated by reference to the proposed order directed to Robert Bruce Woods.

26. The paragraph of Mr Woods’ statement identified in the Schedule that relates to the Annual Financial Statements is paragraph 18 which states:

In the absence of being able to change an employee’s days and times of work, I do not consider the employment of part-time employees.

27. It is submitted that on any reading, neither that, or any other part of Mr Woods’ statement, does not assert or otherwise intimate that he would be unable to meet overtime obligations.

28. Further, the term ‘annual financial statements’ is not defined or limited by the proposed notice (other than identified time periods) and so the order has the

potential to capture a very wide range of information. This is illustrated by the *Corporations Act* requirements regarding content of annual financial reports¹:

Financial Document	Corporations Act Section
Statement of financial position as at the end of the year (if consolidated accounts are not required by Accounting Standards)	295(2) & 296(1)
Statement of comprehensive income for the year (if consolidated accounts are not required by Accounting Standards)	295(2) & 296(1)
Statement of cash flows for the year (if consolidated accounts are not required by Accounting Standards)	295(2) & 296(1)
Statement of changes in equity (if consolidated accounts are not required by Accounting Standards)	295(2) & 296(1)
Consolidated financial statements, if required by accounting standards – which may include parent entity financial information where [CO10/654] conditions are met.	295(2) & 296(1)
Note to financial statement (disclosure required by the regulators, notes required by the accounting standards, and any other information necessary to give a true and fair view)	295(3)
Directors' declaration that the financial statements comply with accounting standards, give a true and fair view, there are reasonable grounds to believe the company/scheme/entity will be able to pay its debts, the financial statements have been made in accordance with the <i>Corporations Act</i> .	295(4)
Directors' report, including the auditor's independence declaration.	298-300A
Auditor's report	301& 308

29. The Australian Accounting Standards Board (AASB) framework also illustrates the potential width of the term 'financial statement'. AASB 101 'Presentation of Financial Statements' at [10] defines a complete set of financial statements as comprising²:

- a. A statement of financial position;
- b. A statement of profit or loss and other comprehensive income for the period;
- c. A statement of change in equity for the period;
- d. A statement of cash flow for the period;

¹ <http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/financial-reports/> current as at 20 August 2015.

² <http://www.aasb.gov.au/Pronouncements/Current-standards.aspx>

- e. Notes, comprising a summary of significant accounting policies and other explanatory information;
- f. Comparative information in respect of the preceding period as specific in paragraphs 38 and 38A; and
- g. A statement of financial position as at the beginning of the preceding period when an entity applies an accounting policy retrospectively or makes a retrospective restatements of items in its financial statements, or when it reclassifies items in its financial statements in accordance with paragraphs 40A-40D.

30. Accordingly, the AHA submits that proposed orders for the production of annual financial statements have no apparent relevance to the nature/substance of the witness evidence, nor do witnesses refer to these documents. Consequently, the proposed order lacks legitimate forensic purpose.

Conclusion and Proposal

31. It is submitted that, with few exceptions, the proposed orders seek documents/records which are not relevant, would be unlikely to assist or would likely impose unnecessary burden and therefore the proposed orders should be refused.

32. In their place the AHA proposes orders directed at the 10 lay hospitality witnesses which require the production of

- a. The commencement date and role or classification for each casual employee and part-time employee covered by the Hospitality Industry (General) Award 2010;
- b. Rosters for the period of 1 November 2015 to 31 January 2016 for the casual and part-time employees identified in order (a);
- c. Timesheets for the period of 1 November 2015 to 31 January 2016 for the employees identified in order (a)
- d. Any correspondence or documents identifying the acceptance, rejection or amendment of the roster or availability; and
- e. Any correspondence or documents requesting conversion from casual employment to part-time employment and any response to such requests.

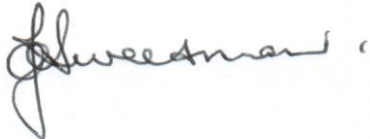
33. The AHA submits that the proposal outlined above is, in the context of the Commission exercising its functions to conduct its review of the Award in the allocated listing periods:

- (i) A reasonable response to United Voice's request and would be of utility to the Commission; and
- (ii) Would not impose an unnecessary burden upon the witnesses.

Further Information

Please direct any queries regarding this correspondence to Mr. Phillip Ryan on (02) 9281 6922 or by email to: Phillip.Ryan@ahansw.com.au.

Yours faithfully,

A handwritten signature in black ink that reads "John Sweetman". The signature is written in a cursive, flowing style.

JOHN SWEETMAN
National Workplace Relations Director