FAIR WORK COMMISSION

Matter No. AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

SUBMISSIONS OF UNITED VOICE REGARDING TRANSITIONAL ARRANGEMENTS AND FURTHER MATTERS REGARDING THE HOSPITALITY INDUSTRY (GENERAL) AWARD 2010, THE CLUBS INDUSTRY AWARD 2010 AND THE RESTAURANT INDUSTRY AWARD 2010

1. On 23 February 2017, in its decision in *Four Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (***Penalty Rates Decision***) the Fair Work Commission (*the* ***Commission***) determined, amongst other matters:

   (a) to cut Sunday penalty rates for permanent workers employed under the *Hospitality Industry (General) Award 2010* (the ***Hospitality Award***); and

   (b) that Restaurant and Catering Industrial (**RCI**) and Clubs Australia Industrial (**CAI**) had failed to make out a merit case in support of their applications that Sunday penalty rates should be reduced for workers employed under the *Restaurant Industry Award 2010* (the ***Restaurant Award***) and the *Clubs Industry Award 2010* (the ***Clubs Award***).

2. On 17 March 2017, the Commission published draft variations for the foreshadowed reductions in the public holiday penalty rates within the *Hospitality Award* and *Restaurant Award*. These variations to the *Hospitality Award* and the *Restaurant Award* foreshadow cuts of 25 per cent to the current public holiday rate for all employees covered by the *Hospitality Award* and of 25 per cent to the public holiday rate for permanent employees covered by the *Restaurant Award*. The reductions in the public holiday rate are intended to commence on 1 July 2017. The Commission noted in the *Penalty Rates Decision* that no transitional arrangement is necessary for these reductions in the public holiday rate.[1] We disagree with this finding for the reasons noted at paragraph 17.

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1 *Penalty Rates Decision*, [2014], [2025].

3. These submissions are filed pursuant to the invitation issued by the Commission in the *Penalty Rates Decision* to make submissions regarding:

   (a) a transitional arrangement for the cut to the Sunday penalty rate for permanent employees under the *Hospitality Award*; and the draft variations giving effect to cuts to the public holiday within the *Hospitality Award* and *Restaurant Award*

   (b) the proposal to abolish the *Clubs Award*; and

   (c) the invitation to CAI, and the request to RCI, for a further opportunity in respect of their failed applications.

Section 134(1)(a)

4. United Voice reserves its rights in respect of the issue concerning the efficacy of the finding that cuts should be made to penalty rates, and particularly the Sunday rate for permanent employees covered by the *Hospitality Award*. The Commission's approach to s 134(1)(a) is relevant to this issue, and to each of the matters at paragraph 3(a) to (c) above.

5. The correct response to the finding that the effect of the proposed reductions will result in employees experiencing indigency is that the reduced rates cannot be said to provide for a fair and relevant safety net of terms and conditions, and the cuts should not be implemented.

6. Section 134(1)(a) provides that the Commission must take into account "*relative living standards and the needs of the low paid*" when ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.

7. In the *Penalty Rates Decision* the Commission concluded that a substantial proportion of the employees affected are "*low paid"* and the proposed variations "*are likely to reduce the earnings of those employees and have a negative impact on their relative living standard and their capacity to meet their needs*."[2] The Commission acknowledged that the cuts to Sunday penalty rates for permanent employees under the *Hospitality Award* would have an "*adverse impact*" on the earnings of these employees.[3]

8. The Commission stated: " …*it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best*

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2 *Penalty Rates Decision*, [1998].

3 *Penalty Rates Decision*, [824].

addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)."[4]

9. United Voice reserves its rights on this point, and submits that it is incorrect to conclude that because penalty rates are directed at disutility it is inappropriate or unnecessary to consider the needs of the low paid as provided for by s 134(1)(a) in this review. Penalty rates form a significant part of the safety net in the hospitality sector and elsewhere.

10. The fact that the Act requires the Commission to consider "*the needs of the low paid*" when setting minimum wages[5] does not relieve the Commission of its function to properly consider the needs of the low paid as part of the four yearly review, and in consideration of the applications made by employer proponents for reductions to penalty rates.

(a) Transitional arrangements

11. In the alternative to our submission that the cuts should not be implemented, United Voice makes the following submission concerning transitional arrangements.

12. The Full Bench has determined to cut Sunday penalty rates for permanent employees covered by the *Hospitality Award* from 175 per cent to 150 per cent.

13. The Commission stated that there was "*plainly a need for appropriate transitional arrangements*" to "*mitigate the hardship caused to employees who work on Sundays.*"[6]

14. The hardship was explained by the Full Bench as arising from the fact that "*a substantial proportion of the employees*" covered by the relevant awards are "*'low paid' within the meaning of s 134(1)(a)*".[7] The Commission has stated that it is conscious of the adverse impact that the cuts to penalty rates will have on those employees especially where unexpected expenses "*produce considerable financial distress.*"[8] In the context of its provisional views as to the form of transitional arrangements, the Commission has proposed the following options:

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4 *Penalty Rates Decision,* [823].

5 At s 284(1)(c).

6 *Penalty Rates Decision*, [2000], [2021].

7 *Penalty Rates Decision,* [1998]; and see Chart 24 at [735]; [817]; [818]–[824].

8 *Penalty Rates Decision*, [1999].

(a) The reductions should take place in a series of annual adjustments on 1 July each year, commencing 1 July 2017, to coincide with any increases in modern award minimum wages arising from *Annual Wage Review* decisions.[9]

(b) At least two instalments will be required, but the Commission's preference is for less than five instalments.

(c) The availability of take-home pay orders may shorten the period required for transitional arrangements.

(d) The Productivity Commission proposed that employees be provided with 12 months" notice of any reduction in rates, after which the full rate cut is passed on. The Commission rejected this proposal on the basis that the 12 month notice period imposed an "*unnecessary delay on the introduction of any reduction*", and the purpose for the notice period, which was to give employees time to seek alternative employment or undertake additional training, was not made out on the evidence.[10]

15. United Voice agrees with the submission of the Productivity Commission that the rate cuts should be subject to a notice period. The concern of the Full Bench that a notice period of 12 months will cause "*unnecessary delay*" must be balanced against the acknowledged hardship to be visited upon employees by these cuts. The Commission found these cuts will have a significant effect on affected workers' "*relative living standards and on their capacity to meet their needs*."[11]

16. It cannot be expected or assumed that safety net increases in the minimum wage will adequately compensate any affected workers.

17. United Voice reserves its rights and submits that the cuts to the public holiday rate will have similar effect and should be phased in over an identical period. Public holiday loadings provide additional income to low paid workers, for example, at times of the year when they are under some financial stress such as the Christmas/New Year period and may rely on this additional income in their financial planning.

18. United Voice agrees with the Fair Work Commission that the cuts should be phased in over a series of annual adjustments, but submits that two instalments are not sufficient to ameliorate

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9 *Penalty Rates Decision*, [2021(iii)].

10 *Penalty Rates Decision*, [2021(i)].

11 *Penalty Rates Decision*, [1998].

the impact on employees or the incapacity and financial stress that the cut in earnings that such a rapid introduction will create.

19. United Voice proposes that the cuts to Sunday rates for permanent employees covered by the *Hospitality Award* and the cuts to the public holiday rate for employees covered by the *Hospitality Award* and permanent employees under the *Restaurant Award* should be subject to the following transitional arrangements:

Year	**Reduction – Sundays**	**Reduction – Public Holiday**
1 July 2017	0	0
1 July 2018	0	0
1 July 2019	8 per cent	8 per cent
1 July 2020	8 per cent	8 per cent
1 July 2021	9 per cent	9 per cent

20. There is broad economic consensus that Australia is in a period of exceptionally low wage growth. Over the year to September 2016, wage growth was a record low at 1.9 per cent.[12] In the event of a significant change in labour market conditions prior to the proposed cuts taking effect, United Voice reserves its rights to make an application immediately prior to the orders being implemented, to ensure that current economic conditions are taken into account, where those conditions constitute a significant and relevant change to labour market conditions.

Take Home Pay Orders

21. At paragraph 2019 of the *Penalty Rates Decision*, the Commission observes that it is unclear whether take home pay orders are an available option to mitigate the impact of the reductions in Sunday rates proposed, and sought submissions from interested parties.

22. United Voice submits that take-home pay orders are not available to ameliorate the impact of the proposed cuts.

23. The power of the Commission to make a take home pay order is found in item 9, schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**TPCA Act**). The provision allows the Commission, on the application of an employee or organisation or person acting on their behalf,[13] to make an order in relation to an employee or

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12 See Commonwealth Government, *Mid Year Economic and Fiscal Outlook 2016–17*, Budget Paper No 1 2016–17, Chart 2.4 at 14.

13 See TPCA Act, item 9(3), schedule 5.

class of employees who will suffer a "*modernisation-related reduction in take-home pay"*. An employee suffers a modernisation-related reduction in take-home pay in prescribed circumstances including that the employee is employed in the same or comparable position she or he was in immediately prior to the operation of the modern award; and the reduction in an employee's take-home pay is attributable to the award modernisation process in Part 10A of the *Workplace Relations Act 1996* (Cth).[14]

24. As described in paragraphs 2013–14 of the *Penalty Rates Decision*, Reg 3B.04 of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010* (*No 1*) (**the amending regulations**) widened the circumstances in which the Commission could make a take-home pay order. The amending regulations modified schedule 5 of the TPCA Act to provide that a modern award may include terms that give the FWA power to make a take-home pay order remedying any reduction in take-home pay suffered, relevantly, by an employee as a result of the making of a modern award, "*or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay)*".

25. The justification for expanding the circumstances in which take-home pay orders could be made to transitional arrangements "*whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay*" was described by the Explanatory Statement to the amending regulations as follows:

> *...The Regulations allow take-home pay orders to be made where a reduction occurs because of certain variations to modern awards made by FWA.* ***While take-home pay orders can be made with respect to reductions arising from the award modernisation process, FWA variations to moderns awards to deal with residual issues are not recognised as part of that process,*** *as defined by the legislation.* ***Any reductions in take-home pay that result from this limited range of FWA variations to modern awards are not able to be remedied by take-home pay orders. The Regulations address this inconsistency.***

26. The *Penalty Rates Decision* is neither '*the making of a modern award*', or a '*residual issue*' arising from the award modernisation process. Accordingly, the amending regulations do not provide for the availability of take-home pay orders to offset the impact of the proposed cuts, which is a factor in favour of the transitional arrangements sought by United Voice.

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[14] TPCA Act, item 8(3), schedule 5.

(b) Abolition of the *Clubs Award*

27. The Full Bench has suggested that determinations could be made revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employees and employers presently covered by the *Clubs Award*.[15]

28. United Voice opposes the absorption of the *Clubs Award* within the *Hospitality Award*. In particular, the absorption of the *Clubs Award* into the *Hospitality Award* would cause permanent employees under the *Clubs Award* to suffer an immediate cut in penalty rates on Saturdays and Sundays, as shown in the table below:

Award	**Full and Part Time - Saturday**	**Full and Part-Time – Sunday**
HIGA	125	150
Clubs	150	175

29. Permanent employees make up 49 per cent of the *Clubs Award* workforce, with 67 per cent of all employees aged over 25.[16] CAI sought to reduce weekend penalty rates payable to permanent employees under the *Clubs Award* by a figure of 25 per cent. Had CAI been able to persuade the Commission that such cuts were necessary to meet the modern awards objective, penalty rates for permanent employees would have been reduced to mirror those rates in the *Hospitality Award*. However, CAI were not successful in their application for variation and the Commission was unpersuaded that weekend penalty rates in the *Clubs Award* were not meeting the modern awards objective. It is inappropriate that the Commission now find, in the absence of any merit case sufficient to engage the Commission's jurisdiction to vary the *Clubs Award*, that employees in that sector should have their weekend penalty rates reduced by a side wind.

(c) The proposal that CAI and RCI be provided a further opportunity in respect of their failed applications for variation

30. Shortly after the commencement of the four yearly review, in February 2015, CAI and RCI filed draft determinations seeking reductions to Sunday penalty rates in their respective awards.

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15 *Penalty Rates Decision*, [2044].

16 *Penalty Rates Decision*, [938], [941].

31. CAI sought a reduction for full and part-time staff (permanent employees) and casual employees, from 175 per cent to 150 per cent. CAI also sought a reduction to Saturday rates for permanent staff, from 150 per cent to 125 per cent.

32. RCI sought a reduction for permanent staff, from 150 per cent to 125 per cent, and for casual staff at Levels 3 to 6 from 175 per cent to 150 per cent, to bring the Sunday rate for casual staff down in line with the rates reduced by the Full Bench in the *Transitional Review* [2014] FWCFB 1996 (**2014 Transitional Review**). Although RCI did not seek to reduce Saturday penalty rates, the effect of its proposed reductions to Sunday rates would have meant that Saturday and Sunday penalty rates were equalised, i.e., 125 per cent on weekends for permanent staff and 150 per cent for all casual staff.

33. The draft determinations were filed in response to directions of the President that "*employer parties seeking to amend the penalty rates provisions*" in the relevant awards would file draft variation determinations: [2014] FWC 9175 at [10].

34. Following the filing of draft determinations in February 2015, the parties took the following steps in preparation for the hearing in September 2015:

    (a) RCI and CAI were directed to file lists of expert witnesses to be called, and an outline of submissions and findings that they submitted the Commission should make based on the expert evidence to be called. Neither party called evidence from any expert witness, although they indicated an intention to rely on expert evidence called by other employer parties. United Voice also filed a list of expert witnesses and associated material, in part directed to the expert evidence that RCI and CAI did not call, but sought to rely upon.

    (b) RCI and CAI were directed to file an outline of any survey evidence to be relied on including information relevant to the conduct of the survey. RCI filed a document stating it would rely on four surveys. CAI relied on a survey conducted by KPMG in 2011 about licensed clubs.

    (c) RCI and CAI were directed to file expert evidence and common material. As stated above, neither party called any expert evidence. RCI tendered a number of documents marked as common material.

    (d) RCI and CAI were directed to file lay evidence and an outline of submissions and findings that they submitted the Commission should make based on the lay evidence to be called. RCI filed lay witness statements from Mr Hart, Mr Parker, and Ms

Warren, and 10 restaurant operators. CAI filed evidence from its officers Mr Tait and Mr Rees, and four clubs operators. United Voice filed witness statements from workers employed under the *Restaurant Award* and the *Clubs Award*.

35. As set out in the *Penalty Rates Decision* (at [23]–[33]), the Commission relevantly heard evidence on 8–25 September, 1 October, 4–6 November, 15–16 and 21 December 2015. There were in total 143 lay and expert witnesses of whom 128 were required for cross-examination. Together with the submissions and evidence of the principal parties, there were some 5,845 public contributions and 36 submissions from other organisations.

36. During the hearing, RCI were unable to make five out of their 10 lay witnesses available for cross-examination, and their evidence was not called or relied upon.

37. Prior to and during the course of the hearing, United Voice made a number of objections to the evidence sought to be called by RCI. Following either the agreement of RCI, or a ruling of the Full Bench, the volume of evidence sought to be tendered by RCI was reduced. At all times, RCI was on notice as to the standard of evidence required to make out its case.

38. The witness statement of Mr John Hart provides a compelling example of the strategic approach that RCI elected to take in the conduct of its application. United Voice objected to Mr Hart's witness statement on grounds that it was largely submission, and contained irrelevant, hearsay, and speculative material. While the Full Bench ruled in favour of some of Mr Hart's statement, ultimately, RCI withdrew all but six of the 34 paragraphs of Mr Hart's statement. The revised statement was tendered after the following exchange on 11 September 2015 (from PN 3293):

> MR DOWLING: *Good morning, your Honour. Just two brief administrative matters to inform the Bench. Firstly, I understand the Commission has been provided a new statement of John Hart to replace the existing statement.*
>
> JUSTICE ROSS: *Mm-hm.*
>
> MR DOWLING: *I've notified my friend Mr Clarke that in those circumstances we don't require Mr Hart for cross-examination.*
>
> JUSTICE ROSS: *All right. I just want to clarify the position with the Restaurant Catering. My chambers contacted someone from I'm not sure who when we received this just chasing you up on what was said yesterday, which was that we wanted a statement that reflected where did we end up after the redactions and the rulings we had made. You recall some of the rulings were in your favour and we retained paragraphs which had inserted the words "in my experience" and then a statement, and you were going to continue your position in relation to two of the survey materials. What I was informed by my associate was that the indication from your organisation was that the only thing you wanted to proceed with was this document.*

MR CLARKE: *That's correct, your Honour*.

JUSTICE ROSS: *All right, so* ***you're no longer pressing the material that was in fact left from Mr Hart's statement after the rulings we made*** *and the objections that were taken*?

MR CLARKE: *They are my instructions*.

JUSTICE ROSS: *Well that's your choice. I'm just making that clear, because the way it was communicated to me seemed to be that there was nothing left from Mr Hart's statement. That's not the case. There was something left but* ***you've made the decision not to pursue it?*** *I'm just wanting to clarify that's the case*.

MR CLARKE: *Your Honour, we stand before you on a 4-year review. Mr Hart is willing to give evidence this afternoon. If you would like, or the Bench would like to put stuff to Mr Hart then Mr Hart is - - -*

JUSTICE ROSS: *No, Mr Hart is –* ***you keep saying it's a review but you're the proponent of a change and you put in a witness statement for Mr Hart****. What I don't want is to create the misleading impression that we have somehow removed all of his evidence. We haven't. We've made rulings about it.* ***You've made the decision to only press this aspect of his evidence. That's a matter for you***.

MR CLARKE: *Your Honour, Mr Hart stands willing to come to the Commission this afternoon*.

JUSTICE ROSS: *But on what basis do we call him*?

MR CLARKE: *On the basis that we've got a 4-year review, and from my understanding from yesterday there's some significant matters that you put to me that the head of the association stands willing to come and answer those concerns*.

JUSTICE ROSS: *But you're not going to call him? And you're not putting in a witness statement that sets out what his evidence would be?*

MR CLARKE: *We are putting forward a witness statement, your Honour, and my instructions are that that's all that - - -*

JUSTICE ROSS: *That's all you wish to say in putting evidence from Mr Hart, that's your instruction*?

MR CLARKE: *That is the instruction*.

JUSTICE ROSS: *That's all right. Well* ***you've had the opportunity***.

MR CLARKE: *Yes, but we acknowledge that, your Honour*.

JUSTICE ROSS: *Yes*.(emphasis added).

39. At the conclusion of the hearings, the RCI and CAI filed final written submissions. United Voice filed final written submissions on 21 March 2016. RCI filed reply submissions on 4 April 2016, while CAI did not file any reply submissions. Additionally, all parties were invited to address the Commission's own research material, additional relevant research identified by the Commission's research staff, and the 5,845 contributions from members of the public. The Full Bench heard final oral submissions over five days in April 2016.

40. Approximately two years after the RCI and CAI filed their draft determinations, and after the conduct of the proceedings outlined above, the Full Bench published its *Penalty Rates Decision*, and found that both CAI and RCI had failed to make out a merit-based case in support of their proposals for variation.

Statutory review and inter partes litigation

41. The Full Bench has justified the invitation to CAI and RCI to bring further and better evidence and submissions on the basis that those parties' claims have been made "*in the context of the Review, and s 156 imposes an obligation on the Commission to review each modern award*".[17] The Full Bench has stated that it would otherwise dismiss the applications. In respect of RCI, the Full Bench has set out clear directions as to the evidence that party would need to successfully persuade the Commission that its proposed variation should be made.[18]

42. United Voice accepts that the relevant claims are made in the context of a statutory review, however that does not mean that all principles applicable to *inter partes* proceedings are irrelevant to the review. As the Commission identified (in the extract at [21] above) CAI and RCI were each the "*proponent of a change"* and the moving parties in the review.

43. That each of CAI and RCI were the proponent of change and the moving party is consistent with the following matters.

44. In *Re Four Yearly Review of Modern Awards –Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdictional Issues***), the Full Bench determined that where a "*significant change is proposed*" in the four yearly review:

> *... it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*[19]

45. Further:

> *...a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation…where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and*

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17 *Penalty Rates Decision*, [995], [1156], and see [110].

18 *Penalty Rates Decision*, [1157]–[1158].

19 *Preliminary Jurisdictional Issues*, [23].

> *be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*[20]

46. And in *4 Yearly Review of Modern Awards: Security Services Industry Award 2010* [2015] FWCFB 620, the Full Bench held:

> *... In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change*.[21]

47. Importantly, the Full Bench in the *Security Services* decision added (at [8]) that "*the more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be*."

48. The requirement that an applicant for a variation make an application supported by probative evidence, submissions addressing the law, and sound and balanced reasoning, relevantly demonstrates the *inter partes* aspects of this proceeding. The findings of the Full Benches in this regard otherwise have no purpose.

49. *Inter partes* proceedings are characterised by:

    (a) Each interested party being served with material affecting their interest;

    (b) Each interested party receiving notice of the matters put against them; and

    (c) Each interested party being given a reasonable opportunity to attend and be heard.

    Each of those matters was satisfied in the present proceeding.

50. The conduct of the hearing, including all preliminary steps and the hearing itself, proceeded in a manner consistent with *inter partes* proceedings, whilst in the context of the statutory review. The employer parties, including RCI and CAI, brought applications for variation, which were opposed by United Voice. The parties filed and served their evidence and submissions. Evidentiary objections were taken by the parties and ruled upon. Witnesses provided evidence in chief and were cross-examined. Submissions were made by all parties. The Commission determined to conduct this review with many of the key attributes of an *inter partes* proceedings.

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[20] *Preliminary Jurisdictional Issues*, [60].

[21] At [8] (Watson VP, Kovacic DP, Roe C).

51. Courts have repeatedly confirmed that their powers are limited by the general principle of the finality of litigation. In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 the majority (of Gleeson CJ, Gummow, Hayne and Heydon JJ) stated at [34]: "*A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.*" Whilst the tenet does not have strict application in the Commission, the underlying bases are applicable, protecting parties to a proceeding from:

(a) having the same matters, as previously determined, from being raised against them a second time;

(b) having matters later raised against them that could have been raised in first opportunity; and

(c) having determined controversies reopened.

Findings of the Full Bench – the application by CAI

52. The Full Bench held that "*the variations proposed by CAI constitute significant changes to the modern award*".[22]

53. In respect of the proposal brought by CAI, the Full Bench found that:

(a) The evidentiary case put by CAI was "*patently inadequate*".[23]

(b) CAI had "*not established a merit case sufficient to warrant the granting of the claim*".[24]

54. The Full Bench held that there was "*an inherent contradiction in the position put by CAI*", in that CAI contended there was no difference between Saturday and Sunday work, but sought variations that would maintain different penalty rates for Saturday and Sunday. This contradiction was not satisfactorily explained.

55. The Commission held further that "*the case put on behalf of CAI*" lacked "*a detailed exposition of the merits of the particular proposal*";[25] contained "*a paucity of evidence advanced in support of the proposed changes*", attended by submissions which "*made only a*

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22 *Penalty Rates Decision*, [984].

23 *Penalty Rates Decision*, [993].

24 *Penalty Rates Decision*, [994].

25 *Penalty Rates Decision*, [983] (emphasis added).

cursory reference to the relevant s 134 considerations", and "*failed to adequately address the relevant statutory provisions*".[26]

Findings of the Full Bench – the application by RCI

56. In respect of the application brought by RCI, the Full Bench found that:

(a) The RCI lay witness evidence was "*of limited assistance*".[27] Of the five witnesses ultimately called by RCI, the Commission found that two out of five were unaware of the reduction to penalty rates for level 1 and 2 casuals;[28] none of the RCI witnesses suggested that there was any positive employment effect as a consequence of the previous reduction;[29] and there was a "*paucity of evidence*" about the likely impact on employment and service levels as a result of the cuts proposed by RCI.[30]

(b) The Elections Australia survey attached to the witness statement of John Hart, CEO of the Restaurant and Catering Association, was "*so flawed that it [*was*] of no assistance*".[31]

(c) The Jetty Research survey attached to the witness statement of James Parker had "*a number of significant deficiencies when considered in the light of the proposals being advanced by the RCI in this Review*",[32] and the Commission "*expressly reject[*ed*] the proposition advanced by RCI that the results of the Jetty Survey can be extrapolated to all businesses covered by the Restaurants Award and that an estimate can be made of the aggregate employment effect of reducing penalty rates*".[33]

(d) The Benchmarking Survey attached to the witness statement of Carlita Warren had "*a number of significant deficiencies*".[34]

57. In addition to the failure by RCI to call probative evidence in support of its proposal for variation, the Full Bench identified the failure of RCI to address or deal with the consequences of the 2014 Transitional Decision.[35] The need to address the 2014 Transitional

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26 *Penalty Rates Decision,* [985].
27 *Penalty Rates Decision*, [1142].
28 *Penalty Rates Decision*, [1060].
29 *Penalty Rates Decision*, [1061].
30 *Penalty Rates Decision*, [1062].
31 *Penalty Rates Decision*, [1069].
32 *Penalty Rates Decision*, [1081].
33 *Penalty Rates Decision*, [1098].
34 *Penalty Rates Decision*, [1090].
35 *Penalty Rates Decision*, [1144].

Decision was obvious from the outset. In the *Preliminary Jurisdictional Issues* decision, the Full Bench held:

> *In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so*.[36]

58. This failure of RCI to address the 2014 Transitional Decision was the subject of sustained criticism by United Voice in final submissions and was raised during the course of evidence: see United Voice final submissions at [188]–[197]. The impact of the 2014 Transitional Decision was put to Professor Phil Lewis, a labour economist called by ABI as an expert witness in this case, who gave evidence for RCI in the hearing of the transitional review. Professor Lewis' attention was drawn to the fact that he did not address the 2014 Transitional Decision despite being asked to do so by ABI. He initially explained that he thought it too difficult and then changed his evidence to explain that he did not have time: see United Voice final submissions at [188]–[197]. The issue was clear to RCI, and they chose not to deal with it.

59. The Full Bench has stated that "*there is no material before us which would enable us to assess the impact of the variation proposed by the RCI*", referring to, among other matters, the lay witnesses called by RCI. The Full Bench approaches this conclusion by noting that the limited lay evidence before it suggests the benefits of the variation proposed by RCI would be modest, "y*et the detriment to the employees affected would be significant*".[37] We agree.

60. The participation of RCI in the 2014 Transitional Decision is an even more persuasive factor in support of the proposition that RCI were at all times aware of the strategic decisions that it made concerning their application, and the potential consequences of these decisions.

Appropriate action by the Full Bench

61. The Full Bench should not invite or permit RCI and CAI to re-litigate their failed claims for variation to weekend penalty rates.

62. Together with the need for finality and the matters set out above, the proposal raises serious practical considerations that are unlikely to be capable of resolution through case management or measures directed to ensuring procedural fairness. These considerations include the following matters.

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[36] *Preliminary Jurisdictional Issues*, [27].

[37] *Penalty Rates Decision*, [1151].

63. In the *Preliminary Jurisdictional Issues* decision, the Full Bench held that in conducting a review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue, and that previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so.[38] The *Penalty Rates Decision* is a "*previous decision relevant to a contested issue*" and a "*previous Full Bench decision*". Although United Voice will rely on the *Penalty Rates Decision* in any resuscitated application for variation by RCI or CAI, the circularity of this exercise demonstrates the futility of those parties re-litigating their proposals for variation.

64. Further to the relevance of the *Penalty Rates Decision*, it is not clear what use the Commission will make of its findings about "*common issues"* such as the employment effect, the value of weekends, and employee choices and preferences. It will be procedurally unfair to prevent United Voice from calling evidence to refute propositions put by RCI and CAI that are relevant to those issues. Such evidence may include further expert evidence. It is inevitable that there will be a degree of repetitiveness in any hearing, given that the express purpose of the proposed fresh hearing is to invite RCI and CAI to repeat their claims, but with improvements.

65. During the hearing, the transcript was published in confidence and only provided to the parties' representatives. The full transcript has been available online since 24 March 2016, and the *Penalty Rates Decision* describes the cross-examination of each lay witness called by hospitality parties, and makes findings about that evidence. The purpose of publishing the transcript in confidence until the conclusion of the evidentiary hearing was to prevent witnesses from being forewarned of the approach taken to cross-examination and the concessions, errors and the like (if any) made by witnesses under cross-examination.[39] Since the publication of the transcript and the *Penalty Rates Decision*, any further witnesses called by RCI and CAI will be able to access the transcript and read the decision, and will have an advantage over the witnesses called by those parties in the September 2015 hearings. In those circumstances United Voice will be denied the protection intended by the original order that the transcript only be published in confidence.

66. The preparation of further evidence and the conduct of additional hearings will involve significant cost to the parties and resources of the Commission. This is aggravated by the repetitive nature of the exercise. The Commission is required to conduct the review consistent with s 577 of the FW Act, which provides that the Commission must perform its functions in

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38 *Preliminary Jurisdictional Issues*, [27].

39 See Transcript, 10 September 2015, PN 2531–2537.

a manner that is fair, just, quick and informal. Providing a further opportunity to RCI and CAI would undermine each of those matters.

67. Sections 577 and 578 are intended to ensure fairness and equity. The principle of the finality of proceedings is consistent with these matters. This review is occurring within the four yearly review which commenced in 2014 and demands that the Commission conduct a review "*as soon as practicable after each 4 year anniversary of the commencement of the Act"*. "*A review"* has been conducted and it is not proper for the Commission to continue to enquire and/or conduct another review.

68. At all times, CAI and RCI were afforded full procedural fairness over the course of more than two years of preparation and hearing; are experienced, well-resourced, and active participants in industrial relations proceedings before the Commission and its predecessors; and were at all times on notice as to the deficiencies in their case. The invitation to both parties to *improve* their failed claims, along with directions to RCI on precisely how to achieve that improvement, is manifestly unfair to United Voice and its members, who will be required to fund the further defence of any additional applications that may be put in these further reviews. It is not fair to United Voice to have to continue to defend the same application by RCI and CAI to reduce weekend penalty rates until the review concludes at some indeterminate point in time. Such an approach cannot be seen to be impartial, in the interests of justice or consistent with how the Act requires the Commission to perform its functions.

69. Having found that CAI and RCI failed to support their proposals for variation with probative evidence and an analysis of the relevant legislative provisions, and taking into account relevant common evidence, the Full Bench should dismiss the applications for variation and enquire no further into these matters within these proceedings. The review that the Commission was required to conduct is complete.

70. United Voice otherwise reserves its rights in respect of the Commission's invitation to provide both RCI and CAI a further opportunity to advance a properly merit based case to support the changes in penalty rates proposed by them.

Date: 24 March 2017

C W Dowling

K Burke

Counsel for United Voice