

**SUBMISSION OF CLUBS AUSTRALIA (INDUSTRIAL)  
REGARDING THE OPTIONS AT [2044] OF THE PENALTY RATES DECISION**

1. In the *Penalty Rates Decision* [2017] FWCFB 1001 issued on 23 February 2017 the Full Bench of the Fair Work Commission ('**FWC**') ('**the Full Bench**') gave CAI two options:

*[2044] In Chapter 7.3.6 we conclude that CAI has not established a merit case sufficient to warrant the variation of the Clubs Award. We also express the view that there are 2 options in respect of the future conduct of the penalty rates review of the Clubs Award:*

- *Option 1: determinations could be made revoking the Clubs Award and varying the coverage of the Hospitality Award so that it covers the class of employers and employees presently covered by the Clubs Award. Such a course would obviously avoid the need for any further Review proceedings in respect of the Clubs Award.*
- *Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.*

*[2045] At [1000] we express the provisional view that option 1 has merit and warrants further consideration. We propose to provide an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, we invite submissions on the two options set out above.*

*[2046] Short submissions setting out the position of the interested party are to be filed at [amod@fwc.gov.au](mailto:amod@fwc.gov.au) by 4.00 pm Friday, 24 March 2017. We will list this matter for mention on Tuesday, 28 March 2017.*

2. CAI recognises that there is a range of ways that the issue of penalty rates in the club industry could be addressed in the future.
3. However, CAI is concerned to avoid an outcome where employers in the club industry are at a significant cost disadvantage to employers in the hospitality industry (by the retention of much higher penalty rates for club employees in comparison to penalty rates for employees in the hospitality industry) in circumstances where there is a high degree of commonality in work performed by, classifications used for and rates of pay provided to both sets of employees.
4. CAI prefers a consensual approach to the issue of penalty rates in the club industry and to that end CAI sought to engage in discussions with relevant unions (including United Voice). To date, those discussions have not led to an agreed position. CAI also sought conciliation with the FWC but United Voice declined to participate.
5. In the absence of a consensual approach, CAI's preference is to adopt the provisional view expressed by the Full Bench as to the merits of Option 1.
6. CAI notes that, as the Full Bench recognised in the *Penalty Rates Decision* at [1004], both the Clubs Award and the Hospitality Award cover food and beverage preparation and service, accommodation, entertainment, recreation and leisure pursuits, and gaming.

7. CAI also notes the statement of the Full Bench in the *Penalty Rates Decision* at [1005]:

*“We accept that there are differences between the two awards [the Clubs Award and the Hospitality Award], for example in relation to annualised salary arrangements, overtime on Saturdays and in both the classification definitions and the range of classifications covered. But it seems to us that such differences may be accommodated by either appropriate transitional arrangements or the inclusion of clubs-specific arrangement with in the Hospitality Award”.*

CAI understand that, in dealing with its application, the FWC will continue to accept the importance of having regard to the circumstances of the club industry, and have regard to differences between clubs and other sectors covered by the Hospitality Award. However, CAI submits that these differences between the clubs industry and the hospitality industry do not justify employers in the club industry being regulated by a different modern award or having to pay higher penalty rates than employers in the hospitality industry.

8. CAI acknowledges that the making of the separate Clubs Award was, as the Full Bench recognised in the *Penalty Rates Decision* at [1000], “no doubt heavily influenced by the consent position of the interested parties”. CAI submits that at least two circumstances have changed materially since the making of the Clubs Award in 2010:
- (a) First, a very significant difference between clubs industry and other areas of hospitality, which CAI viewed was best accommodated by a separate award, was part-time employment. (Due to the provisions contained in the NSW Clubs Award NAPSA, a significant proportion of employed in the industry were employed on a part time basis whereas the incidence of part-time employment elsewhere in hospitality was negligible.) CAI notes that the Full Bench has now has an opportunity to consider a merits based case on this issue in its Part-Time Common Issues proceedings (AM \*\*\* of 2014) and is hopeful that appropriate part-time provisions for the club industry will result from that case, and that such provisions would be reflected in any modified Hospitality Award in the future.
  - (b) Secondly, the desirability as recognised by the Full Bench of “providing greater consistency in the regulation” of penalty rates in the [*hospitality*] sector” (see *Penalty Rates Decision* at [998]) has become more significant in light of the changes to penalty rates that will be introduced shortly in the hospitality industry generally, and in restaurants and fast food industries, as a result of the *Penalty Rates Decision*. The changes that will occur to penalty rates (from 1 July 2017 in all likelihood) will mean that club employers will be required to pay significantly higher penalty rates if they engage employees on weekends or public holidays. This will mean that clubs will incur significantly higher costs which will ultimately impact on the services that they can offer their members and the contributions that they can make to communities that they serve.
9. CAI also notes that, since 2010, the changes to the Hospitality Award have, in the main, been reflected in identical or similar changes to the Clubs Award.
10. CAI is concerned over two possible consequences of maintaining higher penalty rates for employers in the club industry – the possibility that the higher costs could be ameliorated by using a more casual workforce or by contracting-out services to employers under awards with lower costs structures. CAI does not regard these possible consequences as positive developments. CAI regards the avoidance of these two possible consequences as strong factors in support of Option 1.

### **Clubs Australia (Industrial)**

2 May 2017