

FAIR WORK COMMISSION

MATTER No. AM2014/305

Penalty Rates

Statement of Keith Harvey

I, Keith Harvey of 26 Knightsbridge Avenue, Nunawading, in the State of Victoria state as follows:

Employment history

1. Until 30 June 2011, I was employed full-time as a National Industrial Officer of the Australian Services Union (**ASU**). I was employed in that role since the ASU was created in 1993. Prior to that date I was an employee of the Federated Clerks Union of Australia. I was first employed by the Federated Clerks Union in 1979 as a Research Officer.
2. My duties as National Industrial Officer of the ASU included a range of functions in relation to industrial matters relevant to the ASU and its members. These included the negotiation of collective agreements and their approval by the Commission, award matters including extensive involvement in the award modernisation process in 2008 and 2009 and beyond, dispute resolution, and involvement in particular cases of national significance.
3. In June 2011, I retired from full-time work with the ASU. Since that date I have been employed casually or as an independent contractor from time to time to perform various industrial research and other work for the ASU and other unions. I have also been engaged to perform research, writing and editing and other work for the Australian Institute of Employment Rights, of which I am also a member.
4. Since December 2013, I have been a Director of Care Super, an industry superannuation fund.

5. I am also a Board member and Chair of Aspire Learning, a learning resources company publishing learning resources particularly for training employees in clerical and administrative occupations.
6. In 2015, I was engaged by United Voice to undertake research into award reliance and agreement making in the hospitality industry.

Project

7. United Voice requested that I examine industrial regulation in the industries covered by the *Hospitality (General) Award 2010*, the *Restaurant Industry Award 2010* and the *Registered and Licensed Clubs Award 2010*, specifically the extent to which employees are covered by agreements or are award reliant.

Summary

- ~~8. My examination showed the following:

 - ~~a. That the hospitality industry and related sectors are the most award reliant industries in the Australian economy. Nearly half of employees in these sectors are paid no more than the award rate of pay.~~
 - ~~b. There is conflicting evidence about the trend in these sectors; by one measure there has been a small increase (up to May 2014) in the percentage of employees covered by enterprise agreements; by another there has been a significant drop in the number of agreements and the number of employees covered, especially in very recent periods.~~~~

Note on data sources

9. I have examined the available evidence with regard to award reliance in the hospitality, clubs and restaurant sectors. There is a range of reliable data available which shows that the hospitality and related sectors are among the most award reliant sectors in the Australian economy.
10. Before examining the available data, I provide the following explanation of the sources of the data.
11. Most of the relevant data is obtained from Australian Bureau of Statistics (**ABS**) publications, particularly from the publication *Employee Earnings and Hours* (Cat. No. 6306.0 - Employee Earnings and Hours, Australia) (**EEH publication**).

12. The ABS reports industry data against the Australian and New Zealand Standard Industrial Classification 2006 (**ANZSIC**) (ABS Cat No. 1292.0 - Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 2.0)). The relevant hospitality industry classification is Division H – Accommodation and Food Services. This major group is broken down into what are known as two-, three- and four-digit level subdivisions as follows:

44 – Accommodation

440 Accommodation

4440 – Accommodation

45 – Food and beverage services

451 Cafes, Restaurants and takeaway food services

4511 – Cafes and Restaurants

4512 – Take away food services

4513 – Catering Services

452 Pubs Taverns and Bars

4520 – Pubs Taverns and Bars

453 Clubs (Hospitality)

4530 – Clubs (Hospitality)

13. With one exception, the Industry Division H maps against the three modern awards with which this statement is concerned: the Hospitality, Restaurants and Clubs Awards. The exception is the four digit industry subdivision 4512 – Take away food services. This subdivision maps against the modern award *Fast Food Industry Award 2010* with which this statement is not concerned. I note that research done by the Fair Work Commission confirms this mapping, however, the ANZSIC classifications are constructed on a particular basis and methodology and do not map precisely against modern award coverage. For more details see *Fair Work Australia – Research Report 2/2012 – Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 Report* (February 2012).

14. The ABS reports most survey data at the industry division level since the data is survey data and the sample size does not allow disaggregation to the subdivision level. Some survey data is available at the two digit subdivision level, but none at the three or four digit level. This means it has been impossible to exclude the take away food sector from the whole of the industry division. The inclusion of this subdivision may have the effect of skewing the data but I expect that the overall impact of this will be small or non-existent.
15. For the purposes of this report therefore, the industry division Accommodation and Food Services and the 'hospitality industry' generally are taken to be synonymous. Using the mapping done by Fair Work Australia, the three awards in question map to the following subdivisions:

Hospitality Industry (General) Award: 44 – Accommodation; 4511 – Cafes and Restaurants 4513 – Catering Services; 452 – Pubs Taverns and Bars

Restaurant Industry Award: 4511 – Cafes and Restaurants

Licensed and Registered Clubs Award: 453 – Clubs (Hospitality)

Award reliance in the hospitality sector (Accommodation and Food Services)

16. The main source of data regarding award reliance is the ABS publication 6306.0 - *Employee Earnings and Hours, Australia*. The latest issue of this contains May 2014 data and was published on 22 January 2015. That publication reports on whether employees had their pay set by award, collective agreement or by 'individual arrangement'.
17. The definition of these categories are strict. The ABS publication 6102.0.55.001 - *Labour Statistics: Concepts, Sources and Methods, 2013* specifies these:
- "13.21 The survey identifies the main method used to set pay for employees in Australia, and estimates the proportion of employees who had their pay set using each method. The methods used to set pay identified in the survey are:*
- award only;*
- collective agreement; and*
- individual arrangement.*

13.22 *Employees who have their pay set by an award or pay scale only had their rate of pay specified by an award or pay scale and were not paid more than that rate of pay. Awards are defined as legally enforceable determinations made by Federal or State industrial tribunals or authorities that set the terms of employment (pay and/or conditions) usually in a particular industry or occupation. Employees on 'over-award' pay (i.e. paid at a certain amount or percentage above the rate of pay specified in an award) are classified as having their pay set by an unregistered individual arrangement. ...*

13.23 *Employees who have a collective agreement with their employer which sets the main part of their pay are classified as having their pay set by a collective agreement. A collective agreement is defined as an agreement between an employer (or group of employers) and a group of employees (or one or more unions or employee associations representing the employees). A collective agreement sets the terms of employment (pay and/or conditions) for a group of employees. Collective agreements are further classified as registered or unregistered, reflecting whether they are registered with a Federal or state industrial tribunal or authority.*

13.24 *Employees who have an individual agreement, contract or other arrangement with their employer which sets the main part of their pay, or are a working proprietor of an incorporated business, are classified as having pay set by an individual arrangement. An individual arrangement is defined as an arrangement between an employer and an individual employee on the terms of employment (pay and/or conditions) for the employee. Common types of individual arrangements are individual contracts (which are not allowed to be made under the Fair Work Act), letters of offer and common law contracts. An individual contract (or letter of offer) may specify all terms of employment, or alternatively may reference an award for some conditions and/or in the setting of pay (e.g. over-award payments). Working proprietors of incorporated businesses are regarded as having their pay set by an individual arrangement, and are identified separately in the individual arrangement category.”*

18. The definition of “award only” is precise and only those employees whose rate of pay is that specified by the award and no more are considered to be award reliant employees. Employees who may normally be considered by industrial relations practitioners to be award reliant because their terms and conditions are largely set

by an award but who receive an over-award payment will be classified into the third category – individual arrangement – by the ABS. However, since employees cannot contract out of an award entitlement it may still be the case that the award is the predominant source of pay (since a collective agreement does not operate).

However, for the purposes of this report, the ABS definition and data are used since they are the only ones available.

19. The May 2014 EEH publication contains a table showing method of pay setting by industry for non-managerial employees (excluding owner/managers). The table below is derived from that table (percentages have been calculated from the original data).

Table 1: Pay setting by industry for non-managerial employees

	Award only		Collective agreement		Individual arrangement		All methods of setting pay	
	(000)	%	(000)	%	(000)	%	(000)	%
Mining	1.3	0.8	56.6	36.0	99.5	63.3	157.3	100
Manufacturing	109.8	17.3	228.0	35.9	298.1	46.9	635.9	100
Electricity, gas, water and waste services	7.8	7.4	67.6	64.0	30.3	28.7	105.7	100
Construction	93.8	15.8	179.2	30.3	318.8	53.9	591.8	100
Wholesale trade	53.1	14.4	50.1	13.6	266.1	72.1	369.3	100
Retail trade	320.3	29.6	468.1	43.3	293.2	27.1	1,081.6	100
Accommodation and food services	316.3	45.4	234.7	33.7	146.3	21.0	697.3	100
Transport, postal and warehousing	47.9	11.9	223.3	55.5	131.3	32.6	402.5	100
Information media and telecommunications	8.3	5.7	56.9	38.9	81.1	55.4	146.3	100
Finance and insurance services	20.1	5.8	147.3	42.9	176.2	51.3	343.6	100

	Award only		Collective agreement		Individual arrangement		All methods of setting pay	
	(000)	%	(000)	%	(000)	%	(000)	%
Rental, hiring and real estate services	38.9	24.9	17.1	11.0	99.9	64.0	156.0	100
Professional, scientific and technical services	76.9	11.7	79.4	12.0	503.3	76.3	659.5	100
Administrative and support services	227.8	39.4	83.8	14.5	266.1	46.1	577.6	100
Public administration and safety	74.8	13.3	457.6	81.2	31.4	5.6	563.8	100
Education and training	47.4	5.3	753.3	84.9	86.8	9.8	887.6	100
Health care and social assistance	280.2	23.1	722.0	59.6	209.4	17.3	1,211.7	100
Arts and recreation services	36.7	23.2	67.8	42.9	53.7	33.9	158.2	100
Other services	90.6	28.8	44.7	14.2	178.9	56.9	314.2	100
All industries	1,852.0	20.4	3,937.7	43.5	3,270.2	36.1	9,059.9	100

20. It can be seen from this table that the Accommodation and Food Services industry has the highest rate of 'award only' pay setting of all industries. The rate of award reliance is more than twice the 'all industries' average. The rate of use of collective agreements is about a third less than the overall average (but not the lowest overall). It has the fourth-lowest rate of pay setting by individual arrangement.
21. To obtain some time series data, I looked at the various ABS publications covering the period since 2010. Data for non-managerial employees only does not appear to be available for all of the three most recent surveys – 2010, 2012 and 2014, so the table below includes all employees, including the small number of owner/managers in the sector. This slightly reduces the percentages in the other three categories:

Table 2: Method of Pay Setting – Accommodation and Food Services – 2010 to 2014

	Award only		Collective agreement		Individual arrangement		Owner manager of incorporated enterprise		All methods of setting pay	
		%		%		%		%		%
2014	316.9	42.8	236.9	32.0	166.2	22.5	19.7	2.7	739.7	100
2012	307.9	44.8	163.9	23.8	203.7	29.6	11.9	1.7	687.4	100
2010	291.6	45.2	194	30.1	148.7	23.1	10.8	1.7	645.1	100

Source: ABS, EEH publication, May 2010, 2012, 2014

22. Table 2 shows a small decline in the number of award only employees in Accommodation and Food Services sector and a small rise in the number of employees covered by collective agreements. In all three years from which the data is available, this sector was the most award reliant of all industry sectors in Australia.
23. The table below eliminates owner/managers from the table and re-calculates the percentages.

Table 3: Method of Pay Setting – Accommodation and Food Services – 2010 to 2014 (excluding owner/managers)

	Award only		Collective agreement		Individual arrangement		All methods of setting pay exc owner/managers	
		%		%		%		%
2014	316.9	44.0	236.9	32.9	166.2	23.1	720.0	100
2012	307.9	45.6	163.9	24.3	203.7	30.2	675.5	100
2010	291.6	46.0	194	30.6	148.7	23.4	634.3	100

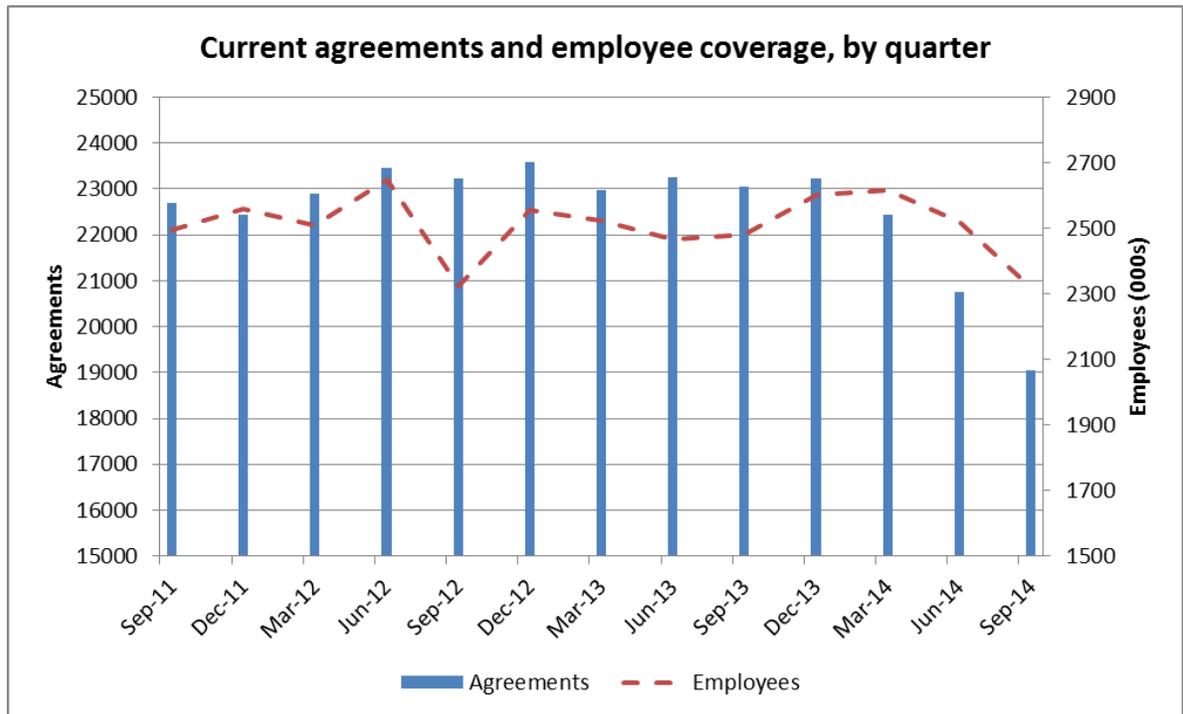
24. These figures also show a small decline in the number of award covered employees in the period 2010-2014.

25. The Fair Work Commission (the **Commission**) has done research on award reliance by employers and employees. The Commission published major research on award reliance in 2013 titled *Report No. 6/2013—Award reliance* undertaken by the Workplace Research Centre, University of Sydney in collaboration with ORC International.
26. In this report, running to 250 pages, the Commission considered award reliance from the point of view of employers and employees, rather than industries. This shows, among other things, that the modern Hospitality Award is a frequently used award by award reliant employers and employees. A copy of the full report can be found at: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14-2>

Incidence of agreement making in the Accommodation and Food Services industry

27. While the data in Tables 2 and 3 show a small increase in the proportion of employees in the Accommodation and Food Services industry covered by enterprise agreements between 2010 and 2014, the data collected by the Federal Department of Employment (**the Department**) and its predecessors shows a different picture with regard to agreement making. The Department has data dating back to 1991 on the incidence and coverage of agreements in all industry sectors (published as *Trends in Federal Enterprise Bargaining*) which can be found at: <http://employment.gov.au/trends-federal-enterprise-bargaining>
28. The most recent report is for the September 2014 quarter. This shows a significant decline in the absolute number of current enterprise agreements and a smaller but still significant decline in the number of employees covered by such agreements. Chart 4 (below) shows the position since 2011:

CHART 4: Current Agreements and Employee Coverage – September 2011 to September 2014



Source: *Trends in Enterprise Bargaining*, September 2014.

29. The report attributes part of the recent decline overall in agreement making to the decline in the number of agreements in the construction industry, a significant user of enterprise agreements. However, it can also be seen that there has been a significant decline in the incidence of current agreements in the Accommodation and Food Services sectors in recent quarters and especially in March and September 2014 (which trend may not have been captured by the June 2014 ABS *Employee Earnings and Hours* survey).

Conclusion

32. The material above demonstrates that the hospitality industry and related sectors are the most award reliant industries in the Australian economy. Nearly half of employees in these sectors are paid no more than the award rate of pay. There is conflicting evidence about the trend in these sectors: according to ABS data there has been a small increase over the past few years in the percentage of employees covered by enterprise agreements and a decrease in award reliance; but according to the Employment Departments figures there has been a significant drop in the number of agreements and the number of employees covered by them in the hospitality sectors, especially in very recent periods.



Keith Harvey

Date: 10 August 22 September 2015

30. The table below has been constructed from the historical data series published by the Department. For convenience, the table shows agreements current in the March and September quarters 2010-2014 although data is available for each quarter each year back to 1991:

Table 4: Historical wage agreements – Accommodation and Food Services and all industries current on the last day of the quarter: March and September quarters 2010 to 2014

	Mar-10	Sep-10	Mar-11	Sep-11	Mar-12	Sep-12	Mar-13	Sep-13	Mar-14	Sep-14
Accommodation and Food Services agreements	1629	1743	1834	1705	1534	1297	1007	925	735	470
Employees ('000)	98.9	189.9	194.4	194.7	189.4	169.8	157.3	156.6	145.4	153.2
All industries agreements	23322	24711	24915	22692	22907	23220	22972	23060	22428	19049
Employees ('000)	2207.0	2424.0	2627.6	2493.5	2514.1	2327.7	2526.7	2485.5	2621.0	2318.5

Source: *Trends in Enterprise Bargaining*, historical tables.

31. Table 4 shows a peak in the number of agreements and employees covered in March 2011, and since that date, a substantial decline in the number of agreements as well as a 21% decline in the number of employees covered. The number of agreements and employees covered in all industries also peaked in the same quarter and both have declined since but not so substantially.