

FAIR WORK COMMISSION

Matter No. AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

**REPLY SUBMISSIONS OF UNITED VOICE REGARDING
TRANSITIONAL ARRANGEMENTS**

Judicial Review of the Fair Work Commission's decision

1. United Voice has formed the view the Commission's decision on 23 February 2017 ([2017] FWCFB 1001) is affected by jurisdictional error. United Voice intends to seek judicial review of the Commission's orders giving effect to the decision.
2. That application for judicial review will allege at least the following:
 - (a) a failure by the Fair Work Commission to properly exercise its jurisdiction by failing to, or failing to properly, take into account the relative living standards and the needs of the low paid as required by s 134(1)(a) of the *Fair Work Act 2009* (Cth) (the *Act*) ; and
 - (b) a jurisdictional error by the Fair Work Commission in its interpretation of s 156 of the *Act*, by failing to require that the Commission, in order to enliven its discretion to vary a modern award, first be satisfied that since the making of the modern award there has been a material change in circumstances.
3. Accordingly, should the FWC decide to make orders to give effect to the decision, United Voice seeks that any such orders be made subject to a stay on them coming into operation for a period of 30 days in order to allow time for United Voice to file its application with the Federal Court and seek an ongoing stay from the Court until the determination of its application.
4. Without prejudice to the matters set out above and reserving all of its rights in relation thereto, United Voice makes the following submissions in response to:
 - (a) the submissions of the Australian Hotels Association (AHA) regarding the transitional arrangements for the 25 per cent cut to Sunday penalty rates for full and part-time employees under the *Hospitality Industry (General) Award 2010* (*Hospitality Award*); and

- (b) the questions in the Statement issued by the Full Bench on 5 April 2017 in *Four Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1934 (the **Decision**).
5. United Voice reserves its rights concerning the FWC's contemplated further review of the Restaurants Award. No interested party has indicated any desire to participate in any further review of the *Registered and Licenced Clubs Award* 2010 (**Clubs Award**). In relation to any further review of both of these modern awards within the Penalty Rates Review we foreshadow the submission that the appropriate course of action is that any further review be stayed pending the conclusion of the judicial review foreshadowed.

Transitional arrangements for cuts to Sunday rates

- 6. The AHA have submitted that the cuts to Sunday penalty rates for permanent employees should be phased in over two years, with a cut of 15 per cent commencing on 1 July 2017, and a cut of 10 per cent commencing on 1 July 2018.
- 7. United Voice opposes the transitional arrangement proposed by the AHA, and submits that the 24 month notice period and subsequent phasing in of cuts proposed by United Voice will meet the needs of the relevant employees in a manner consistent with the observations of the Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 that the proposed variations will cause hardship to employees who work on Sundays, and the cuts “*are likely to reduce the earnings of [affected] employees and have a negative effect on their relative living standards and on their capacity to meet their needs*”.¹
- 8. A two year notice period is appropriate because:
 - (a) a lengthy notice period is essential to allow low paid hospitality workers to take steps to mitigate the effects of the decision, the proposed period will allow employees to negotiate new hours of work with their employer, save money, find other work, or retrain for new employment;
 - (b) the lay evidence called by United Voice during the hearing, and accepted by the Full Bench, demonstrates that hospitality employees are likely to try to find work in other industries in the event of a pay cut, and that they will require training to do so, employees will not be able to take these measures if cuts are introduced too quickly;
 - (c) employees have non-work related matters that will require adjustment due to reduction in their income and possible increases in their working hours caused by the

¹ *Penalty Rates Decision* [2017] FWCFB 1001, [1998]–[2000].

- cuts in penalty rates. For instance, employees working news hours will require sufficient notice to arrange for childcare, further, students will also require time to find work that accommodates their study commitments;
- (d) there are long-standing and openly acknowledged problems with compliance with wage laws in the hospitality industry, a lengthy notice period is essential to ensure that employers understand their obligations and the changes to those obligations, including any transitional arrangements²; and
 - (e) a lengthy notice period will also permit adequate consideration of possible measures to compensate for reductions in penalty rates, such as those proposed by Australian Council of Social Service (**ACOSS**).
9. No other party has made submissions regarding the transitional arrangements under the awards in which United Voice has an interest. Although the Australian Chamber of Commerce and Industry purported to make a submission regarding the transitional arrangements for the Hospitality Award, that submission is limited to outlining reasons why the cuts should not be delayed and should commence on 1 July 2017, without advancing any specific proposal.

Response to Questions

1.1: Number of employees affected – paragraph 6

- 10. In the Decision, the Full Bench cited research by FWC research staff showing that the Accommodation and Food Services ANZIC division ‘maps’ closely to the employee population covered by the Hospitality Award but includes the Restaurant Award (see [695]).
- 11. The most recent ABS data relied on by the Full Bench showed that there were, as at August 2016, approximately 841,300 employees within those sectors, with high rates of award coverage (approximately 42 per cent; see [706] and Table 24). Approximately 34.5 per cent of those workers do have paid leave entitlements and so are likely to be permanent employees (see Table 28). However, it is very difficult to disaggregate weekend workers from non-

² See Fair Work Ombudsman report, tendered and marked as Exhibit No UV-36. The FWO conducted a wages audit of the cafes, restaurants, and catering industry in 2014, and found that over a third, or 36 per cent, of café, restaurant, and catering businesses had compliance errors relating to rates of pay, and nearly half of those errors – 17 per cent – related to weekend penalty rates. RCI Witness 12 and 13 gave evidence that he was not aware that the penalty rates of Introductory to Level 2 employees had been reduced by the decision of the Full Bench in Restaurant and Catering Association of Victoria [2014] FWCFB 1996. See transcript PN 4124–4128; 4139.

weekend workers, employees who regularly work public holidays and those who do not, and Hospitality Award employees from Restaurants Award employees, from that data set.

1.4: the ACOSS proposal – paragraph 9

12. The Commission has asked the parties to comment on the proposal of ACOSS to mitigate the effects of the decision by ensuring that employees affected by the decision are paid '*loaded hourly rates*'.
13. In its submission of 24 March 2017, ACOSS said:

In brief, we propose that the Commission must ensure that the decision does not result in existing or future low-paid employees being worse off in terms of the income they receive for the hours that they work. **One option for achieving this outcome is to ensure that any existing or future employees subject to reductions in penalty rates in the affected Awards are paid 'loaded hourly rates' to compensate for potential losses of pay.** Further, any future review of penalty rates should be based on the principle of consistent, appropriately graduated compensation for the disutility of working unhealthy or unsocial hours. (emphasis added).

14. United Voice supports the underlying basis of the ACOSS submission, which is that it is necessary for the Full Bench to consider the needs of the low paid when making decisions about transitional arrangements for cuts to penalty rates. However, United Voice is unable to comment in the absence of a specific proposal about how loaded rates would operate in this case. We note that ACOSS have been invited to comment on how the proposal would work in practice. United Voice reserves its rights to make a further submission regarding loaded rates should ACOSS make a more detailed submission in response to the question from the Full Bench.

2.1: Take home pay orders – paragraph 16

15. United Voice confirms its position that take home pay orders are not an available option to mitigate the impact of the reductions in penalty rates.

3.1: Phasing in – paragraph 18

16. United Voice agrees that the Commission has power to make transitional arrangements relating to the staggered introduction of the reduction to existing Sunday penalty rates.

3.1: the need for the Full Bench to act consistently with the matters in AIG submission – para 19

17. At paragraph 43 of its submission, AIG submits that in determining the transitional arrangements for the Sunday penalty rate, the Full Bench must act consistently with:

- (a) its statutory charter, including the exercise of its powers under the FW Act in a manner that is fair and just (see section 577(a) of the FW Act);
 - (b) its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee) (see Penalty Rates Decision at [37], [117], [118], [151], [885], [1701], [1877], [1948]);
 - (c) the objects of the relevant Part (see section 578(a) of the FW Act);
 - (d) the merits of the matter (see section 578(b) of the FW Act);
 - (e) its findings and conclusions in the Penalty Rates Decision;
 - (f) the evidence in the proceedings;
 - (g) the extent of the reductions in the existing Sunday penalty rates; and
 - (h) the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates.
18. United Voice agrees with the matters in (a) to (g) of the AIG submission, and says that these matters are relevant to the task of the Full Bench with respect to transitional arrangements for public holiday penalty rates as well as Sunday penalty rates.
19. Further to sub-paragraph (c) of the AIG submission, the modern awards objective is relevant to the task of the Full Bench in determining the transitional arrangements for penalty rates cuts. Transitional arrangements are part of any modern award which contains them. We note our submissions here are made in the alternate to our submissions noted at paragraphs 2 and 3. Section 578(a) of the FW Act requires the FWC to take into account the objects of the relevant Part. Part 2-3 requires the FWC to ensure that the modern awards meet the modern awards objective at s 134(1) of the FW Act.
20. United Voice does not agree that the Full Bench is required to act consistently with the matter identified in sub-paragraph (h) of the AIG submission regarding the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates. While the decisions of other Full Benches may be illustrative, the decisions in those cases will have been made having regard to, among other matters, the considerations in sub-paragraphs (d) to (g) relevant in those cases. Those considerations may be quite different between previous cases and this case. Further, there is nothing in the Act or relevant jurisdictional decisions that requires the Full Bench to follow the approach taken by previous Full Benches with respect to transitional arrangements.

3.1: the relevance of any modern award terms limiting Sunday work – paragraph 19

21. The Commission asked if the parties consider it relevant that the terms of a particular modern award may limit the incidence of Sunday work. There are no such terms in the Hospitality Award or the Restaurants Award.

3.1: the question posed by ABI and NSWBC – paragraph 20

22. United Voice does not agree with the approach proposed by ABI and NSWBC. That proposal unnecessarily simplifies the multifactorial balancing exercise that the Full Bench is required to undertake in considering the appropriate transitional arrangements. The correct approach is as set out in paragraphs 16 to 19 above.

3.4: Questions for United Voice – Productivity Commission proposals – paragraph 23

23. The reliance by United Voice on the Productivity Commission submission was limited to agreeing with the Commission's recommendation that there be a notice period.
24. The Productivity Commission went on to recommend that cuts to penalty rates be implemented in full after that notice period. By contrast, United Voice proposes that cuts to penalty rates be delayed for a period 24 months and then phased in over three years. The underlying principles identified by the Productivity Commission in support of their submission for a delay to the implementation of cuts are also relied on by United Voice.
25. United Voice has proposed that any cuts to penalty rates be delayed for two years, for the reasons set out in paragraph 7 above.

4.1: Red Circling – paragraph 25

26. United Voice does not agree with any ‘*red circling*’ provisions in the transitional arrangements. Such arrangements have the potential to create a two-tier workforce. It is undesirable to have employees performing the same work, at the same time, while on different rates of pay. Further, because ‘*red circled*’ employees are more expensive, there is a risk that such employees will be rostered to work less hours than newer, less expensive, employees. Finally, we are not confident that the proposal at paragraph 14(b) of the SDA submission (quoted in paragraph 25 of the Statement) can properly safeguard ‘*red circled*’ employees from unlawful adverse action.
27. United Voice does not advance a red circling proposal.

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C W Dowling

K Burke

Counsel for United Voice