FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

21 APRIL 2017

ABN: 73 080 269 905

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1. RCI make these submissions in response to the questions on notice contained in Attachment B of the Commission's statement issued on 5 April 2017, specifically relating to implementation of the reduction in penalty rates in respect of the Fast Food Industry Award 2010, *Restaurant Industry Award 2010,* and the *Hospitality Industry (General) Award 2010*.

2. In response to question [6] of 1.1 of the Statement, RCI does not agree to mitigating the impact of the Decision. As canvassed by a number of employer parties, the Commission has given careful consideration to all material brought before it in these proceedings, in coming to the Decision.

3. In this regard, RCI is of the view that any unnecessary delay in the implementation of the Decision should be avoided, given the three years that it has taken to conduct the review itself. RCI recommends that the implementation of the Decision be implemented by no later than the implementation date of the minimum wage on 1 July 2017.

4. If the Commission is minded that steps need to be taken further to ensure that the awards in question provide a fair and relevant minimum safety net, pursuant to section 134 of the FW Act, the Commission may wish to implement a form of take home pay protection process that is similar to THPO provision that was available in the award modernisation stage, as mentioned below.

5. In response to question [7] of 1.1 of the statement, RCI submits that any suggestion that the decision relating to the reduction in penalty rates in respect of the Hospitality Awards, as submitted by United Voice, should be rejected. RCI supports the submissions of ACCI and AI Group in this regard.[1]

[1] ACCI submission dated 24 March 2017 at paragraphs 14–16 and AI Group submission at paragraph 63.

6. RCI rejects the submission by United Voice, calling on the Commission to retract its invitation to RCI to press its claim to reduce Sunday penalty rates in respect of the *Restaurant Industry Award 2010* in these proceedings. In this regard, if the Commission is minded to inquire further into the merits of RCI's claim, it is empowered to do so pursuant to s 590 of the *Fair Work Act 2009* (FW Act).

7. As stated in RCI's correspondence to the Commission dated 24 March 2017, filed in response to paragraph [2050] of the Decision, RCI welcomes the opportunity to further pursue its claims, bearing in mind the observations made by the Commission,[2] and the material and body of evidence[3] RCI is required to provide in pressing its claim.

8. In relation to the Commission's refusal to grant RCI's claims pending further evidence, in the *Restaurant Industry Award 2010*, on the basis that RCI failed to meet the evidentiary burden of its case,[4] RCI is of the view that the Commission adopted an overly restrictive approach (perhaps in the interest of expediency) in dealing with its evidence. Section 591 of the FW Act states that the Commission *"is not bound by the rules of evidence and procedure in relation to a matter before it (whether or not FWA holds a hearing in relation to the matter)*." RCI notes that notwithstanding it is an established principle that the Commission relies upon the rules of evidence to provide general guidance as to the manner in which it chooses to inform itself in any proceeding, other important considerations should be taken into account, including:

    - the need to review each modern award in its own right (s156(5));
    - the requirement of the Commission to *'perform its functions and exercise its powers in a manner that: (a) is fair and just; and (b) is quick, informal and avoids unnecessary technicalities; and (c) is open and transparent; and (d) promotes harmonious and cooperative workplace relations.'* (s 577);

[2] [2017] FWCFB 1001 at [2047]–[2049], [1159].
[3] Ibid at [1157].
[4] Ibid at [1155].

- *'In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), FWC must take into account: (a) the objects of this Act, and any objects of the part of this Act; and [2017] FWCFB 1001 27 (b) equity, good conscience and the merits of the matters'* (s 578(a) and (b)).

9. RCI is of the view that the Commission gave very little consideration to the statutory requirements mentioned above, in considering RCI's evidentiary case. The outcome of the approach taken by the Commission put RCI at a significant disadvantage, which could only lead to the conclusion that it reached, to deny RCI's claim, pending further evidence. RCI's evidence was stripped down to a bare minimum. For example; Mr Hart's initial statement contained 34 paragraphs of evidence and was stripped back to contain merely 6 paragraphs. Only 5 of the 10 lay witnesses' evidence was called for and relied upon. RCI was not given an opportunity to put together fresh evidence that would meet the peculiar requirements of the Commission from an evidentiary viewpoint.

10. The unfair treatment of RCI's evidence, as extracted from the Decision, was abundantly clear:

> *'[1091] As to the proper process for survey data collection, and the conduct of surveys more generally, United Voice relied upon the expert evidence of Ms Helen Bartley.959 Ms Bartley is a qualified practicing market researcher with the AMSRS and is also an accredited statistician with the Statistical Society of Australia.*
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> *[1092] Ms Bartley was asked to provide evidence about the necessary pre-requisites for the establishment and conducting of a survey from which reliable conclusions may be drawn. In respect of data collection Ms Bartley gave evidence that she would expect such data to be collected "in accordance with accepted market and social research industry standards, such as the ISO International Standard for Market, Social and Opinion Research (AS:ISO 20252) which is the international standard for access panels in market opinion and social research.'*

[1093] Ms Bartley considered the following pre-requisites for the establishment and conduct of a survey from which reliable conclusions may be drawn:

- *A clear aim and objectives for the survey;960*
- *Clear definitions of concepts such as a well-defined target population, scope and timeframe;961*
- *A questionnaire that is relevant, contains meaningful and relevant questions that are unbiased and easy to answer, has response options that are mutually exclusive and follows a logical sequence;962*
- *An unbiased sample design and selection process that maximises the survey response where respondents are randomly selected from the target population and from a current and accurate sampling frame and a sufficiently large sample to draw results that are statistically accurate;963 and*
- *The consequences of any limitations with the survey to be considered.964*

[1094] United Voice relied on these points to respond to the Jetty Survey965 and submitted that the survey did not meet these standards and therefore the results are not reliable.966 A similar submission was made in relation to the Benchmarking Survey.967[5]

11. As noted by RCI's counsel in closing arguments, the evidence from the survey must be considered in the context of the general concerns which have been highlighted. The survey does not, seek to provide quantifications of precise measurements as to any impact or experience of operators. Rather, it's purpose is to engage with participants in the industry and indicate a general trend and views. To this extent it does with is consistent with the views and observations of the Productivity Commission and the views expressed in the Visitor Economy Taskforce Report.

12. Notwithstanding the Commission had every opportunity to use its discretion as it is permitted to do so pursuant to s591 of the FW Act, and it's concession that the Productivity Commission's view of the analysis of the survey material was correct, the Commission allowed itself to be persuaded by the criticisms of United Voice's witness.

[5] [2017] FWCFB 1001.

[1095] The Productivity Commission characterises the test of reliability proposed by Bartley as 'overly stringent' and goes on to make the following observation: 'Evidence is always imperfect, and few conclusions about anything in the social sciences could be reached if only those studies that met the full set of conditions set by Bartley were given any weight'. 968

[1096] The Productivity Commission explained that all of these business surveys would fail the "stringent" tests suggested by Bartley 969 and argued that only surveys from the ABS would be considered reliable if these tests were applied. Instead, the Productivity Commission contended that, while the results "should be treated as suggestive more than definitive", they should not be disregarded as evidence is "always imperfect". 970 Further, the Productivity Commission stated that "few conclusions about anything in the social sciences could be reached if only those studies that met the full set of conditions set by Bartley were given any weight". 971

[1097] We agree with the above observation. The assessment of survey evidence is not a binary task – that is, such evidence is not simply accepted or rejected. Most survey evidence has methodological limitations – be it sample related the nature of the questions put or the response rate. The central issue is the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data.

[1098] Given the limitations in the Jetty Survey and the Benchmarking survey, and consistent with the view expressed by the Productivity Commission, we propose to treat the data from these surveys as suggestive or anecdotal, rather than definitive. ***We expressly reject the proposition advanced by RCI that the results of the Jetty Survey can be extrapolated to all businesses covered by the Restaurant Award and that an estimate can be made of the aggregate employment effect of reducing penalty rates****.'* (emphasis added).[6]

13. RCI noted in previous submissions filed in these proceedings, the importance of considering in respect of its claim:

[6] [2017] FWCFB 1001.

"*We submit the appropriate weight to be attributed to survey evidence should be considered on a case-by case basis and dependent upon the robustness of material presented [49]*

Where in-house survey material has been presented by an employer party based on its membership database the Commission places little weight on such evidence, however, any survey material provided by small business employers should be considered as valuable insights to that collective of small business operators. Again Restaurant & Catering Industrial argue that membership surveys are probative evidence that the Fair Work Commission should take into account during the modern awards review process. [50]"[7]

14. It should also be noted that in the numerous directions hearings, when the evidence to be put by the parties were discussed, no directions were given by the Commission as to the necessary threshold required to be met by the parties in filing expert or survey evidence. In fact, the Commission did not initially contemplate that parties would seek to rely on expert evidence.[8]

15. An important consideration that RCI submits should have been (but was clearly not) at the forefront of the Commission's mind in considering its evidence is, the requirements under s577 of the FW Act, which provides:

'The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and
(b) is quick, informal and avoids unnecessary technicalities; and
(c) is open and transparent; and
(d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).'

16. RCI noted in its earlier submissions[9] the ominous attitude of the Commission towards the evidentiary case to be put by parties, even at the very beginning of these proceedings:

'PN129

[7] AM2014/305 RCI submissions, 29 June 2015 at [49] and [50].
[8] AM2014/305 hearing, 20 February 2015 at PN 128.
[9] [2017] FWCFB 1001 RCI submissions dated 29 June 2015 at [16].

> *So now that that's changing, and you do want to call it, I'm not precluding anyone from calling experts, in relation to their own case, but it has a consequence. Six weeks is, in my view, insufficient time to provide the unions with an opportunity to consider your expert evidence. I think it's broadly sufficient to deal with lay evidence, because,* ***to be perfectly frank, I know each of you have said you're going to have hundreds of lay witnesses and I doubt if much of that evidence will amount to a hill of beans, really****. It'll be views about their particular circumstances. It'll be largely similar, if past cases are anything to go by, largely similar, won't be the subject of much cross-examination and is it likely to have much impact? In past cases it hasn't really, because it's the circumstance of a particular - I understand why parties do it, but it's a bit like in national wage cases getting witness statements from individual workers and from individual employers.'* (emphasis added).

17. As noted in the RCI initial submissions, based on this approach, it withheld a number of operators that it would have otherwise sought statements from.

18. RCI rejects the submission by United Voice, calling on the Commission to retract the invitation provided to RCI to further pursue its claim. In their submissions, United Voice took the time to provide explanatory remarks and erroneously liken this 4 Yearly Review to *inter partes* proceedings[10], due to the comments made by the Commission that it would dismiss RCI's claim in the context of an *inter partes* proceedings.[11] United Voices' submissions ignores the fact that the Commission made clear that this review is to be distinguished from *inter partes* proceedings, and not to mention, it ignores the important role that the Commission plays in the review process, as noted below:

- *'The Review is to be distinguished from inter partes proceedings. Section 156 imposes an obligation on the Commission to review all modern awards and each modern award must be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application.35 The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.'*[12]

[10] [2017] FWCFB 1001 United Voice submissions dated 24 March 2017 at [41] – [51].
[11] [2017] FWCFB 1001 at [1156].
[12] [2017] FWCFB 1001 at [110].

19. In relation to RCI's evidence, the Commission specifically requested evidence of the impact that the 2014 decision had on the industry. In this regard, RCI submits that the time between the handing down of the 2014 decision, it's subsequent implementation and the commencement of the 4 Yearly Review, was not sufficient to gather evidence of the impact of the 2014 penalty rates decision.

20. The two-yearly review penalty rates decision was handed down on 14 May 2014, and came into effect on 1 July 2014. An outline of evidence was required to be filed 25 May 2015, less than a year after the implementation of the 2014 decision, and the employer evidence for these proceedings were required to be filed by 10 August 2015.[13] It is noted that it was contemplated by the parties at a directions hearing that the employer parties would require eight months to put their expert evidence together.[14] RCI submits that in order for it to provide evidence of the impact of the 2014 penalty rates decision in these proceedings, it would have needed approximately one year and eight months to do so. This timeframe consists of twelve months (from the date that the decision came into effect) to allow the impact of the 2014 decision to be fully settled, and then a further eight months to put together expert evidence. As such, the restricted timeframe between the two proceedings, did not provide sufficient time for RCI to furnish the evidence sought by the Commission in these proceedings. However, this evidence is available now, if RCI is given the opportunity to present it.

21. If given the opportunity, some important considerations which RCI will be seeking to address, relating to the 2014 Full Bench Decision includes:
    - the Commission's decision to only reduce penalty rates applying to *'transient and lower-skilled casual employees working mainly on weekends, who are primarily younger workers…'* who fall under Levels 1 and 2 classification

[13] [2017] FWCFB 1001, FWC Statement issued 23 February 2015.
[14] AM2014/305 hearing, 20 February 2015 at PN 128.

- the Commission's rejection of the argument by RCAV that the level of disability for working on Sundays is no longer higher than that for Saturdays, on the basis that there has been no change in position in the industry since a Full Bench of the AIRC considered this matter in 2003. RCI will seek to argue that there has been a significant shift in position in the last fourteen years since the 2003 decision was handed down.

22. In response to question 1.2 of the statement, RCI submits that an important consideration for the Commission in deciding to reduce penalty rates in the selected awards, is to have regard to the modern awards objective contained in section 134(1)(a)-(h), in particular:
    - the need to promote social inclusion through increased workforce participation – s134(1)(d)
    - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden – s134(1)(f)
    - the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – s134(1)(h)

23. An important aspect of the Commission's duties is to balance the interests of existing employees, employers, as well as would-be employees. In coming to its conclusion to reduce the penalty rates in the Retail Industry Award 2010, the Commission importantly noted the importance of assessing 'fairness' from the perspective of employees and employers alike:

> *'In relation to the Sunday penalty rate, for the reasons given, we have concluded that the existing Sunday penalty rate is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by [2017] FWCFB 1001 382 the modern" award in question. The word 'relevant', in the*

context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.'[15]

24. In response to question 1.3 of the statement, RCI understands that the practical implications of the proposal by ACOSS may look like a provision that is similar to the rolling-up provision that is currently in the Restaurant Award at clause 28, which provides employers the option to pay staff an additional twenty-five percent on top of the weekly wage, in lieu of paying overtime and penalty rates.

25. RCI does not disagree with the adoption of this provision, in so far as it will assist businesses from an administrative point of view, in line with section 134(f). It is further noted that the Commission is open to implementing a similar proposal 'subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g).'[16]

26. In response to question 2.1 of the statement, RCI agrees with the general interpretation that Take Home Pay Orders (THPO) available under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* is not an option that can be exercised in the context of implementing the Decision in these proceedings. In any event, RCI notes that THPO should not be seen as a way to mitigate the impact of the Decision. As mentioned by the majority of employer parties, in coming to its decision, the Full Bench has given careful consideration to the vast material presented by the parties by way of written and oral submissions, evidence, as well as the large amount of research that the Commission itself undertook.

27. As mentioned in paragraph 1.1 above, RCI would encourage the Commission to consider implementing a form of take home pay protection to be made available to any employees affected by the Decision.

[15] [2017] FWCFB 1001 at 1701.
[16] [2017] FWCFB 1001 at 90.

28. In response to question 2.3 of the statement, RCI notes that orders obtained from the Commission, to preserve existing the pay of employees were only available in relation to the award modernisation stage. As such, given the circumstances of this Decision and the context of the four yearly review, any reduction in take home pay as a result of the Commission's decision to reduce Sunday penalty rates does not fall within the circumstances prescribed above.

29. Whilst this is the case, the principle of the protection of take home pay is very relevant to this matter, given the basis upon which the Decision is made, that more jobs and more hours will be created.

30. RCI believes that some provision to protect take home pay would ensure that the purpose behind the Commission's decision would be able to be ensured whilst the benefits of penalty rates changes materialise.

31. In response to question [18] at 3.1 of the statement, RCI disagrees with any proposals to stagger the introduction of the Sunday penalty rates. As mentioned in paragraph 1.1 above, any unnecessary delay in implementing the Decision should be avoided.

32. The Commission has previously avoided the use of 'phasing in' in the two-yearly review process, when the Full Bench reduced penalty rates in the Restaurant Award, upon the successful appeal application by the Restaurant and Catering Association of Victoria.[17] RCI considers that the alternative approach that the Commission should take, to mitigate any associated negative impact of the decision on affected employees, is to implement a take home order provision, similar to the provision created as part of the award modernisation process.

[17] [2014] FWCFB 1996.

33. In response to question [19] at 3.1 of the statement, RCI disagrees with the proposal for the Commission to determine the transitional arrangements *in globo*. Pursuant to s156(5) of the FW Act, *'A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right.'* Transitional arrangements should be dealt with award by award as required. Any proposals relating to this issue should be dealt with by the parties to those awards, and be given an opportunity to negotiate the terms as appropriate to suit the conditions of their specific industry. This should not be dealt with as a 'common matter', as was the case in 2010, when the different impacts were determined award by award. As previously submitted by RCI, the only reason that the awards have been dealt with as 'common issues' is for the Commission's administrative convenience.

34. In response to question [20] of 3.1, RCI refers to paragraphs 1.2, 2.1 and 2.3 above.

35. In response to question 4.1, as mentioned previously, section 156 of the FW Act imposes an obligation on the Commission to review all modern awards and each modern award must be reviewed in its own right. In this regard, RCI submits that the proposal by SDA has no relevance to the Hospitality Award or Restaurant Award.

36. In response to the second question of 4.1, RCI rejects the recommendation by SDA to preserve the position of existing employees affected by the Decision in the manner proposed. If SDA's proposal is implemented, it would not only delay the projected positive employment benefits of the Decision, as illustrated by the evidence put by the relevant employer parties, it would also have the effect of adding to the regulatory burden on business, contrary to the requirement under section 134(1)(f).

37. As previously noted, RCI considers that the best alternative to deal with the impact of the Decision by affected employees is to implement an arrangement that is similar to a take home pay protection arrangement, to be made available to affected employees.