

**FAIR WORK COMMISSION**

**Matter No. AM2014/305**

**FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES**

**SUBMISSIONS OF UNITED VOICE IN REPLY TO THE SUBMISSIONS OF RESTAURANT AND CATERING INDUSTRIAL DATED 21 OCTOBER 2016**

1. On 28 September 2016, the Fair Work Commission released updated statistical reports prepared by the Workplace and Economic Research Section, Tribunal Services Branch of the Commission, titled, relevantly:
  - (a) Changing Work Patterns; and
  - (b) Industry Profile – Accommodation and Food Services.
2. United Voice referred to and relied on a previous version of the Industry Profile report in its final submissions dated 21 March 2016.<sup>1</sup>
3. These submissions are filed in accordance with the directions issued by the Fair Work Commission on 28 September 2016 and in response to the submissions of Restaurant and Catering Industrial dated 21 October 2016 (**RCI Submissions**).

**Changing Work Patterns**

4. At paragraph 3(a) of the RCI Submission, Restaurant and Catering Industrial refer to the words at page 25 of the Changing Work Patterns report that “*Employed persons in these industries [Retail Trade and Accommodation and Food Services] were more likely to prefer working more hours, taking into account how it would affect income*”. RCI then refer to paragraph 53(d) of its final submissions where it claimed that equalisation of weekend penalty rates would result in 60,000 more hours of work created on each Sunday.
5. Three points are made in reply.

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<sup>1</sup> See Part IV: Demographics, and in particular pp 27–38 of the submissions of United Voice dated 21 March 2016.

6. First, the reference in RCI's final submissions to '60,000' more hours of work on a single Sunday relies on the evidence of James Parker. Mr Parker gave evidence at the hearing in September 2015 and was cross-examined. As set out in the final submissions of United Voice dated 21 March 2016,<sup>2</sup> the Jetty Research survey designed and conducted by Mr Parker was deficient, and the results are so unreliable as to be misleading. In particular:
- (a) Survey participants were asked questions about "weekend penalty rates" without distinguishing or clarifying if those questions related to Saturday or Sunday penalty rates.<sup>3</sup> Mr Parker accepted that "*the answer will not tell you anything as between Saturday and Sunday*".<sup>4</sup>
  - (b) Where questions sought to elicit answers about the effect of a reduction in penalty rates they did not identify, in any way, the level of that reduction. Mr Parker was asked "*The recipient to this question will not understand what level of reduction is being described by the question will they?*" He answered "*no*".<sup>5</sup> He was asked "*And they won't know whether it might be 40 or 80 or 95 per cent [reduction].*" He again answered "*no*".<sup>6</sup>
7. Second, the extract quoted by RCI of the Changing Work Patterns conclusion states that employed persons in accommodation and food services are likely to prefer to work more hours, "*taking into account how it would affect income.*" The RCI submission ignores this part of the quotation. It is to be expected that persons employed in accommodation and food services would not prefer to work more hours in order to maintain their current income which would be the case in the event that weekend penalty rates were reduced.
8. Third, the extract quoted by RCI appears to be based on Table 3.22 in the Changing Work Patterns report. Table 3.22 sets out data from Waves 6 and 14 of the HILDA survey, conducted in 2006 and 2014, about the working hours preferences of employees who work weekdays, and those who usually work weekends. For each sub-group of employees, in both 2006 and 2014, the data clearly shows that about two thirds of employees wish to work about the same or fewer hours than they currently work, and only a little over one third wish to work more hours, taking into account the impact on income.

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<sup>2</sup> At [219]–[227] of the submissions.

<sup>3</sup> Transcript 14 September 2015, PN 4675.

<sup>4</sup> PN 4676.

<sup>5</sup> PN 4685.

<sup>6</sup> PN 4686.

9. At paragraph 3(b) of the RCI Submission, Restaurant and Catering Industrial assert that findings recorded in the Changing Work Patterns report about attendance at religious services support previously made statements by RCI that “*disruption to religious practice on Sunday no longer provides a distinction in terms of disability between working on a Sunday over Saturday*”.
10. The data concerning religious activity and religious practice reported in Part 4 of Changing Work Patterns is not sufficiently robust and for that reason, cannot be said to be in support of RCI’s contention about the disability of Saturday v Sunday work. This is for four reasons. First, the data in Table 4.2 – which relates to attendance at religious *services* – does not identify the whether attendance at such services is on a Saturday, a Sunday, or some other day. Second, the data in Table 4.1 – which relates to religious *activities* – shows an *increase* in time spent on religious activities by women, and no change for men, between 1997 and 2006. Third, the data sets in Tables 4.1 and 4.2 were taken over different albeit overlapping periods (1997 to 2006 in Table 4.1 and 2004 and 2014 in Table 4.2) and by different organisations, making it difficult to comfortably assume that the data read together provides an accurate portrait of the significance of religion to Australians over time. Finally, the distinction or overlap between the RCI’s choice of words of religious ‘*practice*’ and the terms used by the ABS (religious ‘*activities*’) and HILDA (attendance at religious ‘*services*’) is unclear and is apt to confuse rather than clarify the question.

### Industry Profile

11. At paragraphs 4–20 of the RCI Submissions, Restaurant and Catering Industrial submit that all ‘*aggregate data*’ used in the Industry Profile is at risk of being ‘*misleading*’ if taken to be representative of the industries covered by the Restaurant and Catering Association, which includes cafes and restaurants (ANZIC classification 4511, covered by Division H) and takeaway food services (ANZIC classification 4512, covered by Division H but within the Retail Group designated by the Fair Work Commission in the conduct of this modern awards review).
12. The RCI rely on a number of other data sources in support of its claims that the Industry Profile data is potentially ‘*misleading*’. These other data sources are:
  - (a) Department of Employment, *Industry Employment Projections – 2016 Report*, at paragraphs 6 and 8;
  - (b) Department of Employment, *Industry Outlook: Accommodation and Food Services*, December 2014, at paragraph 9;

- (c) Department of Employment, *2016 Employment Projections, Industry Projections to November 2020*, at paragraph 10 (which may or may not be the same as source as identified in sub-paragraph (a); different forms of citation have been used by the RCI);
  - (d) The draft report of the Productivity Commission titled *Workplace Relations Framework* and dated August 2015 at paragraphs 8 and 13;
  - (e) Australian Bureau of Statistics, *81650 Counts of Australian Businesses including Entries and Exits, June 2011–2015*, at paragraph 11;
  - (f) The *Dimmi Australian Dining Index 2013 and 2014* at paragraph 14; and
  - (g) Professor Peter Forsyth, *What is Happening to Tourism Industry Productivity?* (undated) at paragraph 19.
13. Aside from the ABS data identified at paragraph 12(e), none of the data sources referred to in the RCI Submissions are in evidence, and none have been tested by cross-examination. The RCI have not provided any of the data sources referred to in its submissions to United Voice or, to our knowledge, to the Commission.
14. Notwithstanding and in addition to that criticism, several of the data sources relied on by the RCI are *prima facie* unreliable:
- (h) The Restaurant and Catering Association 2016 *Industry Benchmarking Report* is presumably based on a survey that is similar in structure and form to the 2014 *Benchmarking Survey*, which was tendered before the Full Bench in September 2015.<sup>7</sup> The author of the survey, Carlita Warren, gave evidence and was cross-examined. United Voice addressed the substantial deficiencies in this survey in its final submissions dated 21 March 2016.<sup>8</sup>
  - (i) Prior to Ms Warren giving evidence about the 2014 *Benchmarking Survey*, in the 2013 and 2014 *Annual Wage Reviews*, the Full Bench of the Fair Work Commission was critical of ‘*Benchmarking Surveys*’ conducted by the Restaurant and Catering Association.<sup>9</sup>

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<sup>7</sup> Exhibit UV-8.

<sup>8</sup> See United Voice submissions dated 21 March 2016 at [228]–[237].

<sup>9</sup> Decisions cited and quoted at paragraphs [229]–[231] of the United Voice submissions dated 21 March 2016.

- (j) The *Dimmi Australian Dining Index 2013 and 2014* is an infographic (according to the link at footnote 17 of the RCI Submissions) that does not, contrary to the RCI Submissions at paragraph 14, contain any information about busy and quiet times for restaurant operators.
- (k) The data released by Professor Forsyth, according to the summary in the RCI Submissions at paragraph 19, relates to tourism productivity between 1997 and 2009. No publication details have been provided and it is not possible to identify the source of the data, or its reliability. The data apparently pre-dates the introduction of modern awards, raising questions as to its relevance to these proceedings. Further, the conclusion in the RCI Submissions that falling tourism productivity suggests an increase in productivity for the accommodation sector, but a decrease in productivity for 'food services', is not based on any articulated data or reasoning.
15. The RCI have not provided any explanation in support of their contention that the alternative data sources identified in their submissions should be preferred over the data reported in the Industry Profile. It is not sufficient to simply identify inconsistencies in the various data sources. The RCI have failed to explain why the Industry Profile data is inaccurate, and why the sources identified in their submissions are reliable and should be preferred.

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