Justice Iain Ross
President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

21 April 2017

Dear President

We write in accordance with the directions of the Fair Work Commission issued in [2017] FWCFB 1934 on 5 April 2017. The following represents our responses to the questions on notice:

1. At 1.1 [1] the Full Bench requests *estimates of the number of employees affected by the penalty rate reductions*. We submit these matters should not be based on the estimates of the parties. In order to fully understand and deal with the consequences of its decision, the Full Bench should be properly informed by the Australian Bureau of Statistics of the number of workers who will be affected and are only covered by a relevant modern award. This will require an exhaustive study by the *ABS* and should be undertaken over a significant period of time.

2. Further, there are many workers who are entitled to wages paid under agreements which refer to awards. There must be a comprehensive study, conducted by the Full Bench, of all extant agreements in operation and applying to workers in the affected sectors to determine if those workers will be directly affected by the penalty rates reduction. The recent media attention of Kikki.K exposes this issue in two ways. Firstly, an indeterminate number of extant agreements refer directly to award rights. The new Kikki.K agreement does that. Those workers, and workers in numerous other workplaces, are thus affected. Secondly, media attention has exposed most Kikki.K workers are, in fact, employed by a labour hire company under an extant agreement known as *HRO Initiatives Pty Ltd Employee Collective Agreement 2007* which provides few rights and expressly states wages are to be paid "equal to or above the Australian Pay and Classification Scale applicable to the work being performed." Those APCS have been replaced by the modern awards which now set the minimum that may be paid to the relevant labour hire employees. Clearly these labour hire employees are directly affected.

3. Further, there are very many workers who are entitled to wages paid under agreements which exclude the awards but for whom the awards are established under the Act at Object 3, (b) as "*ensuring a guaranteed* ***safety net of fair, relevant and enforceable minimum terms and conditions through the*** *National Employment Standards,* ***modern awards*** *and national minimum wage orders*". The decision substantially affects the rights of all workers who are supposed to have a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the awards.

4. The impact at [3] above manifests in a multitude of ways. For example, retail and fast food workers are entitled to apply to terminate agreements after their nominal expiry (see s.225). The decision would reduce the wages which would otherwise be paid upon such a termination. While those wages are manifestly likely to be more than under the terminated agreement, they will not be at the current level and those workers are affected.

5. Legislation is proposed (Fair Work Amendment (Pay Protection) Bill 2017) which would guarantee the full rate of pay under the relevant award was paid to retail and fast food workers where the full rate of pay under the relevant agreement is lower than the full rate of pay under the award. If that legislation is passed, the decision would impact the workplace rights of hundreds of thousands of retail and fast food workers who currently have a lower entitlement at certain times of the week. Our estimates, based on rosters, pay slips and timesheets at major retailers and fast food outlets, indicate hundreds of thousands of workers would be directly affected by the decision should the legislation pass.

6. To properly assess the impact of the decision in workplaces covered by agreements, the Full Bench should conduct a comprehensive analysis, where necessary compelling relevant large employers to provide roster and related information, of the *potential* impact of the decision on those workers taking into account the workplace rights of those workers under s.225 and the proposed *Fair Work Amendment (Pay Protection) Bill 2017*. These issues bely the matter raised at 3.3, [17], in that the unseemly rush to cut the wages of low paid workers proposed by the NRA exposes the desire to shield employers from some of the effect of agreement terminations or the *Pay Protection* legislation.

7. Only after the Full Bench is properly informed with this information can it determine any implementation program.

8. At 1.2, [3], the Full Bench raises the "employment benefits" issue with the Retail Associations. We take this opportunity to note that it is a matter of simple logic that a worker who earns less wages on a Sunday will need to work more hours to earn the same wage. Few employers have identified the capacity to open for more hours on the basis of reduced penalty rates. Even, without concession, if there was some small number of additional hours available to be worked, those hours will be swamped by the ***millions*** of additional hours required to be worked to make up for the lost wages.

9. Simple logic dictates that most workers will look to work more hours to make up the lost wages. By doing so, fewer positions will be available. ***The decision will lead to increased unemployment***. In the short term it may be ongoing staff looking to swallow up casual hours. In the longer term it will be the failure to replace ongoing staff.

10. At 1.4, the Full Bench seeks feedback on the loaded rates proposal. It is now notorious that loaded rates have stripped hundreds of thousands of workers in the retail and fast food sectors of the wages they would otherwise earn. This was exposed in the *Coles* decision and

has been repeatedly exposed in the media at workplaces such as McDonald's and Woolworths. These matters are partly the subject of a Senate Inquiry and we reject any proposal to offset actual penalty rate cuts with loading rates. If the Full Bench is minded to directly offsetting the penalty rate cuts it ought set aside its decision.

11. In relation to the question posed at 3.1, [15], there is a misconceived assumption. There are no employment benefits as the decision will lead to unemployment. Any transition should take into account the substantial detriment and unemployment that will flow from the implementation.

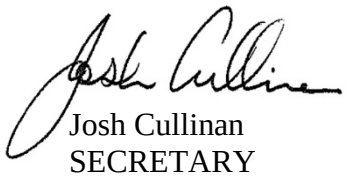
12. In relation to the "red-circling" issues discussed at 4.1, [20], we note and agree with the submissions in reply of United Voice dated 20 April 2017. In circumstances where the Full Bench decides some form of "red-circling" should apply we make the submission that it should apply:

    a. equally to workers covered by awards and agreements (which may be terminated in the future);
    b. across employers within the relevant sectors; and
    c. irrespective of breaks in employment.

13. We note that any "red-circling" ought include agreement covered workers to ensure the objects of the Act are met. In particular, section 3 (b).

14. We take this opportunity to reiterate our earlier submission that the decision ought be set aside in its entirety. We welcome the notice by United Voice of its intended application for judicial review of the decision.

Your sincerely



Josh Cullinan
SECRETARY