[2019] FWCFB 349

The attached document replaces the document previously issued with the above code on 21 March 2019.

Spelling corrected in Appearances.

Associate to Vice President Hatcher

Dated 27 March 2019

DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

Registered and Licensed Clubs Award 2010
Hospitality Industry (General) Award 2010
(AM2017/39)

VICE PRESIDENT HATCHER
COMMISSIONER HAMPTON
COMMISSIONER BISSETT SYDNEY, 21 MARCH 2019

Application by Clubs Australia - Industrial

Introduction

[1] Clubs Australia - Industrial (CAI), a registered organisation, has applied for the modern award which currently applies to its members, the *Registered and Licensed Clubs Award 2010* (*Clubs Award*), to be revoked, and for the *Hospitality Industry (General) Award 2010* (*Hospitality Award*) to be varied to expand its coverage to encompass that of the *Clubs Award* and to accommodate some particular features of the *Clubs Award*. The genesis of CAI's current application lies in an earlier application made by CAI as part of the 4 yearly review of modern awards for a reduction in weekend and public holiday penalty rates in the *Clubs Award*. The reductions sought were, for full-time and part-time employees, from 150% to 125% on Saturdays, 175% to 150% on Sundays, and 250% to 200% on public holidays and, for casual employees, from 175% to 150% on Sundays and 250% to 200% on public holidays (inclusive of the casual loading). This application, together with other applications seeking reductions to weekend and public holiday penalty rates in other awards, was determined in the *Penalty Rates Decision* issued by a five-member Full Bench of the Commission on 23 February 2017.[1] The Full Bench rejected CAI's claim, concluding:

> "[994] On the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, CAI has not established a merit case sufficient to warrant the granting of the claim."

[2] However the Full Bench went on to say:

> "[995] If these were simply *inter partes* proceedings we would dismiss the CAI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award. There is also, at least on

[1] [2017] FWCFB 1001

face value, a disconnect between the present provisions in the *Clubs Award* and those that will apply within the hospitality industry more broadly.

[996] We have given consideration to the next steps to be taken in respect of the review of weekend penalty rates in the *Clubs Award*. It seems to us that there are 2 options in respect of the future conduct of this aspect of these proceedings.

[997] Option 1: We could make determinations revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employers and employees presently covered by the *Clubs Award*. Any such determinations would have to comply with the statutory provisions relating to changing the coverage of modern awards and to the revocation of modern awards (ss.163 and 164 respectively). Such a course would obviously avoid the need to conduct any further Review proceedings in respect of the *Clubs Award.*

[998] Extending the coverage of the *Hospitality Award* and revoking the *Clubs Award* would also have the desirable outcome of rationalising the awards applying to the hospitality sector and providing greater consistency in the regulation of penalty rates in the sector. We would also observe that the 'merger' of the *Hospitality* and *Clubs Awards* is consistent with the 'need to ensure a simple, easy to understand… modern award system', which is one of the considerations we are required to make into account in determining whether a modern award meets the modern awards objective' (s.134(1)(g) of the FW Act).

[999] Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.

[1000] It is our *provisional* view that option 1 has merit and warrants further consideration…"

[3] In paragraphs [1001]-[1008] of the decision the Full Bench set out a number of matters which it regarded as supportive of the provisional view it had expressed. The two primary matters identified were the degree of commonality in the work performed by employees under the two awards and the desirability of greater consistency between penalty rates in the hospitality sector. It will be necessary for us to discuss these matters in greater detail later in this decision having regard to the evidence adduced before us. The Full Bench then indicated that it would give interested parties the opportunity to make submissions concerning the two options it had identified.

[4] In the *Penalty Rates Decision* the Full Bench separately determined to vary the *Hospitality Award* to reduce the Sunday penalty rate from 175% to 150% and the public holiday penalty rate from 250% to 225% for full-time and part-time employees only. In brief summary, the Full Bench's decision in respect of the Sunday penalty rate was based on findings that the level of disutility for employees under the award working Sundays was much less than it had been in the past (while still being higher than for Saturdays for many workers)[2] and that the current level of penalty rates led employers to reduce labour costs by

[2] Ibid at [883]

restricting trading hours, staff numbers and service provision on Sundays.[3] This led to the ultimate conclusion that the Sunday penalty rate was neither fair nor relevant and thus did not meet the modern awards objective. The Full Bench also identified that a reduction in the Sunday penalty rate would promote flexible modern work practices because it would facilitate employers extending operating hours and providing additional services on Sundays,[4] and it would also lead to some additional employment.[5] The Full Bench took into account and gave significant weight to the effect a reduction in the penalty rate would have upon the incomes of employees who usually worked on Sundays, but found that this would partly be ameliorated by the capacity to work additional hours on Sundays and would also be relevant to the consideration of transitional arrangements for the implementation of any such reduction.[6]

[5] In determining that a reduction in the public holiday penalty was necessary to achieve the modern awards objective, the Full Bench took into account the need to maintain proportionality with the reduced Sunday penalty rate,[7] the advent of s 114 of the *Fair Work Act 2009* (FW Act) which somewhat alleviated the disutility in working on public holidays,[8] and that the reduction would increase employment and have a number of positive effects on business.[9]

[6] It may be noted that while paragraph [998] of the *Penalty Rates Decision*, which we have earlier quoted, described "greater consistency" in penalty rates in the broader hospitality sector as a "desirable outcome", the Full Bench did not attempt to achieve uniformity of penalty rates in the awards in that sector (in particular the *Hospitality Award*, the *Restaurant Industry Award 2010* and the *Fast Food Industry Award 2010*), nor did it regard competition between employers covered by different awards in the sector as a matter supporting either uniformity or greater consistency in penalty rates.

[7] In a subsequent decision issued on 5 June 2017 (*Penalty Rates - Transitional Arrangements Decision*),[10] the Full Bench determined that this reduction to the Sunday penalty rate in the *Hospitality Award* would be phased in over a period of two years so that it would not be implemented fully until 1 July 2019.[11] In the same decision, the Full Bench referred to the conclusions it had reached in relation to the *Clubs Award* in the *Penalty Rates Decision*, and emphasised the provisional nature of its preference for the option of revoking the *Clubs Award* and absorbing its coverage into the *Hospitality Award*. The Full Bench said (footnotes omitted):

> "[233] At [1000] of the *Penalty Rates decision* we expressed the *provisional* view that option 1 had merit and warranted further consideration. We provided an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, invited submissions on the two options set out above.

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[3] Ibid at [853]

[4] Ibid at [854]-[855]

[5] Ibid at [829]

[6] Ibid at [818]–[823]

[7] Ibid at [1949]-[1954]

[8] Ibid at [1955]

[9] Ibid at [1956]

[10] [2017] FWCFB 3001

[11] Ibid at [198]

> [234] In correspondence dated 2 May 2017 Clubs Australia (Industrial) indicated a preference for option 1. Whereas in its submission RSL Victoria opposes option 1 and states that it does not intend to 'agitate any further arguments in support of changes to penalty rates the subject of the Clubs Australia (Industrial) application'.
>
> [235] United Voice submits that Clubs Australia (Industrial) should not be permitted to relitigate its failed claim for variations to weekend penalty rates but acknowledges that option 1 raises 'quite a different issue'.
>
> [236] The *provisional* views expressed in the Penalty Rates decision were just that and we sought further submissions before making any decision on that aspect. In the circumstances the appropriate way forward is for Clubs Australia (Industrial) (or any other interested party) to file an application setting out the course of action it proposes. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine the future conduct of the matter."

[8] In response to this, CAI filed its application on 28 July 2017. That application has been the subject of a number of amendments during the course of the proceedings. This decision is ultimately concerned with the final amended application which was filed by CAI on 26 September 2018. We will describe the main features of the final amended application in due course, but it will first be necessary to set out the relevant history and principal features of the *Clubs Award* and the *Hospitality Award*.

The *Clubs Award* and the *Hospitality Award*

[9] The relevant history concerning the establishment of the *Clubs Award* in the course of the award modernisation process conducted by a Full Bench of the Australian Industrial Relations Commission (AIRC) in 2008-2009 was usefully summarised in paragraphs [910]-[914] of the *Penalty Rates Decision*. In summary, the award modernisation Full Bench initially expressed the provisional view that the entire hospitality industry could be covered by one award that incorporated coverage of the licensed and registered clubs sector "with or without some special conditions and/or appropriate transitional provisions",[12] and on 12 September 2008 the AIRC published an exposure draft of a single award covering the hospitality industry. That exposure draft relevantly provided in clause 31.1 for penalty rates for permanent employees of time and a quarter on Saturdays and time and three quarters on Sundays.

[10] This course of establishing a single modern hospitality award which encompassed the clubs sector was strongly opposed by CAI (then named in its rules as the Licensed Clubs' Association of Australia but using the name "Clubs Australia") from the outset of the award modernisation process. In a submission filed in the AIRC in June 2008, CAI contended:

> "It is the view of the Clubs Australia that an Award should be made as part of this process, to encompass all registered and licensed Clubs nationally. That is to say that it is our position that a national Club industry Award should be made, that is separate

[12] [2008] AIRCFB 717 at [47]; [2008] AIRCFB 1000 at [113]

and distinct from any other rationalised hospitality industry Award that may be made as part of this process.

We submit that any such rationalised industrial instrument having application to all Clubs nationally should have application to all employees employed by Clubs. This includes all employees employed in the hospitality operations of Clubs as well as greenkeepers and gardening staff, maintenance staff, clerical and administrative employees. The Club Industry would be concerned if occupational awards such as greenkeepers and clerks would cover those occupations within the club industry.

. . .

We make this submission and have reached this position, as we believe that the Club industry in Australia is a separate and distinct industry from most other industries in the hospitality sector. We make this submission based upon the following reasons:

- Clubs are not-for-profit organisations
- Clubs are community based and community run organisations
- Clubs are established on the basis of interest mutuality
- Clubs are subject to separate and distinct regulations and regulatory framework
- They are required to adopt a set of rules (a constitution) subject to the provisions of the applicable regulatory framework.
- They are subject to control by members and only members and bona-fide visitors can avail themselves of the facilities;
- They do not pay a dividend to their members so any excess funds are channeled back into the community;
- Each club is committed to maximizing local support and offering affordable social opportunities in a fun, safe and friendly environment in order to raise funds in furtherance of their community objectives.
- Employees of Clubs provide a service to their members which goes beyond the service provided in a commercial establishment.
- In many Regional Areas employees of Community Clubs are multi-skilled in that they perform work across a range of functions such as Clerical, greenkeeping and counter service.
- Clubs offer a variety of sports, activities and entertainment for its patrons and members that are not normally offered and other hospitality venues.

It is submitted that based on the above facts, there are good and cogent reasons for the Club Industry to be considered as an industry in its own right and to be dealt with separately in the award modernisation process.

Clubs Australia is confident that it will be able to negotiate successfully with the appropriate Unions to develop an industrial instrument that will be rationalised, modernised and simplified that will have application nationally and hopefully be able to provide benefits for all parties concerned."

[11] In a further submission filed on 1 August 2008, CAI continued to emphasise that the clubs industry was a "*separate and distinct industry from the hospitality industry*" and that while clubs did provide hospitality services, "*the scope of the [clubs] industry extends beyond the provision of such services*". In this respect CAI submitted:

"In continuing and reiterating our previous submissions, Clubs are groups of people sharing a common interest, who combine to provide facilities to promote and pursue that interest. Clubs provide popular venues for socialising, inexpensive forms of entertainment, sports and activities and are major economic contributors to local communities, particularly in regional Australia.

It is the Clubs that provide for continual funding to the affiliated sporting teams to provide and maintain the necessary facilities and equipment to allow them to play; the Clubs provide facilities and equipment and fund the surf clubs to continue to provide a public service of safety on the beaches; Clubs provide many services to the elderly and returned services personnel, including aged care homes and other facilities. These are just examples of the community funding that Clubs provide throughout Australia.
The types of Clubs that form the Club industry in Australia are as diverse as the size and employment numbers. They include:

- Sporting (all codes of football, yachting and sailing, cricket, golf, bowls, racing)
- Services (RSL, church, union, political etc)
- Cultural (Italian, Croatian, etc)
- Regional (District Clubs etc)
- Recreational (surf clubs)
- Social (bridge club)"

[12] CAI went on to identify nine reasons why the clubs industry was separate and distinct from the hospitality industry:

"**1.** **Clubs are not-for-profit organisations** – unlike enterprises in the hospitality sector clubs are not run as profit based enterprises. It is for these reasons that most Clubs operate differently and are run differently to other enterprises in the hospitality sector.

2. **In many Regional Areas employees of Community Clubs are multi-skilled in that they perform work across a range of functions such as Clerical, greenkeeping and counter service –** In many Clubs, clerical and greenkeeping staff also perform work in the hospitality operations of the Club. This is not a situation that is likely to occur in other establishments in the hospitality sector.

3. **Clubs offer a variety of sports, activities and entertainment for its patrons and members that are not normally offered at other hospitality venues** – other establishments within the hospitality sector do not offer the same level of activities and entertainment. In that respect there are many tasks and positions not normally found in other enterprises and establishments in the hospitality sector.

4. **Clubs are community based and community run organisations** – this is not the case in other industries in the hospitality sector. They do not pay a dividend based upon profits made and excess funds are channeled back into the community. Additionally, there exists the concept and role of stewardship whereby staff and management recognise that the Club's resources belong to the whole club and must be used and preserved for the benefit of its members

5. **Clubs are established on the basis of interest mutuality** – no other industry or enterprise in the hospitality sector is established on this basis. It is for this reason that volunteers are often found working alongside full-time, part-time and casual employees. This is particularly the case in small and medium sized Clubs.

6. **Clubs are subject to separate and distinct regulations and regulatory framework** – this regulatory framework requires different staffing arrangements to those in other industries in the hospitality sector

7. **Clubs are required to adopt a set of rules (a constitution) subject to the provisions of the applicable regulatory framework. Such regulatory framework means that the Clubs are subject to control by members and only members and bona-fide visitors can avail themselves of the facilities;**

8. **Each club is committed to maximizing local support and offering affordable social opportunities in a fun, safe and friendly environment in order to raise funds in furtherance of their community objectives.**

9. **Employees of Clubs provide a service to their members which goes beyond the service provided in a commercial establishment**."

[13] CAI's submission also pointed to a number of differences in the trading operations of the clubs as compared to other hospitality venues, including that labour costs were a higher proportion of total expenses than for pubs, bars and taverns; the main source of revenue for clubs was gambling; clubs offered a greater diversity of services which required a greater degree of multi-skilling on the part of employees; clubs were not public establishments but rather, with some exceptions, provided service to members and their guests; and club managers had traditionally been represented by the Club Managers' Association, Australia (CMAA) and were subject to detailed award regulation.

[14] CAI's position was supported by the Liquor, Hospitality and Miscellaneous Union (LHMU), as United Voice was then known. In a submission also filed on 1 August 2008, the LHMU said:

> "The LHMU has been in discussion in recent weeks with union and employer interests in the Hospitality Industry (including Clubs). There is still strong support for the separation of licensed clubs from the general Hospitality industry. The LHMU has therefore submitted a draft Clubs Award and has modified the proposed Hospitality Industry Modern Award (HIMA) to exclude clubs."

[15] In a submission also filed on 1 August 2008, the Australian Hospitality Association (AHA) also supported the creation of a Clubs Award separate from the Hospitality Award which it envisaged would cover pubs, taverns, casinos and accommodation. The CMAA took the same position in a submission filed on 31 July 2008. No interested party *supported* the position of the licensed and registered clubs sector being encompassed in a single hospitality award.

[16] Subsequently, on 6 March 2009, the LHMU filed a further submission in which it stated that it and the CMAA had held a number of meetings with CAI, and that substantial agreement had been reached on the terms of a new award to cover the licensed and registered clubs sector. A copy of the proposed draft award was attached to the submission. On the same day CAI filed a further submission which confirmed that a draft award for the clubs sector had been negotiated and (but for a small number of identified items) had been agreed. CAI noted: "*In essence all parties agreed for the need for the* [*Registered and Licensed Clubs Industry Award*] *and feel the attached document reflects the uniqueness of the registered and licensed clubs industry*". The draft contained, as an agreed term, a penalty rates provision under which full-time and part-time employees were to receive penalty rates of 150% for work on Saturdays, 175% on Sundays and 250% on public holidays. That is, CAI's preference for a club industry-specific award caused it to agree to a 150% penalty on Saturdays rather than being covered by a wider hospitality industry award with a penalty rate of 125% as had been proposed in the 12 September 2008 exposure draft.

[17] The award modernisation Full Bench acceded to the approach urged upon it by the parties. In a decision issued on 22 May 2009,[13] the Full Bench said:

> "[100] The question of award coverage for licensed and registered clubs first arose in the priority stage of award modernisation. We deferred a final conclusion, noting that it might be possible to include the sector in the Hospitality Modern Award and the potential overlap in relation to events staged by clubs and grounds management and maintenance.
>
> [101] There is general support amongst employer and employee associations in the industry for a separate licensed and registered clubs modern award. While it might be possible to include clubs within the Hospitality Modern Award, with some sector specific arrangements, we have decided to make a separate clubs award. We publish a draft Registered and Licensed Clubs Award 2010. The LHMU and CAI provided a draft award, in a largely agreed form, and we have used this as the basis of the exposure draft."

[18] After the small number of non-agreed matters were resolved, the *Clubs Award* in its final form was published on 4 September 2009 and took effect from 1 January 2010. It contained the weekend penalty rates that had been agreed to by CAI and the LHMU in their earlier draft award. The *Hospitality Award* was developed separately after the award modernisation Full Bench's decision of 22 May 2009 and likewise took effect on 1 January 2010. As will be demonstrated, there are significant similarities between the two awards, but from the outset the *Hospitality Award* contained a lower penalty rate of 125% for work on Saturdays performed by full-time and part-time employees.

[19] Clause 4.1 of the *Clubs Award* provides that it covers employers of employees engaged in "*the performance of all or any work in or in connection with or for clubs registered or recognised under State, Territory or Commonwealth legislation and their employees in the classifications within Schedule C – Classifications, to the exclusion of any other modern award*". The term "*club*" is defined in clause 3 as follows:

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[13] [2009] AIRCFB 450

> "**club** means any club which is registered and licensed under the provisions of relevant State or Commonwealth Statutes (Liquor and/or Gaming Acts, Associations' Incorporation Acts or Corporations Acts) and which is established and operates on a not-for-profit basis for the benefit of members and the community"

[20] Clause 4.2 provides, "*to avoid doubt*", that it covers the work of bar attendants and stewards employed in a club situated on a football ground, cricket ground or sports ground and persons engaged as greenkeepers, ground attendants, gardeners, propagators, lawn mower and motor roller drivers and general labourers in the construction and maintenance of bowling greens and golf courses. Clause 4.2 also specifies some categories of employees who are not covered by the *Clubs Award*, and clause 4.3 provides that the award does not apply to employees of employers covered by four other specified modern awards, one of which is the *Hospitality Award*.

[21] Clause 4.1 of the *Hospitality Award* provides that it covers employers in the "*hospitality industry*" and their employees in the classification in Schedule D – Classification Definitions of the Award to the exclusion of any other award, subject to the exclusion of employers in a number of identified "*industries*", one of which is "*clubs registered or recognised under State or Territory legislation*" and another of which is "*restaurants covered by the Fast Food Industry Award 2010, the Registered and Licensed Clubs Award 2010 or the Restaurant Industry Award 2010*". Clause 4.2 defines the expression "*hospitality industry*" as follows:

> "4.2 For the purpose of clause 4.1, hospitality industry includes hotels; motor inns and motels; boarding establishments; condominiums and establishments of a like nature; health or recreational farms; private hotels, guest houses, serviced apartments; caravan parks; ski lodges; holiday flats or units, ranches or farms; hostels, or any other type of residential or tourist accommodation; wine saloons, wine bars or taverns; liquor booths; resorts; caterers; restaurants operated in or in connection with premises owned or operated by employers otherwise covered by this award; casinos; and function areas and convention or like facilities operating in association with the aforementioned."

[22] Clause 17.2 of the *Clubs Award* provides for minimum rates of pay for employees in 14 classification levels – an "*Introductory*" level and Levels 1-13. Levels 1-6 contain subsidiary classifications for food and beverage attendants/supervisors, guest service attendants, kitchen attendants, child care workers, clerks, cooks, doorpersons/timekeepers/security officers, front office staff, leisure attendants, maintenance and horticultural employees, storepersons, forklift drivers, handypersons, and club managers at clubs with a gross annual revenue of less than $500,000. The rates for the Introductory Level and Levels 1-6 are expressed as weekly and hourly amounts. Levels 7-13 constitute a system of classifications for managers, and the rates are expressed not just as weekly and hourly amounts but also as annual salaries where they are applicable. Clause 17.3(a)(i) provides that a range of provisions in the award, including the provisions concerning ordinary hours of work, overtime and penalty rates (except for public holidays), do not apply to an employee in a managerial classification who is paid 20% in excess of the prescribed salary, and clause 17.3(a)(ii) provides that a range of additional provisions do not apply where a manager is paid 50% more than the prescribed salary. In addition, clause 17.3(b) provides that a number of award provisions do not apply to maintenance and horticultural employees in Levels 1-4 where they agree to a salary not less than 33% in excess of the prescribed weekly

rate. Schedule C provides the definitions for each of these classifications and sub-classifications.

[23] Clause 20.1 of the *Hospitality Award* provides for an Introductory Level classification, and also Levels 1-6 which contain the same sub-classifications as the *Clubs Award* except that that they do not contain child care workers, refer to gardeners instead of maintenance and horticultural employees and do not include club managers at clubs with a gross annual revenue of less than $500,000. The rates of pay (expressed as weekly and hourly rates) for the Introductory Level and Levels 1-6 are the same as those for the corresponding classifications in the *Clubs Award*. However the *Hospitality Award* does not contain the managerial classifications in Levels 7-13 of the *Clubs Award*. Instead, clause 20.2 simply provides for a single minimum salary for "*Managerial staff (Hotels)*" which is lower than that for the lowest of the managerial classifications in the *Clubs Award*. Additionally the *Hospitality Award* contains a further feature not found in the *Clubs Award*, namely a separate classification stream for casino gaming employees in clause 20.3. The classification definitions are contained in Schedule D, and the Introductory Level and the sub-classifications for Levels 1-6 are defined in a way which is the same as, or highly similar to, those for the corresponding classifications in Schedule C of the *Clubs Award*.

[24] Both awards provide for a 38 hour week, which may be worked in a number of specified ways. With one exception, these are the same in both awards (see clause 26.3 of the *Clubs Award* and clause 29.1(a) of the Hospitality Award). There are differences in the awards as to the number of hours which may be worked in each day before the payment of overtime penalty rates. Both awards provide that ordinary hours may be worked on any day of the week, except that clause 26.6 of the *Clubs Award* provides, in respect of maintenance and horticultural employees, that ordinary hours must be worked Monday-Friday and on Saturday mornings only. Both awards provide for penalty rates for ordinary hours worked on weekends and public holidays but, as earlier explained, there was a reduction to Sunday and public holiday penalty rates for full-time and part-time employees under the *Hospitality Award* as a result of the *Penalty Rates Decision*. The following table sets out the comparative position:

	Saturday %	**Sunday %**	**Public Holiday %**
Clubs Award			
Full-time and part-time	150	175	250
Casual (inclusive of 25% casual loading)	150	175	250
Maintenance and horticultural employees	150 for first 2 hours, then 200	200	250
Hospitality Award – pre Penalty Rates decision			
Full-time and part-time	125	175	250
Casual (inclusive of 25% casual loading)	150	175	250

	Saturday %	**Sunday %**	**Public Holiday %**
Hospitality Award – from 1 July 2019			
Full-time and part-time	125	150	225
Casual (inclusive of 25% casual loading)	150	175	250

[25] It may be seen that the Saturday penalty rates for full-time and part-time employees under the *Clubs Award* have always been higher than under the *Hospitality Award*, and as a result of the *Penalty Rates Decision* the Sunday and public holiday penalty rates for full-time and part-time employees under the *Clubs Award* are now also higher than under the *Hospitality Award*.

[26] The other provisions of the two awards are highly similar. Both awards have the same model of flexible part-time employment provisions as a result of the *Casual and Part-time Employment Decision* of 5 July 2017.[14] The main difference is that the *Clubs Award* contains a number of provisions specifically applicable to managerial classifications that do not appear in the *Hospitality Award*, such as provisions concerning meal allowances (clause 18.1(a)(ii)), recall to duty (clause 27), professional development leave (clause 33) and accommodation (clause 35).

CAI's claim

[27] As earlier stated, CAI's application went through a number of iterations. In its original form, it proposed that the *Hospitality Award* be varied to include a large range of clubs-specific provisions derived from the *Clubs Award* in conjunction with the expansion of its coverage to encompass the clubs sector. However the final version of its application filed on 26 September 2018 significantly reduced the number of provisions from the *Clubs Award* proposed to be incorporated into the *Hospitality Award* upon the *Clubs Award's* revocation. The main variations it proposed for the *Hospitality Award* were as follows:

(1) The coverage provision in clause 4.1 would be varied so that the award covers not only the "*hospitality industry*" but also "*all or any work in or in connection with or for a club*", and the definition of "*club*" in clause 3 of the *Clubs Award* would be added to clause 3 of the *Hospitality Award*. In addition, the current clause 4.2 of the *Clubs Award*, to which we have earlier made reference, would be incorporated as clause 4.2 of the varied *Hospitality Award*. The current coverage exclusions in clause 4 of the *Hospitality Award* for clubs registered or recognised under State or Territory legislation and for restaurants covered by the *Clubs Award* would be removed.

(2) The classification structure in clause 20.1 would be varied so that:

- the sub-classification of "*Child care worker (clubs)*" is added to the same levels in the classifications structure as is currently the case in the *Clubs Award*;

[14] [2017] FWCFB 3541

- references to the sub-classification of "Gardener" are replaced with "Maintenance and horticultural employee";

- in Level 5, the sub-classification of "Food and beverage supervisor" is re-named as "Food and beverage and gaming attendant grade 5" (in line with the current Clubs Award);

- the sub-classification of "Club manager of a club with a gross annual revenue of less than $500,000" is added to Level 6; and

- new Levels 7-13 have been added to incorporate the classification stream for club managers currently contained in the Clubs Award.

(3) Definitions taken from the *Clubs Award* in relation to the proposed modifications to the classification would be added to clause 3 and Schedule C in line with the current *Clubs Award*.

(4) The provisions concerning casual fitness instructors, junior employees and management trainees currently contained in clause 17 of the *Clubs Award* would be incorporated as clubs-specific provisions in clause 20 of the *Hospitality Award*.

(5) Specific beneficial entitlements in the *Clubs Award* applicable to bingo callers (minimum engagement of three hours), maintenance and horticultural employees (may not be required to perform indoor duties; reimbursement for supply of tools; training allowance; span of hours) and club managers (meal entitlements; expenses; accrued rostered days off; recall to duty; accommodation; professional development leave; uniform reimbursement) would be placed in the *Hospitality Award.*

(6) The salaries provisions from the *Clubs Award* applicable to club managers and maintenance and horticultural employees would be placed in clause 27.4 of the *Hospitality Award*.

(7) The superannuation funds applicable to the clubs industry would be added to the list of funds in clause 28.4 of the *Hospitality Award* to which an employer may contribute.

(8) The provisions for the pattern of working ordinary hours currently contained in the *Clubs Award* would be placed in clause 29.1(b) of the *Hospitality Award* as a clubs only provision (with the existing provision being applicable to the hospitality industry).

(9) The meal and crib break provisions currently in the *Clubs Award* would be placed in clauses 31.6-31.12 of the *Hospitality Award* as clubs-only provisions.

(10) The penalty rates provisions in clause 32.1 would be altered so that full-time and part-time clubs employees (other than maintenance and horticultural employees)

would phase from their current Saturday and Sunday penalties under the *Clubs Award* to those currently in the *Hospitality Award* as follows:

	Saturdays %	Sundays %
1 July 2019	145	170
1 July 2020	135	160
1 July 2021	125	150

(11) The current penalty rates provisions for maintenance and horticultural employees in the *Clubs Award* would be placed in clause 32.1 of the *Hospitality Award*.

(12) The definition of a shiftworker currently contained in the *Clubs Award* would be placed in clause 34.1 of the *Hospitality Award* as a clubs-only provision.

(13) Clause 37.1(b)(i), which entitles a full-time employee to an extra day's pay, an alternative day off or an additional day's leave when their rostered day off falls on a public holiday, would be deleted.

[28] As an alternative position intended to minimise the extent of clubs-specific provisions in the *Hospitality Award*, CAI proposed that the provisions concerning junior rates, hours of employment and meal breaks for club employees could cease effect from 1 January 2020.

[29] Under CAI's application, the *Clubs Award* would be revoked simultaneously with the variations it proposed to the *Hospitality Award* taking effect.

[30] CAI's application was opposed by United Voice, the Australian Workers' Union (AWU), the CMAA, the Professional Golfers Association of Australia (PGA), the Australian Golf Course Superintendents' Association (AGCSA), the RSL and Services Club Association Queensland Inc. (RSLAQ), the Federation of Community, Sporting and Workers Clubs (FCSWC), and the 141 individual clubs set out in the Schedule to this decision. The AHA took a neutral position at the level of general principle, but opposed specific aspects of CAI's application and submitted that if the *Hospitality Award* was varied to extend its coverage to the clubs industry, then clubs-specific provisions should be contained in a club-specific schedule to the award. We also note that, although it did not appear in the proceedings before us, RSL Victoria lodged a submission on 24 March 2017 opposing the revocation of the *Clubs Award*. RSL clubs in Victoria appear to constitute sub-branches of RSL Victoria.

CAI's case in support of the application

[31] CAI advanced its application to vary the *Hospitality Award* and revoke the *Clubs Award* on the following bases:

(1) The application made by CAI was contemplated by the Full Bench in the *Penalty Rates Decision*, and the issue of penalty rates for clubs employees was not determined to finality in that decision notwithstanding that the CAI had failed to establish a merits case for any reduction in penalty rates.

(2) The Full Bench in the *Penalty Rates Decision* expressed concern over the appropriateness of a separate *Clubs Award* in circumstances where there was a

high degree of commonality in work performed under the *Clubs Award* and the *Hospitality Award*. This was supported by a similar conclusion expressed in the *Casual and Part-Time Employment Decision*.[15]

(3) The *Clubs Award* did not meet the modern awards objective in s 134(1) in circumstances where the work of employees in the club industry and employees covered by the *Hospitality Award* was the same (or very similar), but the *Clubs Award* required the payment of higher penalty rates for work on weekends and public holidays than did the *Hospitality Award*. Employees in the club industry shared the same or very similar profile as employees in the hospitality industry such that the disutility for work on weekends and public holidays was the same, and thus differential penalty rates could not be justified.

(4) The operation of the *Clubs Award* in terms similar to the terms of the *Hospitality Award* (other than in respect of penalty rates) detracts from the operation of an award system that avoids unnecessary overlap of modern awards and is intended to be simple and easy to understand (s 134(1)(g)).

(5) The Commission has previously considered whether a proposed variation to ensure consistency across awards will make the safety net simpler and easier to understand, and held in *Re Four Yearly Review - Annual Leave Decision*[16] that it would have those effects.

(6) Once the *Hospitality Award* was varied to set minimum terms and conditions for employees in the clubs industry, the *Clubs Award* would become obsolete for the purposes of s 164(a) and the *Hospitality Award* would be an appropriate award to cover clubs employees for the purposes of s 164(b).

(7) The evidence in the proceedings demonstrated that there were the following features of commonality between the clubs industry and the hospitality industry:

- both industries have participants who supply food services in restaurants, clubs and bars;
- both industries have participants who supply beverage (and related food) services in clubs and bars;
- both industries have participants who provide live entertainment services;
- both industries have some (larger) participants who supply accommodation services;
- both industries have participants who are regulated by licencing legislation, including liquor licencing and gaming licencing;

[15] [2017] FWCFB 3541

[16] [2015] FWCFB 3406

- both industries have participants who trade similar hours, including significant weekend trading and public holiday trading;

- both industries have a similar split of male and female employees;

- both industries have a similar split of full-time and part-time hours;

- both industries have a similar age profile of employees;

- both industries employ persons in similar roles and performing similar duties (as demonstrated by the similarity in classifications in the *Clubs Award* and the *Hospitality Award*);

- both industries currently have the same award rates of pay for employees classified at the Introductory Level or Levels 1-6;

- in some clubs, food and beverage services have been outsourced to hospitality groups whose employees are covered by the *Hospitality Award*; and

- in some States and Territories (such as the ACT), both industries were historically regulated by a common award.

(8) While the application does not involve a comparison of the competitive features or costs structures of the clubs industry and the hospitality industry from an economic perspective, it recognised that in general terms the club industry is in its service offerings involved in a level of competition with the hospitality industry but faces a labour cost for working weekends and public holidays for which there is no logical basis.

(9) The merger of the *Clubs Award* and the *Hospitality Award* would not result in a modern award that was complex or unwieldy or difficult to use.

(10) The reversal of its position on the need for a separate *Clubs Award* was justifiable because:

- at the time of the award modernisation process the clubs industry had a traditional high incidence of part-time employment and the hospitality industry had a low incidence, but this disparity was unlikely to continue in the light of the variation to the part-time employment provisions in the *Hospitality Award*;

- the service offerings of the club industry were now largely assimilated with the service offering of the hospitality industry; and

- the Full Bench in the *Penalty Rates Decision* had itself identified the need to examine the appropriateness of maintaining a separate award for the clubs industry.

(11) The effect on employees of the reduction in weekend penalty rates which would result from the grant of CAI's application would be minimised by the transitional arrangements which it proposed (which were consistent with those introduced in the *Hospitality Award* following the *Penalty Rates Decision*), and by the fact that the reductions would operate at the same time as increases in the minimum award rates of pay pursuant to annual wage reviews.

(12) In considering the matters required to be taken into account under s 134(1), the Commission should find (using the paragraph designations in the subsection):

(a) the reduction in weekend and public holiday penalty rates would have an adverse impact on relative living standards and the needs of the low paid, especially those clubs employees in lower classifications who work on weekends and public holidays, but this would be legitimately addressed by the proposed transitional arrangements;

(b) the need to encourage collective bargaining would on one view be unaffected by a reduction in penalty rates, although on another view this may encourage collective bargaining particularly if unions want employers to maintain the current level of penalty rates;

(c) in relation to the need to promote inclusion through increased workforce participation, it was likely that additional employment would occur as a result of a decrease in penalty rates on weekends and public holidays, although this may be difficult to quantify and the increase in employment may only be modest;

(d) the need to promote flexible work practices and the efficient and productive performance of work would be unaffected by a reduction in penalty rates was a neutral consideration;

(da) the need to provide additional remuneration for working on weekends would not be adversely impacted by a reduction in penalty rates and was a neutral consideration, because there was no greater disutility working on weekends in the clubs industry than the hospitality industry given the similarity in the workforce gender and age profile in the two industries, because work on weekends and public holidays was a feature of the clubs industry, and because employees in the clubs industry would continue to receive additional remuneration for working on weekends and public holidays;

(e) the principle of equal remuneration for work of equal or comparable value weighed in favour of the application since it would equalise weekend and public holidays remuneration for food, bar, gaming and leisure attendants in the hospitality and clubs industries;

(f) the likely impact on business was a consideration in favour of the reduction in weekend and public holiday penalty rates as employment costs will axiomatically or self-evidently fall;

(g) the need for a simple and easy to understand, modern award system was a neutral consideration insofar as it related to a reduction in weekend and public holiday penalty rates; and

(h) the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy was, in the light of the absence of material addressing the issue, a neutral consideration.

Cases against CAI's application

United Voice

[32] United Voice contended that:

- CAI's application to simultaneously amend the *Hospitality Award* and revoke the *Clubs Award* could not be successful under the framework of the FW Act because the Commission could not be satisfied that the former award should or could be varied to cover employees currently covered by the latter award;

- the statutory framework required that, in order for the Commission to grant CAI's application, it had to be satisfied that the variations to the *Hospitality Award* were necessary to meet the modern awards objective and that the *Hospitality Award*, as varied, was appropriate for the employees formerly covered by the *Clubs Award*;

- it was significant that s 164(b), which concerned one of the circumstances in which the Commission was permitted to revoke a modern award, was concerned with the interests of employees only, and the test of appropriateness in s 164(b) established a "*high bar*" which should be approached on the basis that no employee should be left worse off;

- the sole purpose of CAI's application to abolish the *Clubs Award* was to obtain cuts to weekend and public holiday penalty rates for the permanent workers under the *Clubs Award*;

- the proposition that clubs and hospitality businesses were "the same" was not established on the evidence, and indeed CAI had not adduced any evidence about the nature of work at clubs or hospitality venues;

- the assertion that clubs were at a competitive disadvantage compared to hospitality venues did not bear scrutiny, since the evidence did not support it and, in fact, clubs in the majority of states and the largest states enjoyed a significant advantage over hospitality venues because of the regulatory framework applying to electronic gaming machines;

- CAI did not attribute any degree of competition to penalty rates, nor did it draw any connection between a reduction in penalty rates payable to a small proportion of the workforce and a more competitive market for clubs, so that complaints about "unfair competition" had no merit or credibility;

- CAI's application was made without regard for the harm that cutting weekend penalty rates would cause to employees employed on a permanent basis, or to the detrimental effect of the removal of other provisions of the *Clubs Award*;

- evidence of permanent clubs employees who worked on weekends and public holidays demonstrated that they would suffer significant financial effects and a lower standard of living if the proposed penalty rates reductions proceeded, with no opportunity to make up their loss through working additional hours;

- clubs employees required to regularly work on weekends and public holidays suffer significant social disutility as a result and often only work weekends because the penalty rates assist with their need to make a living;

- the losses to affected employees would not be ameliorated by the proposed transitional arrangements or by any future wage adjustments arising from annual wage reviews;

- the scale of employer opposition to CAI's application could not rationally be reconciled with the claim that clubs were suffering from unfair competition due to penalty rates, and raised questions concerning the adequacy of CAI's consultation with its membership and whether the application should properly be understood as something that clubs actually want;

- the real reason for the commercial concerns of clubs related to revenue from electronic gaming machines (EGMs), and in this respect clubs enjoyed a significant regulatory advantage;

- in relation to the s 134(1) considerations, paragraphs (a), (da) and (g) weighed against CAI's application, paragraphs (b), (c), (d), (e), (f) and (h) were neutral considerations, and none weighed in favour of the application; and

- coverage of clubs employees by the *Hospitality Award* would not be appropriate as required by s 164(b) because it would render at least permanent employees working weekends and public holidays who are not maintenance and horticultural employees worse off, and would leave widely disparate groups of employees under a single award; and

- such coverage was also not appropriate having regard to the history of the *Clubs Award*, which it could be inferred was considered by the AIRC award modernisation Full Bench to be the appropriate award to cover clubs employees.

Australian Workers' Union

[33] The AWU, whose coverage of clubs employees included maintenance and horticultural employees working on bowling greens and golf courses, and all clubs employees in Queensland except south-east Queensland, submitted:

- the purpose of CAI's application was to achieve its desire to secure cuts to the penalty rates payable to permanent employees working on Saturdays, Sundays and public holidays;

- CAI's case did not engage with the relevant legislative requirements, but focused merely on potential similarities between the clubs industry and the hospitality industry, which was an insufficient basis for a proposal of the significance which it advanced;

- the frequency of CAI's amendments to its claim showed that it was merely seeking the path of least resistance to its goal of reducing weekend and public holiday penalty rates;

- it was necessary that the modern awards objective be met for both the claimed variations to the *Hospitality Award* and the revocation of the *Clubs Award*;

- CAI had not demonstrated that the *Clubs Award* was not currently meeting the modern awards objective or that its revocation was required to achieve the modern awards objective, nor had it demonstrated this with respect to the proposed variations to the *Hospitality Award;*

- in respect of the s 134(1) matters, paragraphs (a), (b), (da) and (g) weighed against the grant of CAI's claim, and the other matters were neutral;

- the bulk of CAI's evidentiary case was largely irrelevant to the modern awards objective, including its primary proposition concerning commonality of work between the clubs industry and the hospitality industry;

- CAI had offered no analysis to demonstrate any correlation between the reduction in penalty rates and the proposition that a significant proportion of clubs were suffering financial distress;

- likewise CAI did not demonstrate how the Commission exercising its modern award powers to reduce penalty rates was a necessary action to take in response to alleged competition between clubs and other hospitality venues;

- CAI's application also sought reductions in other conditions of employment for clubs employees, including additional payment for broken shifts and higher duties, and to junior rates, but its case did not address the merit of any of these changes;

- CAI had conveniently abandoned its long-held belief that the clubs industry was unique in order to pursue cuts to penalty rates; and

- CAI had not consulted with member clubs in making its application and there was evidence of a lack of support for its application amongst clubs.

Club Managers' Association Australia

[34] The CMAA generally adopted the submission of United Voice, and further submitted that the differences between the clubs industry and the wider hospitality sector identified in CAI's submissions to the award modernisation Full Bench which led to the establishment of the separate *Clubs Award* had not materially changed, and accordingly there was no proper

basis for the revocation of the *Clubs Award*. The *Clubs Award* was not obsolete and had operated effectively since it took effect. The CMAA also submitted that the *Clubs Award* contained a career path for club managers that was aligned with the attainment of specified nationally recognised qualifications, was integrated with an entitlement to professional development leave, and had been developed over a long period of time, and that "*cherry picking Managers' conditions in the Clubs Award and randomly plonking them in the Hospitality Award*" defeated the objective of a holistic career progression for all levels of clubs employees.

Professional Golfers Association of Australia

[35] The PGA, which is the peak body for golf professionals in Australia, submitted that golf professionals did not work in the hospitality industry but rather the majority of them were employed by not-for-profit community-based organisations whose central activity was to provide recreational facilities for people with common interests. Its survey evidence demonstrated that 55% of employed golf professionals were covered by the *Clubs Award* (with 44% covered by the *Amusement, Events and Recreation Award 2010*). A significant proportion of golf professionals' income was, it submitted, derived from weekend and public holiday penalty rates, with the result that golf professionals under the *Clubs Award* would suffer a substantial reduction in their incomes. To the extent that golf clubs provided restaurant, bistro or bar facilities, this was to cater for golfers and not the general public, was not part of the clubs' core function, and often ran at a loss. The PGA submitted that to the extent that clubs found themselves in financial distress (which included about half of the golf clubs in NSW), this was the result of poor governance and business models rather than pay rates and, in any event, the number of clubs in distress was falling.

Australian Golf Course Superintendents' Association

[36] The AGCSA, which is the peak body for "*sportsturf professionals*" and encompasses maintenance staff, agronomists and horticulture staff at golf course, sportsfields and grounds and bowling clubs, submitted that it was opposed to CAI's application to revoke the *Clubs Award* because it would reduce the conditions of employment of maintenance and horticultural employees. It submitted that CAI's application would have a detrimental impact on low paid employees and did not have wide industry support.

RSL and Services Club Association Queensland Inc.

[37] The RSLAQ, which represented 65 registered and licensed RSL and services clubs in Queensland, a number of which are among the largest clubs in the State, opposed CAI's application based on a motion passed at its quarterly meeting in June 2017 and since endorsed by unanimous feedback from members and subsequent meetings and through email communications. It submitted that nothing had occurred since 2009 that would warrant a departure from the long-held view of the clubs industry that it was a distinct industry sector requiring separate award coverage, and that in proceeding with its application CAI had engaged in little consultation with the industry. It submitted that the *Clubs Award* had served the industry well since it was made, there was no broad industry support for its revocation, and the incorporation of provisions drawn from the *Clubs Award* into the *Hospitality Award* would make the *Hospitality Award* complex, difficult to interpret and might result in costly mistakes for employers. The proposed reduction in penalty rates, the RSLAQ submitted, would not benefit clubs; rather, it submitted, the current level of penalty rates provided a level

of competitiveness over other hospitality sectors which made it easier to attract quality staff. The RSLAQ also expressed the concern that if the *Clubs Award* was revoked and clubs placed under the *Hospitality Award*, clubs would cease to be "*masters of their own destiny*" and the terms and conditions of employment in the clubs industry might be influenced and impacted by other hospitality industry bodies.

Federation of Community, Sporting and Workers Clubs

[38] According to its website, the FCSWC has 50 member clubs in New South Wales.[17] Its submission simply stated that it did not support the CAI application, supported the continued operation of the *Clubs Award* including its current penalty rates, considered its members' staff to be highly valued by members, management, boards and local communities, and did not wish to see staff face a pay cut from a reduction in weekend and public holiday penalty rates.

Individual clubs

[39] The 141 individual clubs generally lodged submissions in a standard form that was in the same terms as the FCSWC's submission. We note that some of these clubs are members of RSLAQ, the FCSWC and/or CAI.

Statutory framework

[40] CAI's application was made in the context of the current 4 yearly review of modern awards undertaken pursuant to s 156 of the FW Act. Section 156 was repealed by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* effective retrospectively from 1 January 2018, but clause 26 of Schedule 1 to the FW Act (which was added by the amending Act) requires the Commission to continue to apply s 156 to the current review as if it had not been repealed. Section 156(2) of the FW Act identified the task to be undertaken in a 4 yearly review as follows:

> *What has to be done in a 4 yearly review?*
>
> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:

[17] Blacktown Workers Club, Bulli Workers Club, Cabra-Vale Ex-Active Servicemen's Club, Campbelltown RSL, Campbelltown Catholic Club, City Trade Union Bowling Club, Club Central Hurstville, Club Central Menai, C.ex Coffs Harbour, C.ex Urunga, C.ex Woolgoolga, Dora Creek Workers Club, Dubbo RSL Club, Fingal Bay Bowls Sports & Recreation Club, Goulburn Workers Club, Gulgong RSL Club, Graphic Arts Club Mascot, Lantern Club, Lithgow & District Workmen's Club, Liverpool Catholic Club, Mingara Recreation Club, Mooney Workers Club, Mt Pritchard & District Community Club, Mt Pritchard-Harbord Diggers, Mt Pritchard-Manly Bowling Club, Narromine United Services Memorial Club, Newtown RSL, North Sydney Leagues Club, North Sydney Seagulls, Pearl Club Chatswood, Petersham RSL, Randwick Labor Club, Revesby Workers Club, Revesby Bowling & Recreation Club, Richmond Club Limited, Singleton Diggers, Springwood Sports Club, Sutherland District Trade Union Club, Sutherland Tradies Helensburgh, Teralba Bowling Club, The Westport Club, Thurgoona Country Club, Toronto District Workers Club, Wagga Wagga RSL, Wagga Wagga Commercial Club, Warragamba Workers & Sporting Club, West Pennant Hills Sports Club, West Tradies, West Wallsend Workers Club, Weston District Workers Club.

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

[41] However the conduct of the 4 yearly review is subject to s 138, which provides:

138 Achieving the modern awards objective

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.

[42] The modern awards objective to which s 138 refers is set out in s 134(1) as follows:

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.***

[43] Section 134(2)(a) provides that the modern awards objective applies to the performance or exercise of the Commission's functions or powers under Pt 2-3 of the FW Act.

[44] The general principles applicable to the conduct of the 4 yearly review were recently summarised in *Alpine Resorts Award 2010*[18] as follows:

- section 156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards;
- "review" has its ordinary and natural meaning of "survey, inspect, re-examine or look back upon";[19]
- the discretion in s 156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;
- in particular the modern awards objective in s 134 applies to the review;
- the modern awards objective is very broadly expressed,[20] and is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account the matters in ss 134(1)(a)–(h);[21]
- fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;[22]

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[18] [2018] FWCFB 4984 at [52]

[19] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [38]

[20] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227, 219 IR 382 at [35]

[21] *Penalty Rates Decision* [2017] FWCFB 1001, 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [41]-[44]

[22] *Re Annual Wage Review 2017-2018* [2018] FWCFB 3500, 279 IR 215 at [21]-[24]

- the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;[23]

- no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;[24]

- it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;[25]

- the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;[26]

- in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;

- what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;[27]

- the matters which may be taken into account are not confined to the s 134 considerations;[28]

- section 138, in requiring that 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

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[23] *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [56]

[24] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [33]

[25] *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154 at [105]-[106]

[26] Ibid at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[27] Ibid at [28]-[29]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [49]

[28] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [48]

minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed; [29]

- what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;[30]

- where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.[31]

[45] In respect of the current 4 yearly review, s 156(2)(b)(iii) (as applied by clause 26 of Schedule 1 of the FW Act) empowers the Commission to make determinations revoking modern awards. Because this is a power contained in Pt 2-3, the modern awards objective applies to the exercise of this power by virtue of s 134(2)(a). Additionally, s 157(1)(c) empowers the Commission generally to make a determination revoking a modern award if it is satisfied that this is necessary to achieve the modern awards objective.

[46] Section 164 sets out special requirements that also apply to the revocation of a modern award (whether or not this is done as part of the 4 yearly review):

> **164 Special criteria for revoking modern awards**
>
> The FWC must not make a determination revoking a modern award unless the FWC is satisfied that:
>
> (a) the award is obsolete or no longer capable of operating; or
>
> (b) all the employees covered by the award are covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them, or will be so covered when the revocation comes into operation.

[47] The grant of CAI's application would involve the Commission exercising modern awards powers in two respects simultaneously:

(1) the variation of the *Hospitality Award* in order to accommodate coverage of the clubs sector; and

(2) revocation of the *Clubs Award*.

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[29] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, 252 FCR 337 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [45]

[30] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480, 205 FCR 227, 219 IR 382

[31] Ibid at [46]

[48] In order for us to take the first step, we would need to be satisfied that the variations to the *Hospitality Award* proposed by CAI are necessary in order for that award to achieve the modern awards objective. In respect of the second step, it would also be necessary for us to be satisfied that this would achieve the modern awards objective and in addition that either the precondition in s 164(a) or that in s 164(b) is satisfied.

[49] There has been little consideration to this point of the s 164 criteria for revocation. However we derive some assistance from paragraph 627 of the Explanatory Memorandum for the *Fair Work Bill 2008*, which said:

> "An award may become obsolete by the making of a new modern award. In such cases it is envisaged that commencement of the new award and revocation of the existing award would be co-ordinated to ensure no gap in award coverage."

[50] Two things may be derived from the above passage. The first is that the making of a new modern award with a particular area of coverage will render an existing modern award with the same area of coverage obsolete for the purpose of s 164(a) and therefore capable of revocation. It seems to us that, by parity of reasoning, the same proposition would apply to a situation where a modern award is varied to give it an extended area of coverage which overlaps entirely with the coverage of a pre-existing modern award, so that the latter would also become obsolete for the purpose of s 164(a) and revocable. If so, then in the current case a determination to vary the *Hospitality Award* in the terms proposed by CAI in order to achieve the modern awards objective would have the consequential effect of rendering the *Clubs Award* obsolete and thus permitting its revocation without requiring any consideration of s 164(b). That would mean that the primary focus in this case must be on whether the proposed variations to the *Hospitality Award* in the context of the potential to expand its coverage to include employees currently covered by the *Clubs Award* are necessary in order for the modern awards objective to be achieved.

[51] Second, the practical way in which the provision would apply is that the revocation of the obsolete award would occur simultaneously with the making of the new award (or, on our extrapolation from the Explanatory Memorandum, the extension to the coverage of another award) so that there is no period during which the relevant class of employees is left not covered by another modern award. Section 164(b) also contemplates a similar approach in that the criterion of appropriateness is applied to a different modern award that already covers the relevant class of employees or will cover them when the revocation takes effect. That was the approach taken when the Commission, as part of the current 4 yearly review, determined that the *Quarrying Award 2010* should be revoked at the same time as varying the *Cement and Lime Award 2010* to become the *Cement, Lime and Quarrying Award* and to pick up the coverage of the *Quarrying Award*.[32]

Findings on the evidence

The evidence

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[32] See *4 yearly review of modern awards -Award stage - Group 1* [2018] FWCFB 3802 at [119]-[120]

[52] The parties to the proceedings adduced evidence from the following witnesses:

Clubs Australia – Industrial:

- Anthony Trimarchi - Manager of Policy and Government at the Registered Clubs Association of New South Wales[33]
- Gwyn Rees - Chief Executive of The Licensed Clubs Association of the ACT[34]
- George Addison - Government Relations Manager (Qld) of CAI[35]
- Neil Murray - COO of Community Clubs Victoria[36]
- Lisa Petrie - Human Resources Manager of St George Leagues Club[37]
- Chris Mossman - Executive Manager of Workplace Relations for Clubs NSW and the Executive Director/Secretary of CAI[38]

United Voice:

- Rob Docker - CEO of the Tradies Group[39]
- Neale Genge - Company Secretary and General Manager at Casino Returned Servicemen's Memorial Club[40]
- Daniel Constable - CEO of Port Macquarie Golf Club[41]
- Deanna Kelly - Gaming Attendant at Central Coast Leagues Club[42]
- Mark Unwin - CEO of The Australian Golf Course Superintendents' Association[43]
- Magdalena Gorman - Supervisor at Doyalson Wyee RSL[44]
- Sandra King - Cashier and Gaming Attendant at Tewantin Noosa RSL[45]
- Emilio Valenti - Bar Supervisor at Tea Tree Gully Club[46]
- Peter Cooper - Senior Industrial Advocate at the CMAA[47]

Club Managers' Association Australia:

- Sharon Tassell - General Manager at Henry Lawson Sports Club[48]

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[33] Witness Statement – 23 October 2017, Exhibit 1; Oral Evidence – Transcript 2 July 2018, PNs 427-961

[34] Witness Statement – 21 October 2017, Exhibit 9; Supplementary Statement – 7 June 2018, Exhibit 10; Oral Evidence – Transcript 3 July 2018, PNs 969-1581

[35] Witness Statement – undated, Exhibit 14; Supplementary Statement – 8 June 2018, Exhibit 15; Oral Evidence – Transcript 3 July 2018, PNs 1593-2049

[36] Witness Statement – 23 October 2017, Exhibit 20; Supplementary Statement – 6 June 2018, Exhibit 21; Oral Evidence – Transcript 3 July 2018, PNs 2339-2574

[37] Witness Statement – 23 October 2017, Exhibit 22; Oral Evidence – Transcript 4 July 2018, PNs 2757-3233

[38] Witness Statement – 8 June 2018, Exhibit 26; Oral Evidence – Transcript 4 July 2018, PNs 3238-3900

[39] Witness Statement – 10 May 2018, Exhibit 19; Oral Evidence – Transcript 3 July 2018, PNs 2118-2337, 2576-2729

[40] Witness Statement – 8 May 2018, Exhibit 34; Oral Evidence – Transcript 4 July 2018, PNs 3989-4196

[41] Witness Statement – 10 May 2018, Exhibit 35; Oral Evidence – Transcript 5 July 2018, PNs 4217-4597

[42] Witness Statement – 14 May 2018, Exhibit 36; Oral Evidence – Transcript 5 July 2018, PNs 4613-4708

[43] Witness Statement – 10 May 2018, Exhibit 37; Oral Evidence – Transcript 5 July 2018, PNs 4734-4948

[44] Witness Statement – 10 May 2018, Exhibit 38; Oral Evidence – Transcript 5 July 2018, PNs 4963-5042

[45] Witness Statement – 14 May 2018, Exhibit 49

[46] Witness Statement – 15 May 2018, Exhibit 51; Oral Evidence - Transcript 9 July 2018, PNs 6758-6823

[47] Witness Statement – 7 May 2018, Exhibit 39; Oral Evidence - Transcript 5 July 2018, PNs 5046-5287

[48] Witness Statement – 10 May 2018, Exhibit 45; Oral Evidence – Transcript 6 July 2018, PNs 6393-6572

- Allen Peter - Federal Secretary of the CMAA[49]
- Matthew Dagg - General Manager at North Burleigh Surf Life Saving Supporters Association and North Burleigh Surf Life Saving Club[50]
- Zoe Clegg - Professional Development Manager of the CMAA[51]
- David Hiscox - Company Secretary and General Manager at Dapto Leagues Club Ltd[52]

Professional Golfers Association of Australia:

- Vicki Crowe - National Human Resources Manager (People & Culture) of the PGA[53]
- Geoff Stewart - General Manager – Membership and Education of the PGA[54]
- Gavin Kirkman - CEO of the PGA[55]

RSL and Services Club Association Queensland Inc.

- Timothy Wright - General Manager of the Greenbank RSL Services Club Inc.[56]

[53] In addition, the parties (particularly CAI) tendered a considerable amount of documentary material.

Overview of the clubs industry

[54] CAI tendered two documents which provide useful and objective overview information about the clubs industry in Australia. The first was the "*2015 National Clubs Census*" prepared by KPMG at the request of Clubs NSW and published in August 2016 (2016 KPMG Report). An earlier 2011 version of the Clubs Census (2011 KPMG Report) was discussed extensively in paragraphs [922]-[948] of the *Penalty Rates Decision* (and was also placed into evidence before us). The second was Australian Bureau of Statistics 2016 census data on labour force characteristics in the clubs sector and the hospitality sector generally (ABS labour force data).

[55] The KPMG Report stated the following key findings:

- the clubs industry consisted of a total of 6,413 individual clubs across Australia servicing over 13.2 million members and others in the broader community;

- the clubs industry contributed an estimated $8.3 billion to the Australia economy, constituting 0.5% of GDP and up 18% on 2011;

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[49] Witness Statement – 9 May 2018, Exhibit 46; Oral Evidence – Transcript 6 July 2018, PNs 6581-6733

[50] Witness Statement – 8 May 2018, Exhibit 53; Oral Evidence – Transcript 9 July 2018, PNs 6829-7060

[51] Witness Statement – undated, Exhibit 53; Oral Evidence – Transcript 9 July 2018, PNs 7067-7165

[52] Witness Statement – undated, Exhibit 54; Oral Evidence – Transcript 9 July 2018, PNs 7201-7433

[53] Witness Statement – 11 May 2018, Exhibit 41; Oral Evidence – Transcript 5 July 2018, PNs 5291-5563

[54] Witness Statement – 17 May 2018, Exhibit 42; Oral Evidence – Transcript 6 July 2018, PNs 5593-5784

[55] Witness Statement – 17 May 2018, Exhibit 43; Oral Evidence – Transcript 6 July 2018, PNs 5789-5901, 5945-6056

[56] Witness Statement – 10 May 2018, Exhibit 44; Oral Evidence – Transcript 6 July 2018, PNs 6064-6321

- the industry paid an estimated total of $2.6 billion in Commonwealth and State taxes;

- the industry made a "*social contribution*" (consisting of community donations, subsidised access to facilities and volunteering) of a total of $5 billion, of which direct and in-kind donations amounted to $286 million; and

- the industry employed a headcount of just under 131,000 persons, which constitutes a slight fall from 2011, and amounts to around 85,000 full-time equivalents (FTEs);

[56] The 2016 KPMG Report contained a number of significant findings about the revenue received by clubs from EGMs and their financial viability. In respect of EGM revenue, it was found that there had been a change in the structure of the industry since 2011, with a small increase in the number of clubs receiving no EGM revenue (totalling 4,449 out of 6,413, up 17) and a significant increase in the number of clubs earning $5 million or more in EGM revenue (314 in total, up 76). However there had been a large reduction in the number of clubs earning from $200k - $5 million in EGM (1073 in total, down 303). In relation to EGM revenue, the 2016 KPMG Report emphasised that differences in the regulatory framework in the states concerning the operation of EGMs meant that there were large differences in EGM revenue as between the states. On the one hand, in Western Australia no club earned EGM revenue and in South Australia EGM revenue only made up less than 10% of club revenue, while in New South Wales and the ACT EGM revenue made up over half of all club revenue.

[57] The 2016 KPMG Report assessed the financial viability of clubs measured by earnings before interest, income tax, depreciation and amortisation (EBITDA) as a proportion of total revenue. Where EBITDA was more than 25% of revenue, it was classed as "*flourishing*", 15-25% was "*solid*", 10-15% was "*stable*", 5-10% was "*distress*" and below 5% was "*serious distress*". Clubs in the distress category were described as requiring changes to ensure viability, and in relation to those in the serious distress category the 2016 KPMG Report said "*there are serious questions as to whether the club can continue as a going concern*". Overall, there had since 2011 been an increase in the number of clubs in a flourishing or solid financial position, from 27% to 36%, and a decrease in the number of clubs in distress or serious distress from 51% to 41%. Smaller clubs were more likely to be in distress or serious distress, and less likely to be in a flourishing or solid financial position, than larger clubs. There were also differences between the type of clubs, so that for example bowling clubs and golf clubs had facilities that required significant investment and ongoing maintenance as part of their primary mission, and changes in the level of demand might affect the sustainability of these clubs. Overall, the highest proportion of clubs in distress or serious distress were golf clubs and leagues clubs, while the lowest were RSL clubs and community clubs.

[58] The economic contribution of $8.3 billion was unevenly distributed between the states, so that New South Wales contributed 45% of this, Victoria 18%, Queensland 17%, South Australia 9%, Western Australia 6% and the ACT 4%.

[59] In respect of employment, the number of employees in the clubs industry on a headcount basis had dropped slightly, from 131,500 to just under 131,000. Of these, 27% were employed on a full-time basis, 12% were part-time, 59% were casual and 2% were trainees or apprentices. The 2016 KPMG Report found that 53% of clubs employees were women. The age profile of the workforce was: 32% were 24 years of age or younger, 41% from ages 25 to 44, and 25% from 45 to 64.

[60] It may be noted that there is a major discrepancy, as well as some other significant differences, in the clubs industry labour force statistics between the 2016 KPMG Report and the 2011 KPMG Report. According to the 2011 KPMG Report, there were approximately 96,000 persons employed in the clubs industry. That discrepancy with the 2016 KPMG Report was not explained. The composition of employees has significantly changed: the 2011 KPMG Report said that 28% of employees were full-time, 21% were part-time, 49% were casual and 2% were trainees and apprentices. This difference may be the result of the *Clubs Award* having, until the *Casual and Part-time Employment Decision* of 5 July 2017, more restrictive part-time employment provisions than the pre-modern instrument which applied before 2010 in a number of states, especially New South Wales.[57]

[61] The 2011 KPMG Report also contained some information which was not the subject of updating in the 2016 KPMG Report. Some of that information, although now somewhat dated, remains relevant. In particular:

- the average number of employees per club varies significantly between states at 41 for the ACT, 28 for New South Wales and 15 or less for all the other states, and is a result of the fact that there is a higher proportion of large clubs in the ACT and New South Wales;

- the clubs industry was managed by a total of 54,000 directors or equivalents, who were mostly unpaid volunteers;

- the industry also used more than 123,00 volunteers in the provision of sporting assistance, and used over 250,000 volunteers in total;

- clubs' access to a large pool of volunteer labour, with an average of 39 volunteers per club, facilitated them in providing low cost facilities and funding community activities.

[62] The 2016 ABS labour force data showed that the clubs sector of the hospitality industry had the following characteristics:

- 44.1% of employees worked full-time hours and 55.9% worked part-time hours;

- 19.7% worked 1-15 hours per week, 16.4% worked 16-24 hours per week, 19.8% worked 25-34 hours per week, and 44% worked 35 or more hours per week;

- the workforce was 53.9% female and 46.1% male;

- 27.9% of the workforce was aged 15-24, 36.1% was aged 25-44, and 31.1% was aged 45-64;

[63] It should be noted that the ABS labour force data for the clubs sector does not however include those clubs that are not categorised as providing hospitality services. This difficulty is discussed in greater detail later in this decision.

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[57] [2017] FWCFB 3541 at [520]-[522], [525]-[528], [535]

Effect on employees of the proposed reduction in penalty rates

[64] It was not in dispute that the reduction in penalty rates which would flow from the grant of CAI's application would cause a reduction in the take home pay of employees currently covered by the *Clubs Award* who worked on weekends and public holidays. However it is necessary to set out the *extent* of the reductions involved since, unlike the outcome in the *Penalty Rates Decision*, what would be involved is lower penalty rates for Saturdays as well as Sundays and public holidays.

[65] United Voice called four witnesses who gave evidence concerning the personal effect penalty rate reductions would have upon them. Magdalena Gorman, who is employed full-time as a supervisor at Doyalson Wyee RSL Club, has a roster which requires her to work Thursday to Sunday, and is paid at Level 5 rates under the *Clubs Award*. She is a single mother and supports one child. Her evidence was that her weekly expenses totalled average $754 per week, and she received a single parent allowance from Centrelink of $296 per fortnight. The reduction in penalty rates proposed by CAI, if applied to her, would lead to a loss of $113.15 per week (on the award rates as at May 2018 and 20 hours work per weekend). This may be calculated as constituting an almost 10% cut to her weekly income. She described the consequences of this in the following terms:

> "If this happens, then the loss of income would mean that I would need to find ways to cut back on expenses.
>
> My son may have to miss out on going to school excursions and school camps. We may not have a family holiday or greatly reduce the choice and location of holidays to less desirable destinations. I would have to use more of my savings to cover expenses which would be concerning for me as I would have less back up funds for emergencies.
>
> As a full time employee I can work a maximum of 38 hours per week. I already work the maximum number of hours.
>
> In order to make up the lost income, I have calculated that I would have to work an additional four hours on Saturday, or about three and a half hours on Sunday.
>
> While I would be able to work those additional hours, (subject to approval by my employer), the impact of doing so would mean that I would have less time to spend with my son than I do now. I already work 20 hours over the weekend.
>
> It would also mean less time for social activities. I would be basically working, going home, then doing the same thing the next day again. I would be so tired after working I probably wouldn't feel like doing anything other than resting.
>
> Any additional hours on the weekends would be based on my employer increasing my hours on those days and I do not know if they would be prepared to do so, given that I

already work the maximum full-time hours each week. Even if my employer were prepared to offer me overtime, I do not know if they would have the work available."[58]

[66] Deanna Kelly works as a permanent part-time gaming attendant at the Central Coast Leagues Club who is guaranteed 144 hours' work per month. She is paid at Level 3 under the *Clubs Award*. She was born in 1949, is single, and assists in the care of a disabled niece. Her current roster pattern requires her to work a high proportion of weekends on both Saturdays and Sundays. She works 14-18 hours per weekend, and in 2017 her estimate is that she only had four weekends off during the entire year. About 50% of her take home pay comes from working hours that attract penalty rates. She estimated that her average weekly household expenses were $428.50. If the penalty rate reductions proposed by CAI were applied to her, she would lose between $70.74 per week (if she worked 14 hours on the weekend) to $90.95 per week (18 hours). Her pay records show that in the 45 pay weeks to 8 April 2017, Ms Kelly earned an average of $898.36 per week, so the pay cut involved would be approximately 7.9% to 10.1% of her income. She described the effect this would have on her as follows:

"If this happens, then the loss of income will mean I will have very little left from my take home pay to put towards my weekly needs.

In order to make up the lost income, I have calculated that I would have to work an additional:

3 to 3.5 hours on Saturday; or

2.5 to 3 hours on Sunday; or

3.5 to 4.5 hours during the week.

I would not be able to work those additional hours, because due to the lateness of finish times of my shift, which can be anytime between 2.00am or 4.00am, there is no extra time. After completing some of these long shifts I am exhausted. If I had to work extra hours to maintain my same income, then my social interactions would decrease. I provide support for my disabled niece and a lot of my spare time is spent caring and helping her. I have grandchildren which I also try to help with.

Working additional hours to make up for a reduction in my take home pay would just alienate me more from family and friends. Even if I am available to work additional hours, I do not know if my employer would be prepared to offer me additional hours.

If my take home pay was reduced I would have to seriously consider leaving employment and applying for a full pension, as the money I would receive would be comparable to what my new take home pay would be, and I wouldn't have to work the weekends and public holidays.

[58] Exhibit 38 paras 26-32

> I need to work weekends to get the penalty rates which increase my pay that enables me to pay my rent, household bills, transport costs and other essential services that I need."[59]

[67] Sandra King, a full-time cashier and gaming attendant employed at Tewantin Noosa RSL, gave evidence that she was paid at Level 3 under the *Clubs Award*, and worked a fixed 38 hours from Saturday to Wednesday, with 15 hours worked on weekends. She calculated that the weekly living expenses of her and her husband were about $550-$600 per week, and her husband earned about $200 per fortnight on the age pension. On her current roster she earned about $994.09 gross. If the penalty rate reductions proposed by CAI were applied to her, she would suffer a pay cut of $86.02 per week (that is, about 8.65%). Ms King described the effects of such a pay cut as follows:

> "If the cuts are made I will reduce my grocery costs and entertainment budget. I expect the cuts would erode my savings, making it difficult for me to cover one-off expenses such as an appliance failure, or car repairs, for example.
>
> If I were unable to pay for car repairs and my car could not be driven, I would need to take a taxi to work, as I do not have access to public transport between where I live and the Club.
>
> In order to make up lost income, I would have to work an additional 4.25 ordinary hours. I do not think I could cope physically with the additional work. I am already exhausted by the hours I currently work; and working additional hours would further reduce my social and family life.
>
> Even if I were able to work additional hours, I do not know if I will be offered additional hours by my employer. Any extra hours worked would be at overtime rates, as I already work 38 ordinary hours per week."[60]

[68] Emilio Valenti is a full-time bar supervisor employed at the Tea Tree Gully Club. He is paid at Level 4 under the *Clubs Award*. He is single and has two children. He works Tuesdays to Saturdays, and normally works 7½ hours each Saturday. He estimates that his weekly living expenses are about $550-600 per week. If the penalty rate cuts proposed by CAI were applied to him, he would lose $39.92 per week. This may be calculated as constituting about 4.5% of his current income. He said the effect of this would be as follows:

> "If this happens, then the loss of income will mean that things have to get tighter than they already are. I am already in a position where, working full-time, I have to be careful with my spending and cannot afford much more than the basics. I'd have to pay my bills, run my car and eat but I think my ability to go out socially would be impacted, I'd have to analyse things carefully.
>
> If my wages were cut, I would need to look for an extra hour or two to earn the same amount I earn now. I don't know if extra hours would be available, because I already work full-time."[61]

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[59] Exhibit 36 paras 27-32

[60] Exhibit 49 paras 21-24

[69] There is no reason to think that there is anything atypical about the above four employees. There was no dispute in the evidence that most clubs operate seven days a week and are heavily patronised to the extent of reaching peak demand on weekends when members have leisure time to utilise. CAI's witnesses Mr Trimarchi, Mr Murray, Mr Rees and Mr Addison gave evidence to that effect with respect to clubs in New South Wales, Victoria, the ACT and Queensland respectively. Accordingly clubs staff (with the exception of administrative staff[62] and possibly some maintenance staff) are rostered for extensive numbers of hours on weekends consistent with the position of the four United Voice witnesses. ABS data cited in the *Penalty Rates Decision* shows that over two-thirds of clubs employees work on weekends.[63] There was equally no dispute in the evidence generally that there is a high degree of award reliance in pay arrangements within the clubs sector, and this is supported by statistical material concerning award reliance in relation to the broader industry sector of which the clubs sector forms a part.[64] Therefore the fact that Ms Gorman, Ms Kelly, Ms King and Mr Valenti were paid at award rates may be regarded as typical for the clubs sector.

[70] Full-time and part-time employees covered by the *Clubs Award* are therefore highly exposed to any reductions in award penalty rates. The extent of the pay reductions that would result from the application of the lower penalty rates may be assessed as approximately 4-5% for employees who work Saturdays only, and 8-10% for those who work Saturdays and Sundays (with the latter constituting the larger portion).

[71] The base pay rates for full-time employees under the *Clubs Award* are, in respect of the classification levels which applied to the four United Voice witnesses, namely Levels 3, 4 and 5, at or below the benchmark of two-thirds of median full-time earnings which is used to identify the low paid.[65] The current weekly rates for those classifications are $794.70, $837.40 and $889.90 respectively. There are two measures of the low paid benchmark; calculated on the *Characteristics of Employment Survey*, it was $886.67 in 2018, and based on *Survey of Employee Earnings and Hours* data, it was $973.33.[66] To the extent that the earnings of the three full-time United Voice witnesses were above the low paid benchmark (noting that the pay figures in their witness statements pre-dated the Annual Wage Review increase on 1 July 2018), it is clear that this is only because they worked on weekends and receive weekend penalty rates. The reductions threaten to push them below the benchmark and render them low paid employees.

[72] In the case of the three witnesses who work full-time, it is only weekend penalty rates which keep them from being low paid. The income reductions which would result from the application of the lower weekend penalty rates would place them close to, if not below the low paid threshold. That same conclusion may be extrapolated to much of the full-time workforce employed under the *Clubs Award*.

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[61] Exhibit 51 paras 18-19

[62] See eg. Exhibit 34 para 14

[63] [2017] FWCFB 1001 at [460]

[64] See C Jimenez and D Rozenbenes, *Research Report 1/2017 – Award-reliant workers in the household income distribution*, published by the Commission in February 2017, at Table 4.

[65] See *Annual Wage Review 2016-17* [2017] FWCFB 3500 at [369]-[370]

[66] *Statistical report – Annual Wage Review 2018-19*, Fair Work Commission website, Table 8.2 p.38

[73] That position is not significantly ameliorated by the transitional provisions proposed by CAI. As earlier discussed, those transitional provisions would phase in the penalty rate reductions over three stages on 1 July 2019, 1 July 2020 and 1 July 2021, with each stage coinciding with any award wage adjustments taking effect pursuant to the Annual Wage Reviews for 2018-19, 2019-20 and 2020-21 respectively. The assessment of the amount of such future wage adjustments necessitates an exercise in speculation. For permanent employees working both Saturdays and Sundays, it is extremely unlikely that the nominal or dollar value of the loss of income caused by the penalty rate reductions would be fully offset by the nominal or dollar value of Annual Wage Review wage increases over that period. More significantly, the real value of such employees' wage would be highly likely to fall significantly over the proposed transitional period, and the same is likely to be true of permanent employees working Saturdays only.

[74] CAI did not adduce any evidence, nor did it contend, that a reduction in penalty rates would allow clubs to offer more hours of work to affected employees. To the extent that there was any evidence on this topic at all, it suggested otherwise. Clubs already maximise their operations on weekends to meet peak demand, so there does not appear to be any capacity for them to roster more employees on weekends. Any additional hours for full-time employees would have to be paid at overtime penalty rates, so there is no incentive for clubs to give additional hours to full-time employees instead of casual employees. Neale Genge, the General Manager of Casino Returned Servicemen's Club, and David Hiscox, the General Manager of Dapto Leagues Club, both gave uncontested evidence that a reduction in penalty rates would not cause any additional hours of work to be rostered for permanent employees.[67] CAI's witness Lisa Petrie, who was the Human Resources Manager of St George Leagues Club Ltd, confirmed this.[68] Accordingly there is no basis to conclude that employees adversely affected by a reduction in penalty rates could make up their loss of income by working additional hours.

[75] We find therefore that the grant of CAI's application would cause significant financial loss to the large majority of full-time and part-time employees in the clubs industry who work on weekends and public holidays. Some of these employees are already low paid, and the proposed penalty rate cuts may push many employees who are not currently low paid because they receive weekend penalty rates below the benchmark for low paid employees.

Disability associated with working weekends and public holidays

[76] There was no dispute that work on weekends and public holidays in the clubs industry is associated with a level of disability. CAI's contention was that this level of disability was no higher in the clubs industry than in the hospitality sector generally, so that no higher level of penalty rates was justifiable under the *Clubs Award* compared to the *Hospitality Award*.

[77] The nature of the disability associated with clubs employees working weekends and public holidays was described by United Voice's witnesses Ms Gorman, Ms Kelly, Ms King and Mr Valenti. For example, Ms Gorman said:

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[67] Exhibit 34 para 34, Exhibit 54 paras 32-33

[68] Transcript 4 July 2018, PNs 3081-3087

"By virtue of having to work on weekends, I have had to miss out on birthdays for friends and family, and other social engagements and celebrations. I have two nieces and have never been able to attend any of their birthday parties as they were held on weekends and I had to work. I have not been able to properly celebrate any public holidays (Christmas, New Years' Eve) because I have had to work. I have missed out on simple social contact like lunches with girlfriends, and weekends away.

Because I am working when most other people have their leisure time, it is difficult to form and maintain social relationships.

I enjoy music concerts, comedy shows and sporting events but if they are on a weekend I have to miss out."[69]

[78] Ms Kelly described the level of disability in the following way:

"Working weekends and public holidays deprives me of enjoying many social activities with family and friends. My immediate family (children and grandchildren) live throughout NSW. It is extremely difficult to share and be a part of their lives when I am working so many weekends. Up until recently my other son and his family lived close to me. It saddened me to refuse their requests for childcare because I was rostered to work on the weekend. I felt that I was letting them down and I was disappointed by missing out on time with my grandchildren. It is difficult to enjoy the company of any visitors I may get because I'll more than likely be working over the weekend they have travelled to see me."[70]

[79] Ms King said:

"Working weekends limits how much time I spend with friends and family.

My children and grandchildren ('my family') live in Sydney. Because of my family's weekday school and work commitments, they generally visit my husband and me on weekends.

On occasions, I attend weekend social events in the evening. I generally leave these events earlier than I would like to ensure I get sufficient sleep before work the following day. Because of this I do not often go out on weekend evenings, even though I would very much like to.

I make these sacrifices because I am financially dependent on earning weekend penalty rates."[71]

[80] Mr Valenti's evidence was as follows:

"I work every Saturday. I cannot go out Friday and Saturday night because I am working. Most family functions, birthdays and other dinners, like those with my two

[69] Exhibit 38, paras 17-19

[70] Exhibit 36 para 21

[71] Exhibit 49 paras 11-14

daughters, are on Saturday nights and I cannot go because I am working. There have been several family birthday celebrations I have missed. There are occasions when my daughters have been going to see a show and I have not been able to go with them and have had to work instead."[72]

[81] The general managers of clubs who gave evidence generally confirmed the nature of the disability associated with working on weekends. For example, Daniel Constable, the Chief Executive Officer at Port Macquarie Golf Club, said:

"Based on my experience in the industry, and on my experience having worked weekend shifts, many employees would prefer not to work weekends but do weekend work because of the higher penalty rates and their need to make a living. Working on weekends means missing events such as family and social gatherings, and children's sporting contests. There is an opportunity cost to missing out on weekend life, and this is already a significant sacrifice without further reducing penalty rates."[73]

[82] Mr Genge said:

"In my experience, clubs employees work unsociable hours, isolated from your family and friends while everyone else is out having fun and at the end of the night you are left to clean up the mess, whilst being paid some of the lowest award rates. You miss birthdays, weddings, cannot commit to weekend sport and many other events nine to five workers take for granted."[74]

[83] An important element of the level of disability associated with weekend work by full-time and part-time employees in the clubs industry is the level of maturity of the workforce. As earlier set out, approximately two-thirds of the entire clubs workforce is aged 25 or older. We consider it likely that the proportion is significantly higher amongst full-time and part-time employees, with "transient" employees who are younger and studying or looking for a career elsewhere[75] more likely to be engaged as casuals. There was no evidence to suggest that it suited any significant proportion of full-time or part-time employees to work unsociable hours because of commitments to study or other employment during weekdays. This is to be contrasted with the position described by the Full Bench majority in respect of the restaurant industry in *Restaurant and Catering Association of Victoria*[76] (*Restaurants Decision*) as follows:

"[132] As to the second proposition, namely that the special and peculiar characteristics of the restaurant industry workforce meant that the Sunday penalty rate was excessive, we accept that there is a degree of evidence which supports this proposition. We have earlier identified, in our description of the general characteristics of the restaurant industry, the fact that a very large proportion of the workforce consists of young people pursuing full-time studies or women with weekday carers' responsibilities who work significantly less than full-time hours on a casual basis. The evidence tends to

[72] Exhibit 51 para 12

[73] Exhibit 35 para 21

[74] Exhibit 34 para 32

[75] See e.g. Exhibit 34 para 33

[76] [2014] FWCFB 1996

> demonstrate that for that proportion of the workforce, weekends will frequently be the time that they are available to and want to work. Their position is distinguishable from "core" or "career" restaurant employees such as, for example, trade-qualified chefs or senior front-of-house staff intending to stay in the industry on a long term basis, who are much more commonly engaged on a full-time or permanent part-time basis, have to accept the loss of Saturdays and Sundays as a permanent feature of their working lives, and depend upon penalty rates as a core component of their take-home pay."

[84] The above analysis caused the Full Bench majority to establish a lower Sunday penalty rate for "transient and lower-skilled casual employees" than for "career restaurant industry employees".[77] That distinction is not of relevance to full-time and part-time employees in the clubs industry.

[85] CAI's contention that employees under the *Clubs Award* had the same level of disability associated with weekend and public holidays as employees under the *Hospitality Award*, so that the lower *Hospitality Award* penalty rates should apply uniformly to both classes of employees, rested principally on the proposition that both workforces had a similar compositional profile. In that respect, CAI relied upon extracts from a study entitled *Industry profile – Accommodation and food services* (AFS Profile) that was prepared by the Commission's Workplace and Economic Research Section for the purpose of the proceedings which led to the *Penalty Rates Decision*.

[86] The AFS Profile was prepared using data from a number of sources concerning employees in Division H, *Accommodation and food services*, of the ANZSIC[78] labour classification structure. Division H is defined as including *"... units mainly engaged in providing short-term accommodation for visitors. Also included are units mainly engaged in providing food and beverage services, such as the preparation and serving of meals and the serving of alcoholic beverages for consumption by customers, both on and off-site*". It includes ANZSIC class 4400, *Accommodation*; class 4511, *Cafes and Restaurants*; class 4513, *Catering services*, class 4520, *Pubs, Taverns and Bars*, and class 4530, *Clubs (Hospitality)*. Classes 4400, 4511, 4513 and 4520, as well as class 9201, *Casino operation*, and class 4123, *Liquor retailing* were "mapped" to the coverage of the *Hospitality Award* and class 4530 to the *Clubs Award*. The labour force characteristics of these two groups, derived from Tables 5.11 and 5.13 of the AFS Profile, may be compared as follows:

	CLUBS (HOSPITALITY) %	**HOSPITALITY INDUSTRY (GENERAL) %**
Gender		
Male	45.2	43.0
Female	54.8	57.0
Total	100	100
Full-time/part-time status		
Full time	45.8	44.9
Part-time	54.2	55.1
Total	100	100
Highest year of school completed		

[77] Ibid at [141]

[78] Australian and New Zealand Standard Industrial Classification

Year 12 or equivalent	53.5	63.0
Year 11 or equivalent	10.6	11.2
Year 10 or equivalent	27.9	19.0
Year 9 or equivalent	5.5	4.4
Year 8 or below	2.3	2.1
Did not go to school	0.1	0.4
Total	100	100
Student Status		
Full-time student	14.4	21.3
Part-time student	5.9	5.8
Not attending	79.7	72.9
Total	100	100
Age (5 year groups)		
15-19 years	10.1	14.4
20-24 years	18.1	21.7
25-29 years	10.5	15.1
30-34 years	8.7	10.4
35-39 years	8.7	8.4
40-44 years	8.8	7.6
45 49 years	9.4	7.2
50-54 years	9.3	6.4
55-59 years	7.9	4.7
60-64 years	5.8	3.0
65 years and over	2.9	1.2
Total	100	100
Average age	**37.5 (years old)**	**33 (years old)**
Hours Worked		
1-15 hours	18.7	23.7
16-24 hours	16.0	16.7
25-34 hours	19.5	14.7
35-39 hours	18.2	14.7
40 hours	11.9	11.1
41-48 hours	8.0	8.0
49 hours and over	7.6	11.1
Total	100	100

[87] Two caveats need to be placed upon the above date. First, it was derived from the ABS 2011 census data, and thus is not as up to date as the ABS data referred to in paragraph [62] above. Second, ANZSIC class 4530 does not include all clubs, but only those characterised as providing hospitality services. Table 4.7 of the AFS Profile shows that the class only encompasses 2,925 clubs, less than half the total number of 6,413 clubs identified in the 2016 KPMG Report. The clubs excluded fall in other ANZSIC classes. The number of employees contained in class 4530 numbered slightly over 43,000 - well under half the total of 130,000 employees in the clubs industry measured in the 2016 KPMG Report (as well under half of the 96,000 total in the 2011 KPMG Report). These two factors limit the reliability of the conclusions which may be drawn from the above data.

[88] With those caveats in mind, the following observations may be made about the data. First, the clubs workforce and the general hospitality workforce are very similarly composed in terms of gender and the proportion of employees working full-time and part-time hours. Second, there are differences of significance in the age profile, educational

attainments and student population of the two workforces. The hospitality workforce is significantly younger (with a much higher proportion aged under 30), has a higher proportion of employees who have completed Year 12, and has a higher proportion of full-time students. It is likely that these differences all point to there being a much higher proportion of young persons engaged in tertiary studies who have secondary employment in the general hospitality sector than in the clubs sector.

[89] That is a difference which, for the reasons explained in the *Restaurants Decision*, has potential implications for the level of disability associated with working weekends and public holidays. However, the difficulty with the above data is that it does not allow any distinctions to be drawn in either sector between permanent employees, with whom we are concerned in this case, and casual employees. Experience would suggest that, to the extent the general hospitality sector employs a greater proportion of students than the clubs sector, such employees are probably casuals and may therefore not be relevant to a consideration of the relative levels of disability for permanent employees in the two sectors.

[90] Nonetheless it cannot be said that the AFS Profile demonstrates the proposition which CAI wishes to establish, namely that the level of disability associated with weekend and public holiday work is the same for permanent employees under the *Clubs Award* and the *Hospitality Award.*

[91] CAI also pointed to a general similarity in the work performed by employees under the two awards as supporting an alignment of penalty rates. We accept that significant numbers of employees under the *Clubs Award* perform work that is substantially the same as that of many employees under the *Hospitality Award*, particularly in relation to functions associated with the service of food and beverages. The similarity in the classification structures in both awards and the alignment in rates of pay up to Level 6 certainly support a broad equivalence in the duties performed and their work value. We therefore agree with the provisional view expressed in the *Penalty Rates Decision* that "there is a high degree of commonality in the work performed by the employees covered by the *Clubs Award* and the *Hospitality Award*".[79] However that has limited relevance to the issue of penalty rates. The minimum rates for classifications in modern awards are intended to reflect the value of the work performed. Penalty rates serve the quite different purpose of providing employees with compensation for the disability associated with working unsociable hours. The level of such disability will usually depend on the typical circumstances of the employees who work the unsociable hours and the nature and extent of the requirement for them to do so. That may have little relationship to the nature of the work performed.

[92] The Full Bench in the *Penalty Rates Decision* did not express any final or even provisional conclusion that permanent employees under the *Clubs Award* suffered the same level of disability as permanent employees under the *Hospitality Award* when working on weekends and public holidays. Nor did the Full Bench express any view that its findings in relation to the contemporary role of penalty rates in the context of societal change had any necessary implications for the *Clubs Award*. Indeed, the limited evidence before the Full Bench about the disabilities associated with employees working weekends

[79] [2017] FWCFB 1001 at [1004]

and public holidays under the *Clubs Award* was, if anything, supportive of a contrary conclusion.[80] In the proceedings before us, there is simply insufficient evidence to enable us to take this matter any further.

Competition between clubs and hospitality venues and penalty rates

[93] The major part of CAI's evidentiary case was concerned with attempting to demonstrate that clubs provide the same or substantially the same "*service offerings*" as hospitality venues operating under the *Hospitality Award*. It is not necessary for us to traverse this evidence in any great detail because we consider that, with two important qualifications, that element of CAI's case is obviously correct. The evidence is replete with examples of the following:

- clubs serve alcohol and other beverages at a variety of types of bars (such as sports bars and lounge bars) within their premises, as do pubs, taverns, wine bars and large hotels;

- clubs serve food in a number of different ways, including in bistros and self-contained restaurants, as do most pubs, taverns and hotels;

- clubs offer gambling facilities through their EGMs in most States, as do pubs in most States, and casinos covered by the *Hospitality Award* offer gambling services, albeit not confined to EGMs;

- function facilities are provided by many clubs similar to those provided by hotels and some pubs; and

- some "mega" clubs, particularly in New South Wales, offer accommodation, including resort accommodation, in the same way as hotels, motels, resorts, casinos and some pubs covered by the *Hospitality Award*.

[94] Consequently it may be accepted that there is a great deal of commonality and overlap service offerings provided by the clubs sector and the hospitality sector. However, as stated, this must be qualified in two important ways. First, the clubs sector is highly diverse, so that for a great proportion of clubs the provision of such service offerings is merely incidental to the purpose for which the club has been formed. For example, in the case of sporting clubs such as surf clubs, lawn bowling clubs and golf clubs, the designated sporting activity is the club's *raison d'etre* and the focus of its resources and activities, and the provision of food and beverages is merely incidental to this primary activity and often carried on only at a small scale. That is not true of venues covered by the *Hospitality Award.*

[95] Second, clubs also have service offerings which are also provided by venues not covered by the *Hospitality Award*. For example, clubs may provide restaurant and café facilities in the same way as restaurants and cafes covered by the *Restaurant Industry Award 2010*, and fast food restaurants and other facilities similar to those covered by the *Fast Food Industry Award 2010*. The larger clubs may provide live entertainment in

[80] Ibid at [969]-[978]

theatre settings and amusement and recreation facilities such as waterparks similar to employers covered by the *Amusement, Events and Recreation Award 2010*. Some of the larger clubs also provide gym facilities of the same nature as fitness centres covered by the *Fitness Industry Award 2010* and childcare facilities equivalent to child care centres covered by the *Children's Services Award 2010*. Golf playing facilities are primarily provided either by clubs covered by the *Clubs Award* (which in number constitute almost a quarter of all clubs in Australia) or by local councils covered by the *Local Government Industry Award 2010* or by State industrial instruments. The service offerings of clubs therefore have commonality and overlap with those of employers under a variety of modern awards, not just the *Hospitality Award*.

[96] CAI contended that, to the extent that clubs offer services which are the same or substantially the same as venues covered by the *Hospitality Award*, they "*compete*" with those venues. The best example of the evidence adduced in this respect was that of Ms Petrie. In her witness statement, she described the restaurant, bistro, bar, gaming and entertainment facilities and services offered by the club, and said in relation to "*competition*":

> "There are several clubs within approximately five kilometres of St George Leagues, including Ramsgate RSL, Hurstville RSL, Brighton-Le-Sands RSL, Club Central Hurstville and the Motor Boat Club at Sans Souci.
>
> There are also numerous hotels and pubs in the St George area, including the Kogarah Hotel, the Kogarah Tavern, The Intersection at Ramsgate, The Royal Hotel at Carlton, the Allawah Hotel, The Meridian Hotel at Hurstville and the Hurstville Ritz.
>
> There are many local restaurants of the Thai or Chinese varieties in the St George area.
>
> There are many fast food outlets in the St George area, including McDonald's at Bexley, Sans Souci and Rockdale, Domino's Pizza at Bexley, Crust Pizza at Kingsgrove, Red Rooster at Carlton, KFC at Banksia and two at Hurstville and Subway at Kogarah.
>
> In my view, there is much competition for food and beverage services in the St George area and St George Leagues is competing with the other clubs, hotels, pubs, restaurants and fast food outlets for patrons."

[97] She also described competition with the Star Casino in Sydney and hospitality venues for gambling revenue in the following terms:

> "While gaming revenue has historically assisted St George Leagues to provide its core services and other support to the community, gaming revenue for clubs is now at historic lows. In the first nine months of 2017, the gaming revenue has declined by 5.5 per cent.
>
> There are a number of reasons for this reduction in gaming revenue, including changes to the way people game and wager as well as increased competition for

> the gambling dollar. For example, members of St George Leagues now place bets on a range of sports in bars and hotels in and around the St George area.
>
> St George Leagues also competes with Star Casino. The Star Casino operates 24 hours a day. The Star Casino operates courtesy buses seven days a week that take patrons from the St George area to the Star Casino. Some members of St George Leagues have ceased to be members of the Club and started gambling solely at the Star Casino, especially some of our Asian members."

[98] It may be accepted that clubs compete with hospitality venues operating under the *Hospitality Award*, as well as food and entertainment venues operating under other modern awards, in the broad sense that their service offerings are contestable within a market that extends beyond the scope of coverage of the *Clubs Award*. However there are three important caveats which must be placed on this general proposition. Firstly, clubs exist for the benefit of their members, not to gain revenue from the general public, so their focus is necessarily on providing facilities and services which will attract ongoing patronage from those members rather than selling services to the general public. Second, the extent of this competition varies depending on the type of club involved. Larger clubs of the nature of the St George Leagues club described in Ms Petrie's evidence may be regarded as competing in the broad sense with pubs, hotels, restaurants, fast food outlets, casinos and perhaps entertainment and recreational venues. The position is different with more specialised and smaller clubs. Smaller golf clubs which provide food and beverage services may do so primarily as an incidental benefit for their golf-playing members and guests rather than a standalone service, and thus do not compete in any real sense with other food and beverage services. With very small clubs, such as surf clubs, any hospitality services they provide to their members will likely be so insignificant as not to be affected by any broader competitive market. Third, the evidence (including Ms Petrie's evidence set out above) shows that clubs compete with each other as much as venues outside the clubs sector.

[99] CAI's case did not endeavour in any meaningful way to relate the issue of relative penalty rates with its proposition concerning competition between the clubs sector and the broader hospitality sector. It disavowed any attempt to engage in a financial analysis of the cost of penalty rates as a proportion of the overall costs of clubs' business expenses, let alone a comparison of the position in that respect for venues operating under the *Hospitality Award*. CAI did not contend that the penalty rates prescribed by the *Clubs Award* caused any discernible disadvantage to clubs in competing with hospitality venues. The evidence showed that a range of factors affect the competitive balance between clubs and other hospitality venues, including taxation rates and the various State regulatory schemes concerning EGMs, but there was no evidence that penalty rates had any particular role to play. Certainly there was no evidence that penalty rates caused any clubs not to open or to restrict their activities on weekends, and thus disadvantaged them in competition with other hospitality venues. As earlier discussed, the evidence rather demonstrated that clubs maximise their activities on weekends. This may be contrasted to the position concerning the *Hospitality Award* described in the *Penalty Rates Decision*, where there was extensive evidence that the cost of paying Sunday and public holiday penalty rates caused business to restrict their service offerings, opening hours and/or

staffing on those days.[81] The very limited evidence concerning competitive disadvantage with the hospitality sector suggested that it related to other factors; the evidence of Ms Petrie set out above in particular suggested that her club had lost revenue because of aggressive competition for the gambling dollar, and she did not relate this in any way to penalty rates.

[100] In conclusion:

- clubs are involved in varying degrees of competition with businesses under other modern awards, including the *Hospitality Award*, as well as with other clubs under the *Clubs Award*;

- to the extent that clubs do compete with hospitality venues, there is no evidence that the penalty rates prescribed by *Clubs Award* place clubs at a competitive disadvantage or that they have any significance in such competition (although it must be accepted that, with respect to Sunday and public holiday work, employers under the *Hospitality Award* are still in the transition phase to the lower penalty rates determined in the *Penalty Rates Decision*); and

- the competition described occurs in the context of a broader hospitality sector which operates under a number of different modern awards with differing penalty rates and other conditions of employment.

Benefits and detriments of a reduction of penalty rates in the clubs sector

[101] In contrast to the position which applied in the *Penalty Rates Decision* concerning beneficial effects of a penalty rate reduction in the *Hospitality Award*, there was virtually no evidence adduced before us of any particular benefit that would be derived from a reduction in penalty rates for the clubs sector through the sector being placed under the *Hospitality Award*. CAI did not adduce any evidence to the effect that overall employment or hours worked in the sector would increase if weekend and public holiday penalty rates were reduced. This would be inherently unlikely given that, as we have earlier found, clubs already maximise their activities and service offerings on weekends and public holidays under the existing provisions of the *Clubs Award* in order to meet peak demand. There was some evidence from Ms Petrie in cross-examination that a penalty reduction might cause some employment not to be lost, but this evidence was extremely limited in nature. When it was put to Ms Petrie that a permanent employee who worked an eight-hour shift on a Saturday would lose $40 per week and would not be offered additional hours, she agreed but said the employee "*would still have a job*". When asked to explain this answer, she said:

> "… I spoke to the general manager about this because the penalty rates obviously are a big topic at work and because when wage increases happen, like are sent down, how he explained it to me, he said we can put up some of our prices in our bar and in our food outlets to sort of recoup some of that money, he said, but of course, we can't do that in gaming and we can't do that for our horticultural staff, so he said at the moment he – he's actually contemplating closing our brasserie on

[81] [2017] FWCFB 1001 at [779]

> a public holiday because we don't get as many patrons in and it costs a lot to staff the brasserie on a public holiday Monday. That's – Monday is traditionally a quiet day anyway and so he has actually – we've actually done figures so he said to me if it doesn't start to pick up we would either reduce the hours that we open or close the brasserie altogether…
>
> . . .
>
> And how many permanent staff work in the brasserie?---At least half a dozen.
>
> What functions do they perform?---They'd be manning our front counter, doing our till, serving meals, chef, kitchenhand.
>
> . . .
>
> And would the change in penalty rates that are being sought make any difference to that assessment?---Again, according to the general manager, as I said, I had the conversation with him knowing full well this would come up. And he said that with the reductions in penalty rates that may just keep the brasserie open and keep the hours as they are as opposed to having a reduction."[82]

[102] Ms Petrie subsequently accepted that she was unable to quantify the cost reduction to the club's brasserie that would result from reduced penalty rates or demonstrate how this would make a difference to the financial viability of the brasserie.[83] Ms Petrie also made reference to there already having been a reduction in hours at the club's TAB "*because we're not getting the patronage*", and this had been achieved through reducing the hours of casual employees "*but there's nothing to say that somewhere down the track it won't move to permanent part timers or permanent*".[84]

[103] In relation both to the brasserie and the TAB at her club, Ms Petrie's evidence was therefore that it was a lack of patronage, not the cost of penalty rates, that caused the identified difficulties. In neither case did Ms Petrie's evidence demonstrate that a reduction in penalty rates would resolve those difficulties. It is telling that Ms Petrie's evidence was the highpoint of CAI's case concerning the employment effects of its application if granted. We have already referred to the evidence of a number of club managers that a reduction in penalty rates would not result in any additional hours of work being rostered.

[104] CAI also relied more generally on the high proportion of clubs described by the 2016 KPMG Report and the 2011 KPMG Report as being in distress or serious distress on the basis of their EBITDA as a proportion of their total revenue. There was some contest in the evidence about whether this was a reliable measure of the financial viability of clubs; in particular Mr Constable gave evidence that this measure did not take a club's assets into account, and that golf clubs might have little or no gaming income but nonetheless have significant assets and trade with no distress. In any event, there was no evidence to suggest that the fact that any club was in financial distress was a result, in whole or in part, of the level of weekend and public holiday penalty rates in the *Clubs Award*. The evidence did indicate some of the causes of financial difficulty of some clubs. A major cause was a loss of gambling revenue from EGMs due to competition from other

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[82] Transcript 4 July 2018, PNs 3089-3093

[83] Transcript 4 July 2018, PNs 3101-3126

[84] Transcript 4 July 2018, PN 3136

gambling venues, changes in gambling habits and regulatory changes (such as a graduated reduction in the maximum number of permitted EGMs in the ACT). In the case of golf clubs, the evidence suggested a particular problem in regional areas due to high upkeep costs, declining patronage and poor management, whilst many lawn bowling clubs were in difficulty because they were small and had suffered a collapse in participation. Further, the 2016 KPMG Report indicated that while the proportion of clubs it characterised as being in financial distress remained high, this had significantly declined since the 2011 KPMG Report (from 51% to 41%).

[105] There was likewise no evidence that the proposed reduction in penalty rates would result in any club currently in financial distress, as defined in the KPMG Reports, ceasing to be in that state. There was no financial analysis in CAI's evidentiary case of the cost benefit which would be derived by any club which would permit that conclusion to be drawn. Indeed the only analysis of this kind appeared in the witness statement of Mr Hiscox in opposition to CAI's application: his evidence was that the Dapto Leagues Club would be able to reduce its wages costs by about $50,000 per annum which "*would not have a significant effect on the club's profitability*".[85] CAI submitted that any reduction in penalty rates would necessarily improve the financial position of clubs if they had to pay less. That submission assumes that there would be no offsetting cost associated with a reduction in penalty rates, such as a loss of experienced staff which might lead to additional recruitment and training costs, or a lack of willingness on the part of permanent staff to work on weekends, which might require casual employees to be used at a higher hourly cost. In any event even if the proposition is accepted, the lack of any evidence about the aggregate quantum of the financial benefit gained or the use to which it might be put makes it impossible to conclude that clubs would obtain any significant or even discernible benefit from a reduction in penalty rates.

[106] There was some evidence, albeit limited and somewhat speculative, that a reduction in penalty rates would have detrimental effects on the operation of clubs. Timothy Wright, the General Manager of Greenbank RSL Services Club (and a member of the board of directors of RSLAQ) gave evidence that the current higher penalty rates for permanent employees in the *Clubs Award* gave clubs a "*competitive edge*" over hotels covered by the *Hospitality Award* in the recruitment of staff, and he believed that it was essential for clubs to be an "*employer of choice*".[86] Matthew Dagg, the General Manager of North Burleigh Surf Life Saving Supporters Association and North Burleigh Surf Life Saving Club, gave evidence to similar effect, and said that if the cuts to penalty rates were made, this would impact on staff availability, service delivery and staff retention.[87] Mr Hiscox, the General Manager of Dapto Leagues Club, said that reduced pay rates would mean that there would be difficulty in attracting quality staff to the clubs industry and lead to a greater turnover of staff "*as people leave to chase higher earning roles elsewhere*".[88]

[107] We find therefore that there is no evidence that the existing penalty rates in the *Clubs Award* has competitively disadvantaged the clubs sector or caused any club to suffer financial distress. We likewise find that there is no evidence that a reduction to the

[85] Exhibit 54 para 31

[86] Exhibit 44 paras 10-11

[87] Exhibit 52 paras 13, 16

[88] Exhibit 54 para 26

penalty rates applicable to the clubs sector would result in any discernible increase in employment or rostered hours or would relieve the position of any club currently in financial distress, and it may be the case that such a reduction would disadvantage the capacity of clubs to retain and recruit quality staff.

Separate identity of the club industry and industry support for the revocation of the Clubs Award

[108] We have earlier quoted in some detail the submissions advanced by CAI in 2008 which sought to demonstrate that the clubs were a discrete and unique industry and which were successful in persuading the AIRC award modernisation Full Bench to establish the separate *Clubs Award*. There was no evidence before us to suggest that any of the fundamental characteristics of the clubs industry described in those submissions have changed in the decade since. CAI contended that the service offerings of the clubs industry were now "*largely assimilated*" with those of the hospitality industry, but there was no evidence that the overlap in service offering between the two sectors, the extent of which we have previously described, has significantly changed since the *Clubs Award* was made. In New South Wales, there was evidence that, from 2011 to 2015, food and beverage sales had increased as a proportion of total club revenue, but this could not be regarded as paradigm changing: food had increased from 8% to 10% of revenue, beverages had also increased from 16% to 17%, but 60% of revenue still came from EGMs (down from 62%).[89] Chris Mossman, the Executive Director/Secretary of CAI and the Executive Manager – Workplace Relations for Clubs NSW, gave some evidence in fairly general terms that clubs "*are now providing a larger number of services and hospitality offerings including restaurants and accommodation*", and gave some examples of this.[90] However he gave no timescale or point of comparison for this, and one of his examples of a club now offering accommodation services (Penrith Panthers) had in fact been doing so for almost 30 years.

[109] CAI also contended that at the time of the award modernisation process there had been a higher incidence of permanent part-time employment in the clubs industry than in the hospitality industry, but that this was unlikely to continue in the light of the variation to the part-time employment provisions in the *Hospitality Award*. There was no real evidence adduced by CAI to support this contention. There was no statistical material concerning the current and historical incidence of permanent part-time employment in the clubs sector as compared to the hospitality sector. There were some findings relevant to this issue made by the Full Bench in the *Casual Employment and Part-time Employment Decision* of 5 July 2017.[91] In respect of employees covered by the *Hospitality Award*, the Full Bench found that only a very small proportion of the workforce was engaged on a part-time basis, with some survey material obtained by the AHA suggesting that it was as low as 3.6% of the workforce.[92] The position in the clubs industry was mixed: some States, particularly New South Wales, Queensland and Western Australia had historically high levels of part-time employment, but in other States it was as low as in hospitality

[89] Exhibit 1 Annexure 6

[90] Exhibit 26 paras 56-57

[91] [2017] FWCFB 3541

[92] Ibid at [516]-[517]

generally. However the trend was that the clubs sector was reducing the proportion of part-time employees in favour of engaging a higher proportion of casual employees.[93]

[110] The Full Bench in the *Casual Employment and Part-time Employment Decision* ultimately determined that the existing part-time employment provisions in both the *Hospitality Award* and the *Clubs Award* were under-utilised because they did not allow for sufficient flexibility in rostering to meet fluctuating demand. Both awards were varied in virtually identical terms to add more flexible part-time employment provisions.[94] However there was no evidence before us that the new provisions had led to any change in the incidence of part-time employment in the respective sectors, or that there was any trend towards an increase in part-time employment in either sector. The only evidence of relevance was that of Ms Petrie. She had been a witness in the Casual Employment and Part-time Employment proceedings, and had given evidence in those proceedings to the effect that the flexible part-time provisions in the pre-modern instrument which had applied to St George Leagues Club had allowed it to reach a proportion of 19.7% of its workforce for part-time employment, but that the more inflexible part-time provisions in the *Clubs Award* which applied after transitional provisions expired at the end of 2014 meant that the club had switched to a preference for hiring casual employees for vacant positions.[95] However Ms Petrie's evidence before us was, surprisingly, that notwithstanding the new more flexible part-time provisions in the *Clubs Award*, St George Leagues Club was continuing to replace departing part-time employees with casual employees with the result that the proportion of part-time employees had continued to decline and casualisation had increased.[96]

[111] Accordingly the evidence does not permit any reliable conclusions to be drawn about the current and future extent of utilisation of part-time employment in the clubs sector as compared to the hospitality sector.

[112] CAI's position that the separate identity of the clubs industry had eroded to the point where there was no longer a justification for a separate award was strongly contested amongst clubs themselves. As earlier stated, CAI's application was opposed by the RSLAQ, representing 65 clubs in Queensland, the FCSWC, representing some 50 clubs in New South Wales, and 141 clubs which sent in individual submissions in a standard format (although it must be acknowledged that there is some overlap between these three groups, whilst many of these clubs were also members of CAI). Evidence and submissions from these clubs recognised continuing value in the continued existence of the *Clubs Award* separate from the issue of penalty rates. For example Timothy Wright, the General Manager of the Greenbank RSL Services Club and a director of the RSLAQ, gave the following evidence:

> "The Clubs Award was developed in 2009 for good and cogent reasons. The Club Industry fought long and hard to have this Award approved so to move away from it is viewed as a negative result for Clubs as this Award has served the industry well over the past 8-9 years. We want to be 'masters of our own destiny' in

[93] Ibid at [520]-[521]

[94] Ibid at [523]-[535]

[95] Ibid at [471]-[472]

[96] Transcript 4 July 2018, PNs 2840-2844, 3094-3098

> determining the terms and conditions of employment for the industry and our employees."[97]

[113] A significant number of witnesses who were club managers gave evidence that CAI had not consulted its members about its decision to apply for revocation of the *Clubs Award* and that the application was not generally supported in this industry. Mr Wright said that he had had discussions with many club managers and club board members about the application, and had not come across anyone who supported it or had been consulted about it.[98] Mr Constable said that the Port Macquarie Golf Club received no notice of CAI's intention to make the application nor any call for input into it.[99] Mr Genge said it was the view of his club, the Casino Returned Servicemen's Memorial Club, that CAI was "*not representative generally of the industry in this matter*", and that CAI had not consulted with its members or the sector generally about the matter. He said "*My attempts to discuss the proposed changes with Clubs Australia have been ignored and the response has been dismissive in nature*".[100] Robert Docker, the Chief Executive Officer of the Tradies Group (which operates the Canberra Tradesmen's Union Club), and a former General Manager at Clubs Consulting (which provided high-level advice to the national club industry on strategic and operation matters), gave evidence strongly re-affirming the distinct nature of the clubs industry and the need for a discrete award:

> "Clubs are unique entities that bring groups of people with a common interest together to provide facilities to promote and pursue that interest. They are unique businesses that cannot be compared with any other business including those in the hospitality sector. In particular, clubs, unlike hotels, restaurants and motels, have to manage not just commercial demands but also community demands.
>
> This community demand, or the common purpose of clubs, sets clubs apart and is premised on the legal and taxation principle of mutuality. Clubs are treated differently to hospitality not just from an award perspective but also from a legislative and policy perspective. Clubs' non-profit status via the principle of 'non-distribution' or non-payment of dividends is clearly legally set out in the individual Club's member constitutions and charter…
>
> My work with Clubs Consulting highlighted that clubs provide many services that are unlikely to be provided by the hospitality sector or other for-profit businesses. This was especially so in country areas. Clubs provide a variety of sports, activities and entertainment for its members that other businesses generally do not. For example, bowling clubs are unique to the Clubs movement and no other sector provides such entertainment.
>
> Unlike the hospitality sector, Clubs are community-based and community run organisations. The concept and role of stewardship is distinctive in the club sector whereby staff and management acknowledge that the clubs' resources belong to the whole club and must be used and preserved for the benefit of its members.

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[97] Exhibit 44 para 12

[98] Exhibit 44 para 13

[99] Exhibit 35 para 30

[100] Exhibit 34 paras 28-30

> Accordingly, clubs have a unique regulatory framework resulting in their being subject to the control of the members.
>
> . . .
>
> The club industry rightly enjoys the privileges of 'mutuality' which other businesses do not. Clubs are member-owned, do not distribute profit and exist for the benefit of their members and guests. The club industry argued strongly for the creation of the *Clubs Award*. Those arguments are still applicable today."[101]

[114] It is clear that, amongst clubs themselves, there is no consensus that there has been any change in the status of the club industry as being separate and distinct or that the industry's separate award should revoked. CAI only called one actual representative of the management of a club (Ms Petrie, an HR Manager) to give evidence in support of the application, and in contrast seven general managers of clubs gave evidence against the application and affirmed their clubs' position on the continued existence of a separate clubs industry requiring a separate award.

Consideration

[115] Although CAI's application had the nominal objective of abolishing the *Clubs Award* and subsuming coverage of the clubs industry into the *Hospitality Award*, there can be no doubt that the real objective of the application was to obtain a reduction in weekend and public holiday penalty rates for permanent employees in the clubs industry. CAI's commitment to the proposition that the clubs industry is not, or is no longer, sufficiently distinguishable from the rest of the hospitality sector such as to justify the maintenance of a separate modern award is dubious. As was noted in the *Penalty Rates Decision*, CAI actively advanced evidence and submissions in those proceedings that the clubs industry *was* distinguishable from the broader hospitality sector. In those proceedings, CAI submitted that the clubs industry was "*a different industry from any other industry that is before the Commission in this 4 year modern award review*",[102] and CAI's then Executive Director, Richard Tait, gave evidence about the factors which distinguished clubs from other hospitality venues such as hotels. CAI did not contend that, apart from the issue of alignment of penalty rates, there would be any particular benefit in the clubs industry being placed within the coverage of the *Hospitality Award*. The various iterations of its proposed amended *Hospitality Award* demonstrated that, apart from the provisions concerning penalty rates, it had a flexible position concerning the extent to which existing provisions of the *Clubs Award* which were unique to that award should be incorporated into the *Hospitality Award*. To the extent that it proposed that distinct provisions currently found in the *Clubs Award* should not continue in its proposed amended *Hospitality Award*, it adduced no evidence touching upon this. Its case was, in substance, a case for the reduction of weekend and public holiday penalty rates, with the revocation of the *Clubs Award* and the amendment of the *Hospitality Award* the vehicle to achieve this.

[116] As earlier outlined, in the *Penalty Rates Decision* the Full Bench rejected CAI's application for a reduction in weekend and penalty rates in the *Clubs Award.* The Full Bench concluded:

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[101] Exhibit 19 paras 14-17, 29

[102] Transcript 12 April 2016, PN26729

> "[994] On the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, CAI has not established a merit case sufficient to warrant the granting of the claim."

[117] The merits case for any reduction in weekend and public holiday penalty rates in the clubs advanced before us was, if anything, weaker than that considered in the *Penalty Rates Decision*. Based on our evidentiary findings, the position in summary is as follows:

- the proposed reduction in penalty rates would inflict significant economic harm on permanent clubs employees who regularly work on weekends and public holidays, taking into account the high degree of award dependence in the clubs sector;

- there is no evidence that the current penalty rates regime causes clubs not to open or to restrict their activities on weekends and public holidays;

- there is no evidence that a reduction in penalty rates would cause any discernible increase in employment numbers or hours worked, nor is there any logical basis to conclude this would happen because clubs already maximise their activities and service offerings during weekends and public holidays to meet peak customer demand; and

- to the extent that a significant proportion of clubs may be characterised as being in financial distress, there is no evidence that penalty rates were a causal factor or that a reduction in penalty rates would remove them from that position or even provide financial relief of any significance.

[118] CAI's case was mainly concerned with the merits of an alignment of penalty rates as between the clubs sector and the broader hospitality sector covered by the *Hospitality Award* because of the common service offerings of, and competition between, the two sectors. However we do not consider that a merits case has been established in this respect, based on the following findings:

- although the clubs sector does provide food, beverage, accommodation and gaming services in a similar way to the hospitality sector, many of its service offerings also overlap with sectors covered by awards other than the *Hospitality Award*, and other of its service offerings are not provided to any substantial degree by the hospitality sector;

- although it may be said at a high level of generality that clubs "compete" with hospitality venues in relation to the service offerings they have in common, this is subject to two qualifications: first, clubs also "compete" in the same sense with venues in other sectors covered by awards other than the *Hospitality Award* as well as with other clubs covered by the *Clubs Award* and, second, this does not involve commercial competition in the normal sense in that clubs do not seek to make profits by servicing the general public but rather are non-profit institutions which seek to provide ongoing services to their members and guests and to support local communities;

- there was no evidence that the penalty rates currently existing in the clubs sector caused clubs to be at any identifiable disadvantage in any competition with hospitality venues or that such penalty rates have any significance in that context; and

- the evidence before us concerning the workforce profile of the clubs sector as compared to the hospitality sector was not sufficient to demonstrate that the level of disability for permanent employees working weekends and public holidays in the clubs sector was the same as that in the hospitality sector.

[119] The AIRC award modernisation Full Bench was persuaded to establish a separate *Clubs Award* at the urging of CAI supported by United Voice and the CMAA. The submissions of CAI at the time identified a range of factors which distinguished the clubs sector from the broader hospitality sector and justified the establishment of a separate award. All of those differences were accepted by the parties and the Full Bench in the making of the separate *Clubs Award* and remain relevant to the present exercise including the competing considerations arising from the modern awards objective. They also impact upon the degree to which the findings in the *Penalty Rates Decision* in respect of the *Hospitality Award* can safely be applied to the clubs sector. There is no consensus in the clubs sector, even on the employer side, that the basis upon which the award modernisation Full Bench acted should be reversed, and the perception of the clubs industry being distinct and requiring its own award remains strongly entrenched in significant sections of the industry.

[120] In respect of penalty rates, there is one critical matter which arises from the circumstances in which the *Clubs Award* was made by the award modernisation Full Bench. As earlier stated, there was an initial exposure draft for a single hospitality industry award which covered the clubs industry. That exposure draft proposed that the penalty rates for full-time and part-time employees be 125% for Saturdays and 175% for Sundays. CAI strongly opposed being covered by such an award, and proposed (in conjunction with United Voice and the CMAA) a separate clubs industry award with penalty rates for full-time and part-time employees of 150% for Saturdays and 175% for Sundays. That is, the result urged by CAI was for a separate award with a *higher* Saturday penalty rate than that foreshadowed for the general hospitality industry. The award modernisation Full Bench was persuaded to take the course proposed, which is why the *Clubs Award* has a higher Saturday penalty rate for permanent employees than the *Hospitality Award*. Not surprisingly, it has not been contended that the award modernisation Full Bench acted in error in taking this course. Nor has anything been put before us to demonstrate that any new development or change in circumstances since the award modernisation process was undertaken has altered the premise upon which the award modernisation Full Bench acted and the 150% Saturday penalty rate for clubs was established. Further, we note that there has been no challenge by CAI in these proceedings to the conclusion expressed in the *Penalty Rates Decision* that "[g]enerally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past".[103]

[103] [2017] FWCFB 1001 at [689]

[121] There has been no independent justification advanced for a reduction to the Sunday penalty rate in the *Clubs Award* apart from the adoption of the *Hospitality Award* provisions. In this respect, the position here is entirely different from that dealt with in the *Penalty Rates Decision*, where the Full Bench had before it extensive employer evidence concerning change in the disutility associated with working on Sundays for employees working under that award and the potential benefits of a reduction in the penalty rate. With respect to the public holiday penalty rate, it may be accepted as a general proposition that employees currently under the *Clubs Award* will have benefited from the application of s 114 of the FW Act and (although this was not a feature of CAI's case) that this is relevant to the level of disutility when working on public holidays in the same way as it was considered to be in the *Penalty Rates Decision*. However, absent the coverage of the *Clubs Award* being absorbed into the *Hospitality Award* as sought by CAI, the current Sunday penalty rate in the *Clubs Award* will remain, and no issue of disproportionality will arise between that rate and the current public holiday rate. This is in contrast to the position in the *Penalty Rates Decision* whereby, once it was determined that there should be a reduction to the Sunday penalty rate, it became apparent that the public holiday penalty rate was no longer proportionate to that rate. No other independent basis for a reduction in public holiday penalty rates was raised by CAI.

[122] There is a superficial attraction in the proposition that the number of awards applicable to similar or comparable sectors of the economy should be reduced. That may be desirable where, for example, particular employers operate in multiple sectors under multiple awards or may move from one sector to another as their businesses evolve. In those situations a simplification of the regulatory regime may have benefits. However, there are also potential detriments in taking such a course. Awards may have particular conditions that are tailored with precision for the requirements of a particular sector, and merging awards to achieve full commonality of regulation will result in that degree of tailoring being lost. Alternatively, if the merger of awards is done in a way that preserves some or all of such provisions for one sector, the new award may become more complex to the extent that it becomes two awards in one and the objective of greater regulatory simplicity is not achieved.

[123] We cannot identify any particular benefit that would arise from revoking the *Clubs Award* and expanding the coverage of the *Hospitality Award*. It is not currently the case that any employers have operations which straddle the two awards, or that an employer may move from one award to the other, so no regulatory advantage is gained from the merger of the two awards in that respect. Some clubs may contract out functions to specialist employers who are not covered by the *Clubs Award*, but there was no evidence that this has caused any regulatory confusion or difficulty and, in any case, the examples of this disclosed in the evidence were primarily restaurants contracted out to employers covered by the *Restaurant Industry Award*. Although we do not wish to overstate the position, the modified *Hospitality Award* proposed by CAI is unavoidably more complex to a degree than the current awards, and we take into account that the terms of the proposed award did not receive the support of the AHA.

[124] It is also the case that the proposed merged award contains inconsistencies which are difficult to rationalise and may be productive of future difficulty. The proposed award retains the higher weekend penalty rates for maintenance and horticultural employees currently found in the *Clubs Award*, without any explanation being advanced as to why they would not participate in alignment of penalty rates considered desirable by CAI. It

also appears to be the case that these higher penalty rates would become applicable to gardeners in hotels currently covered by the *Hospitality Award*, without there being any explanation afforded for this. The merged award would also contain the classification structure and career path for club managers only currently found in the *Clubs Award*, while the far less beneficial existing provisions for hotel managers would be retained. Again, there is a lack of cogent explanation for this in the context of CAI's case that employees in the clubs sector and the hospitality sector largely perform the same work and that their employers compete with each other. As earlier stated, the proposed new award would also effect change to a range of other conditions currently found in the *Clubs Award* without there having been any evidence or a merits based case about the consequences of this for clubs and clubs employees.

[125] We do not therefore consider that CAI's proposed variations to the *Hospitality Award* to subsume the coverage of the *Clubs Award* are necessary to or would achieve the modern awards objective. In short, they would inflict economic harm on clubs employees without any identifiable countervailing benefit to clubs, their employees, the hospitality sector or the public interest. In reaching this conclusion, we have taken into account the considerations set out in s 134(1) of the FW Act in the following way (using the paragraph designations in the subsection):

(a) The variations insofar as they involve a reduction in weekend and penalty rates for permanent clubs employees would detrimentally affect the relative living standards and needs of the low paid (and would be likely to expand the numbers of low paid employees). This weighs heavily against the grant of the application.

(b) We do not consider that collective bargaining would be encouraged or discouraged, so this is a neutral consideration.

(c) There is no basis to conclude that the grant of CAI's application would increase employment and thus promote social inclusion through increased workforce participation, so this is a neutral consideration.

(d) We do not consider that CAI's application would promote flexible modern work practices and the efficient and productive performance of work. In this connection we note in particular that the clubs industry is already able to service peak customer demand on weekends and public holidays. This is therefore a neutral consideration.

(da) Clubs employees will receive additional remuneration when working overtime, unsocial, irregular or unpredictable hours, weekends and public holidays, and shifts, whether the application is granted or not. This is a neutral consideration.

(e) CAI submitted that the grant of its application would achieve equal remuneration for work of equal or comparable value, in that it would end the situation in which permanent employees under the *Hospitality Award* receive less remuneration for working on weekends and public holidays than permanent employees under the *Clubs Award*. This submission is misconceived, since s 302(2) makes it clear that s 134(1) is concerned with

gender pay disparities.[104] There is no gender element in this case and accordingly this is a neutral consideration.

(f) We do not consider that the exercise of modern awards powers to modify the *Hospitality Award* as proposed by CAI would have any discernible beneficial effect on business insofar as productivity and the regulatory burden are concerned. It would reduce employment costs for clubs but, for the reasons already stated, we do not consider that any substantial benefit would follow from this, and there may be detrimental effects. This is a neutral consideration.

(g) We do not consider that the grant of the application would make the modern award system simpler, easier to understand, or more sustainable. It is likely to add some degree of complexity to the award regulation of the club industry and the hospitality industry, and would disrupt the stability of the award regulation of those industries. There is no issue of any overlap in the coverage of the *Clubs Award* or the *Hospitality Award*. This is a consideration which weighs against the grant of the application.

(h) There is no basis to conclude the grant (or rejection) of CAI's application would have any discernible impact on employment growth, inflation, or the sustainability, performance and competitiveness of the national economy.

[126] Cumulatively, the s 134(1) factors weigh against the grant of CAI's application. For the reasons given, we decline to grant the application either in the primary or alternative terms proposed.

"Red circling"

[127] Section 599 of the FW Act provides that the Commission is not required to make a decision in relation to an application in the terms applied for. As already explained, we are not satisfied that the transitional provisions proposed by CAI in its application would significantly ameliorate the economic harm it would inflict upon permanent clubs employees who work on weekends and public holidays. However, in a Statement which we issued on 11 July 2018,[105] we invited parties to address us on a potential alternative transitional arrangement whereby, if the *Clubs Award* was revoked and the *Hospitality Award* varied to incorporate its coverage, existing full-time and part-time employees who are currently covered by the *Clubs Award* would have their existing weekend and public holiday penalty rates maintained for the duration of their employment, with any reduced penalty rates applicable only to new full-time and part-time employees. Transitional arrangements of this nature are often described as "red-circling" existing employees.

[128] Red-circling was rejected as a suitable transitional arrangement in the implementation of the Sunday penalty rates reduction determined in the *Penalty Rates Decision*. In the *Penalty Rates – Transitional Arrangements Decision* issued on 5 June

[104] See *4 yearly review of modern awards - Family and Domestic Violence Leave* [2018] FWCFB 1691 at [296]

[105] [2018] FWCFB 4116

2017[106] the Full Bench said (in response to a proposed red-circling term advanced by the Shop, Distributive and Allied Employees Association in respect of the *General Retail Industry Award 2010*):

> "[119] Contrary to the submissions advanced by the SDA we are of the view that the introduction of such a term would:
>
> - create significant potential for disharmony and conflict between employees performing the same work at the same time but receiving different Sunday penalty rates (contrary to s.577(d)); and
>
> - make the transition to 'fair and relevant' Sunday penalty rates more complex (adding to the 'regulatory burden' on business (s.134(1)(f)) and making the modern award system less simple and easy to understand (s.134(1)(g)).
>
> [120] As to the second point, the introduction of a term of the type proposed would require employers to apply two different regimes in respect of Sunday penalty rates – the current rates for employees employed as at the date of implementation (i.e. 1 July 2017) (the 'existing employees') and the new rates for employees employed after the implementation date (the 'new employees'). This would be so even if the 'existing employees' had not previously worked on Sundays and hence could be said to have suffered *no reduction in* their *take home pay* as a result of the *Penalty Rates decision*. Indeed an employer who had never previously operated its business on a Sunday, but decided to do so in the future, would be obliged to pay 'existing employees' a higher Sunday penalty rate than 'new employees'. We also agree with the submission of United Voice that there is a risk that 'red circled employees' may suffer disadvantage in comparison with new employees and that safeguarding such employees may be difficult.
>
> [121] There is also a significant degree of complexity, and uncertainty, in the operation of the proposed term and in particular the duration of the 'red circling' arrangement…"

[129] Those parties opposing CAI's application also opposed the introduction of any red-circling arrangement. It is sufficient to refer to United Voice's submission that the conclusions reached by the Full Bench in the *Penalty Rates – Transitional Arrangements Decision* were equally applicable here in that it would create significant potential for disharmony between employees doing the same work at the same time but receiving different pay, would add complexity to the award system and make it less simple and easy to understand, and give rise to a risk that red-circled employees may suffer disadvantage in comparison with new employees and that safeguarding them would be difficult.

[130] Red-circling was not embraced by CAI as a viable alternative path to the revocation of the *Clubs Award* and the incorporation of the coverage of clubs into the *Hospitality Award*. Although CAI accepted that an expanded *Hospitality Award* containing red-circling provisions for permanent clubs employees' penalty rates would be an "*appropriate*" award for

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[106] [2017] FWCFB 3001

such employees for the purpose of s 164(b), it nonetheless submitted that this course should not be taken because:

- it would entail the existing clubs employees being continued to be overcompensated for working on Saturdays, Sundays and public holidays;
- it would subjugate the interests of employers in the clubs industry to those of employees;
- it would lead to employees of the employer being engaged on different terms and conditions; and
- it would introduce a degree of complexity in the transitional arrangements and add to the regulatory burden.

[131] Having regard to these submissions and the *Penalty Rates - Transitional Arrangements Decision*, we conclude that the modification of CAI's application by the adoption of red-circling as a transitional arrangement for the application of lower penalty rates to permanent employees in the clubs sector would not lead to the modern awards objective being attained. Although a red-circling arrangement would prevent any *direct* reduction of the take-home pay of existing permanent employees who work on weekends, and thus impact upon the extent to which the s 134(1)(a) consideration is a factor weighing against the grant of the application in some form, it would give rise to a range of problems of which the following are the most significant:

(1) There would be significant difficulties in defining who would constitute the existing permanent employees who would be protected by the red circling arrangement. As discussed in the *Penalty Rates - Transitional Arrangements Decision*, if it encompassed *any* existing permanent employee, it would mean that an employee who had never worked on a weekend or a public holiday before would be entitled to the higher penalty rates if they ever did so in the future. If the red circling arrangement only applied to existing permanent employees who currently work on weekends, there would be a host of questions concerning what is necessary to qualify for that designation and the extent of the preservation of entitlements to apply. For example, United Voice's witness Mr Valenti works a Tuesday to Saturday roster, but does not work on Sundays; the question would then arise whether only his existing Saturday penalty rate should be preserved or whether he should also retain an entitlement to the Sunday penalty rate in the event that he ever worked on a Sunday in the future.

(2) A red-circling arrangement would necessarily create a financial incentive for an employer to substitute the employment or hours of an existing permanent employee for a new employee, or to convert the existing permanent employee to casual employment, or to minimise the rostering of weekend and public holiday work for such an employee. Accordingly it would need to be supplemented by safeguarding provisions to prevent detrimental outcomes to the class of employees it is intended to protect. The design of safeguarding provisions to prevent these outcomes would involve considerable difficulty and potential legal and practical complexity.

Conclusion

[132] We do not consider that the grant of CAI's application to vary the *Hospitality Award* so that it covered the clubs industry would achieve the modern awards objective, and accordingly the *Hospitality Award* will not be varied in this respect. Consequently there is no basis for the statutory preconditions in s 164 of the FW Act for the revocation of the *Clubs Award* to be satisfied: the *Clubs Award* is not obsolete or incapable of operation, and the employees covered by it would not be covered by any other modern award were it to be revoked.

[133] CAI's application is dismissed.

VICE PRESIDENT

Appearances:

H.J. Dixon SC of Counsel and *A. Gotting* of Counsel on behalf of Clubs Australia – Industrial
C. Dowling SC of Counsel and *K. Burke* of Counsel and on behalf of United Voice
P. Imber and *P. Cooper* on behalf of Club Managers Association Australia
Z. Duncalfe on behalf of the Australian Workers' Union
P. Ryan on behalf of Australian Hotels Association
G. Arnold on behalf of QLD RSL and Clubs

Hearing details:

2018.
Sydney:
2 – 12 July.

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<PR704018>

SCHEDULE Individual clubs opposing CAI's application		
	Name	Date
1.	Coboolture RSL	31 August 2017
2.	Maclean Lower Clarence Services Club Ltd	12 September 2017
3.	Victoria Point Sharks Sporting Club Inc and Cleveland Sharks Sporting Club	22 September 2017
4.	Randwick Bowling Club	20 October 2017
5.	Redlands RSL and Stradbroke RSL	25 October 2017
6.	Rockdale Tennis Club	1 November 2017
7.	Rathmines Labor Club	2 November 2017
8.	Club Harrington	2 November 2017
9.	Parkes Services Club	3 November 2017
10.	Lalor Bowling Club	3 November 2017
11.	Illawarra Leagues Club	6 November 2017
12.	Buckingham Bowls Club Inc.	6 November 2017
13.	Wellington Golf Club	6 November 2017
14.	West Tamworth League Club Ltd, Wests Diggers and The Courts @ East	6 November 2017
15.	Sutherland District Trade Union Club	9 November 2017
16.	Darebin RSL Sub- Branch Inc	10 November 2017
17.	Gosnells Bowling Club	10 November 2017
18.	South Grafton Bowling Sports and Recreation Club	10 November 2017
19.	Talbingo Club	13 November 2017
20.	Kotara Bowling Club	14 November 2017
21.	University of Adelaide Club	16 November 2017
22.	Cugden Leagues Club	16 November 2017
23.	Capella Tennis Club	16 November 2017
24.	Redcliffe Harness Racing Club	16 November 2017
25.	Pittsworth Bowls Club	21 November 2017
26.	Tarcutta RSL & Citizens Club	21 November 2017
27.	Collinsville Bowls Club	22 November 2017
28.	Moodiarrup Sports Complex Inc	27 November 2017
29.	Lake Conjola Bowling & Recreation Club Ltd	27 November 2017
30.	Gunnedah Golf Club	29 November 2017
31.	Cardiff Bowling Club Co-op Limited	29 November 2017
32.	Port Macquarie Golf Club	29 November 2017
33.	Warialda Golf & Bowling Club Ltd	6 December 2017
34.	Windale Gateshead Bowling Club	7 December 2017
35.	Club Merbein	8 December 2017
36.	Mildura Working Man's Club	8 December 2017
37.	Wynnum Manly Yacht Club	8 December 2017
38.	Austrian Australian Club	11 December 2017
39.	Weipa Bowls Club	14 December 2017
40.	Binjour Bowls Club	18 December 2017
41.	Tamworth City Bowling Club	22 December 2017
42.	Kattaning Bowls Club	22 December 2017
43.	Brighton Bowls Club	22 December 2017

44.	Moe RSL Sub-branch	2 January 2018
45.	Moonie Sports Club	2 January 2018
46.	Port Sorell Bowls Club	8 January 2018
47.	Bramble Bay Bowls Club	16 February 2018
48.	Greenbank RSL Services Club	13 March 2018
49.	Redlands Multi Sports Club	16 April 2018
50.	Queensland Railways Institute Ipswich Branch	14 June 2018
51.	Diggers Services Club	4 July 2018
52.	Padstow RSL Club	27 July 2018
53.	Cranbourne Sports and Entertainment Centre	30 July 2018
54.	Bellambi Bowling Club	30 July 2018
55.	Hat Head Bowling Club	30 July 2018
56.	Moe Racing Club and Bairnsdale Sporting and Convention Centre	31 July 2018
57.	Canberra Highland Society and Burns Club	31 July 2018
58.	Narrandera Ex-Servicemen's Club	31 July 2018
59.	Lake Conjola Bowling & Recreation Club Ltd	1 August 2018
60.	Blackwood Community RSL	1 August 2018
61.	Lithgow Workman's Club	1 August 2018
62.	Wangi RSL Club	2 August 2018
63.	The Hobart Workers' Club	3 August 2018
64.	Public Schools Club	3 August 2018
65.	Adelaide Bowling Club	6 August 2018
66.	Canberra Labor Club	6 August 2018
67.	Currarong Bowling Club	6 August 2018
68.	Gulgong RSL Club	7 August 2018
69.	Southern Districts Workingmans Club	7 August 2018
70.	Braidwood Servicemens Club	7 August 2018
71.	Port Bouvard Recreation & Sporting	7 August 2018
72.	Altona Bowling Club	7 August 2018
73.	Braidwood Servicemens Club	7 August 2018
74.	Cabramatta Golf Club	8 August 2018
75.	Kingscliff Beach Bowls Club	8 August 2018
76.	German Australian Association of Tasmania	9 August 2018
77.	Gunnedah Golf Club	9 August 2018
78.	Belconnen Soccer Club	10 August 2018
79.	German Austrian Club of Australia	10 August 2018
80.	Exeter Golf Club Inc.	13 August 2018
81.	Australian Croatian National Hall	13 August 2018
82.	Oaklands RSL Bowling Club	13 August 2018
83.	Donnybrook Country Club	13 August 2018
84.	Karingal Bowling Club	13 August 2018
85.	Moranbah Bowls Club	14 August 2018
86.	Lithgow Golf Club	14 August 2018
87.	Brooms Head Bowling Club	15 August 2018
88.	The Albury Club	15 August 2018
89.	Lansdowne Bowling Club	15 August 2018
90.	Boyne Tannum Bowls Club	16 August 2018

91.	Chinchilla Club	16 August 2018
92.	Rockingham Bowling Club	16 August 2018
93.	Barraba RSL & Recreational Club Ltd	16 August 2018
94.	Lara Sporting Club	16 August 2018
95.	Denman RSL	17 August 2018
96.	Red Rock Bowling & Recreation Club Ltd	20 August 2018
97.	West Cairns Bowls Club	20 August 2018
98.	Albany Bowling Club	20 August 2018
99.	Railways Football Club	21 August 2018
100.	Frederickton Golf Club	21 August 2018
101.	Claremont Football Club	21 August 2018
102.	Bowraville & District Ex-Services Club Limited	24 August 2018
103.	Lawson Bowling Club	24 August 2018
104.	Woodford Golf Club	27 August 2018
105.	Moranbah Golf Club	27 August 2018
106.	Goolgowi Ex-Servicemen's Memorial Club	28 August 2018
107.	Hilton Park Bowling Club W.A.	28 August 2018
108.	Bicheno RSL Sub Branch	28 August 2018
109.	Hornsby RSL Club	28 August 2018
110.	Morwell RSL Sub Branch Inc	28 August 2018
111.	Peak Hill Bowling Club	28 August 2018
112.	Scottsdale RSL Ex Servicemen's Memorial & Community Club	28 August 2018
113.	Pacific Palms Recreation Club	30 August 2018
114.	Newcastle Leagues Club	31 August 2018
115.	Alexandra House Sports Club	31 August 2018
116.	Daylesford Bowling Club	31 August 2018
117.	Bunnaway Golf Club	31 August 2018
118.	Tin Can Bay RSL	31 August 2018
119.	Windale Gateshead Bowling Club Co-Op	5 September 2018
120.	South Perth Bowling Club	6 September 2018
121.	Texas Golf Club	6 September 2018
122.	Tamworth Golf Club	7 September 2018
123.	Uralla Golf Club	12 September 2018
124.	South Sydney Graphic Arts Club	12 September 2018
125.	Kendenup Country Club	17 September 2018
126.	Cadell Club	18 September 2018
127.	Millmerran MBC	19 September 2018
128.	Primrose Sands RSL	24 September 2018
129.	Club Macquarie	25 September 2018
130.	Lithgow Bowling Club t/a Club Lithgow	26 September 2018
131.	American River Community & Sports Association	26 September 2018
132.	The Commercial Sporting and Recreation Club Inc	8 October 2018
133.	Bibela Bowls Club Inc	8 October 2018
134.	Murrumbidgee Country Club	16 October 2018
135.	Federal Golf Club	16 October 2018
136.	Building Workers Club	17 October 2018
137.	Turners Beach Bowls & Community Club Inc	22 October 2018

138.	Australian Croatian Club	24 October 2018
139.	East Maitland Bowling Club	24 October 2018
140.	Maroubra Seals Sports & Community Club	25 October 2018
141.	Nambucca Leagues and Sports Club Ltd	5 November 2018