

**From:** Stephen Bull [mailto:Stephen.Bull@unitedvoice.org.au]  
**Sent:** Monday, 10 October 2016 5:13 PM  
**To:** Chambers - Hatcher VP  
**Cc:** AMOD; Phillip Ryan; Marianne Wells; 'Helen Carayannis'; 'Richard Tait'; David McElrea; Michael Robson; Stefan Russell-Uren; Nikkita Venville  
**Subject:** Annualised salaries common issue AM2016/13

The Associate  
VP Hatcher

Dear Associate

Please find attached to this email:

- a submission;
- draft variations for the *Hospitality Industry (General) Award 2010*;
- draft variations for the *Registered and Licensed Clubs Award 2010*; and
- draft variations for the *Restaurants Industry Award 2010*.

We apologise about being unable to file our evidence in support of these variations now. The evidence is well advanced and seek an extension to **5pm, 17 October 2016**.

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## IN THE FAIR WORK COMMISSION

Matter No: AM2016/13

### Section 156 - Four Yearly Review of Modern Awards - Annualised Salaries

## SUBMISSION

### UNITED VOICE

#### I – INTRODUCTION AND BACKGROUND

1. United Voice intends to pursue variations to the annualised salary provisions in the *Hospitality Industry (General) Award 2010* ('the Hospitality Award'), *Registered and Licensed Clubs Award 2010* ('the Clubs Award') and *Restaurant Industry Award 2010* ('the Restaurants Award') (collectively: 'the Hospitality Awards').
2. This submission is made pursuant to the direction of Vice President Hatcher of 5 September 2016. Accompanying this submission are draft variations containing the changes that United Voice intends to pursue.
3. On 2 March 2015, United Voice indicated by correspondence to his Honour the President that United Voice intended to make a number of substantive claims in this 4 yearly review concerning the Hospitality Award's annualised salary provisions.
4. We indicated a claim for a 'better off over all' ('BOOT') type of provision as a criterion for annualised salaries. We do not intend to press this claim.
5. We indicated a claim concerning an express provision in the Hospitality Award concerning the right to refuse a direction to work additional hours if the direction could be considered unreasonable. We intend to pursue this claim and also intend to make similar claims for the Clubs Award and the Restaurants Award.
6. In this correspondence, United Voice made a claim for a right for employees on annualised salaries to have access and make copies of any daily records of their start and finish times held by the their employer. We intend to maintain this claim and make similar claims under the Clubs Award and Restaurants Award.
7. On 12 November 2015, United Voice made further substantive claims in relation to the Hospitality Awards concerning annualised salaries. This claim concerned having a reconciliation or review provision which applied when an annualised salary arrangement or employment is ended before a reconciliation has taken place. We intend to pursue this claim.
8. In addition to the substantive claims already foreshadowed, United Voice seeks the broad harmonisation of annualised salary arrangements in the Hospitality Awards.

9. The principal additional claim is that the period for reconciliations or review should be reduced from 12 months to 6 months.
10. This reduction in the period of review is an important mechanism to ensure compliance actually takes place. For an employer who is compliant with these provisions it should entail minimum additional regulatory burden.

## **II – ANNUALISED SALARY ARRANGEMENTS IN THE HOSPITALITY AWARDS.**

11. The compliance and reconciliation provisions in each of the Hospitality Awards for annualised salary arrangements vary significantly and some are incomplete and susceptible to abuse by employers.
12. Each of the Hospitality Awards include provisions that allows an employer and some types of employee to come to an agreement to be paid an annualised salary instead of the minimum wages required to be paid to the particular classification pertinent to the employee.
13. The relevant clauses are:
  - a. clause 27.1 of the *Hospitality Award*;
  - b. clause 17.3 of the *Clubs Award*; and
  - c. clause 28 of the *Restaurants Award*.
14. Described broadly, these provisions allow agreements to be made between a full time or part time employee and their employer whereby the employee is paid an annualised salary which is 20% to 50% above the weekly minimum base rate applying to the classification. The employer is relieved of the obligation to pay penalty rates, overtime and other loadings and allowances.

### ***Hospitality Award***

15. The *Hospitality Award* provides that an annualised salary arrangement must be sufficient to cover the monetary entitlements payable to the employee under the award, this is expressed in clause 27.1(b)(ii), which reads:

*(ii) unless the parties otherwise agree, relieve the employer of the requirements under clauses 32—Penalty rates and 33—Overtime (or other award clauses prescribing monetary entitlements, as specified in the agreement) to pay penalty rates and/or overtime (or other specified award-derived monetary entitlements) that the employer would otherwise be obliged to pay in addition to the weekly award wage for the work performed and the hours worked by the employee, provided that the salary paid over a year will be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate*

*payment obligations (and other monetary entitlements specified in the agreement) had been complied with.*

16. The *Hospitality Award* does not contain any provision that a reconciliation must take place between the remuneration paid to an employee on an annualised salary arrangement and what would have been earned had the general provisions of the award applied.
17. The *Hospitality Award* requires the daily records of the hours worked by an employee on an annualised salary arrangement to be maintained and the record must be countersigned by the employee (clause 27.1(e)).
18. There is no cap on the hours that can be worked per week under an annualised salary arrangement and the employee on an annualised salary does not have the benefit of an express term of the award concerning the right to refuse unreasonable requests to work additional hours (clause 33).

#### ***Clubs Award***

19. The *Clubs Award* annualised salary provisions concern managerial and horticultural and maintenance classifications.
20. For managerial employees, there are two categories of annualised salary arrangements. One where for a 20 per cent premium on the classifications weekly base rate of pay a limited number of loadings, penalties and allowances are excluded (cl 17.3 (a) (i)) and another where for payment of a premium of 50 per cent almost all additional payments beyond the base weekly rate is excluded (cl 17.4 (a) (ii)).
21. For horticultural and maintenance employees, cl 17.3 (b) permits an agreement between the employer and the employee for the payment of a salary not less than 33 per cent over the minimum weekly rate for a level 4 employee, which relieves the employer of paying certain allowances, loadings and penalties.
22. The *Clubs Award* contains no record keeping provisions and no express requirement for a reconciliation.

#### ***Restaurant Industry Award***

23. The Restaurant Award allows for annualised salary arrangements to be made on payments of 25% or more above the weekly rate' for all classifications under the Award. Clause 28.2 notes:

*28.2 The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. This is to enable the employer to carry out reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.*

### **III –THE DRAFT VARIATIONS**

#### ***The Draft Variations***

24. Each of the draft variations will ensure the following;
  - a. There is clear and comprehensive record keeping obligations in relation to employee's hours on annualised salary arrangements in each of the Hospitality Awards;
  - b. there is a clear obligation on the part of an employer to conduct a reconciliation or review of the hours worked and what the employee would have been paid under the award every 6 months and if there is a short fall pay the difference; and
  - c. a clear provision within the award that employees on annualised salaries have the right to refuse unreasonable directions to work additional hours and to inspect and copy their records.
25. Draft variations for the Hospitality Award, Clubs Award and Restaurants Award are filed with this submission.
26. Additionally, United Voice proposes to replace the word '*reconciliation*' with the word '*review*' as it has a clear meaning and conforms to the Commissions desire that modern awards are expressed in plain English.

#### ***Hospitality Industry (General) Award 2010***

27. Clause 27.1 of the Hospitality Award provides for annualised salary arrangements for employees other than those classified as managerial staff.
28. The proposed variation will delete the existing cl.27.1(c) and insert 4 new clauses that will provide for a 6 monthly review, reviews before 6 months when the arrangement or employment ends, a clear obligation to pay any short fall in remuneration and a right to refuse directions to work excessive additional hours. In addition, a new clause is sought providing employees on annualised salaries with the right to inspect and copy any records made.

29. Draft variations for managerial employees on annualised salary arrangements are included in similar terms.

#### ***Registered and Licensed Clubs Award 2010***

30. United Voices draft variations to the Clubs Award proposes a new clause 17.3(c) which intends to apply to all annualised salary arrangements permitted under this award.
31. The proposed new clause 17.3 will provide for a 6 monthly review, reviews before 6 months when the arrangement or employment ends, a clear obligation to pay any short fall in remuneration, a right to refuse directions to work excessive additional hours, clear record keeping obligations and a right for employees to inspect and copy any records made.
32. We have not included annualised salary provisions for all classifications within the Clubs. We note that the Commission in its general review function may contemplate a general annualised salary provision for all classifications in the Clubs Award.

#### ***Restaurant Industry Award 2010***

33. United Voices draft variations to the Restaurants Award proposes a new clause 28.2.
34. The proposed new clause 28.2 will provide for a 6 monthly review, reviews before 6 months when the arrangement or employment ends, a clear obligation to pay any short fall in remuneration, a right to refuse directions to work excessive additional hours, clear record keeping obligations and a right for employees to inspect and copy any records made.

### **IV –WHY THE DRAFT VARIATIONS SHOULD BE MADE**

#### ***The Annualised Salary Provisions in the Hospitality Awards do not provide a fair and relevant safety net***

35. The annualised salary provisions of the Awards do not provide a fair and relevant safety net because they allow an employer to circumvent the ordinary hours, overtime and penalty rate provisions of each of the Awards.
36. First, there are no clear procedures for review and reconciliation of annualised salary arrangements in the *Hospitality Award* and the *Clubs Award*. Only the *Restaurants Award* mandates a yearly review and reconciliation of an employee's annualised salary arrangement. Further the *Hospitality* and *Clubs Award* do not oblige an employer to pay the difference between the annualised salary paid and what the employee would have earned in wages if the general provisions of the award had applied.
37. Second, none of the *Hospitality Awards* provide for a reconciliation to take place in a

situation where an employee's annualised salary arrangement or employment is terminated before the completion of a review period. This offers an incentive to shuffle an employee between salary and award wages over the course of a year. This would permit a worker to be paid wages in slow periods and a salary in busier periods to the employer's advantage and benefit.

38. Without a clear provision for review and reconciliation of an annualised salary, there is no guarantee that that salary will be appropriate for the employee's real pattern of work. This flaw is particularly problematic in an award-dependent, low-paid industry characterised by working weekends, nights and public holidays. These problems are compounded by the rapid growth of employment in the hospitality industry.
39. The proposed variations are limited in scope and will not affect the flexibility of full-time employment or increase the regulatory burden on employers.

***Workers in the Hospitality Award industries are low paid and depend on penalties and overtime to maintain their living standards***

40. Hospitality Award workers are low paid and dependent on penalty rates and overtime to maintain their living standards. This has been demonstrated by the expert report of Dr Damian Oliver filed in Commission's Penalty Rates Review (AM2014/305).<sup>1</sup>
41. Most employees engaged on annualised salary arrangements are full-time employees in higher classifications, such as chefs and managers. Even so, these employees can in some sense be classified as low-paid or not adequately remunerated if they are not paid the penalty rates, overtime and allowances that would normally attach to their pattern of work.
42. The Commission has accepted that award reliant employees who receive a rate of pay that (as a full-time equivalent) would place them below the two-thirds of median adult ordinary time earnings are a suitable bench-mark for low paid status.<sup>2</sup> The Expert Panel in the 2015 -2016 Annual Minimum Wage Review used two ABS datasets to estimate the threshold for low paid status: \$880 working from the ABS Employee Earnings and Hours survey ('EEH'),<sup>3</sup> a figure of \$800 based on data from the 2014 ABS Characteristics of Employment survey ('COE'). The 2014 EEH-based estimate remains greater than all current minimum wages in the

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<sup>1</sup> Report of Dr Damian Oliver, dated 3 September 2015, tendered as Exhibit UV-28 in AM2014/305 *Penalty Rates Case* on 4 November 2015 (**Oliver Report I**), [21]-[23].

<sup>2</sup> *Annual Wage Review* [2015] FWCFB 3500, [315]-[316]. See Table 5.1.

<sup>3</sup> ABS, Employee Earnings and Hours, Australia, various, Catalogue No. 6306.0.

Awards, except for those employees at Level 7 of the Clubs Award or above and gaming employees at Level 6 of the Hospitality Award.<sup>4</sup>

43. A significant number of workers in this industry are paid award rates. Award reliance in the Accommodation and Food Services ('AFS')<sup>5</sup> sector is high: up to 42.18 per cent of workers in the accommodation and food services industry were award-reliant in 2014.<sup>6</sup> The level of award coverage for AFS employees could be even higher than 42.18 per cent, because the ABS definition of 'award only' employees, from which this statistic is derived, is limited to those employees whose rate of pay is that specified by the Award and no more. Employees who are paid above the award, even if only marginally, are categorised as under an 'individual arrangement' by the ABS. The individual arrangement category will include many employees who are paid above the Award minimum rate but whose conditions of employment are predominantly provided by the Award, such as a salaried chef or manager. Data from the 2013 wave of the HILDA survey shows that only 25 per cent of full-time employees had their pay set at exactly the award rate.<sup>7</sup>
44. This hides the true extent of practical award dependence because low paid workers (including salaried workers) dependent on the Award are grouped with higher paid employees on genuinely individualised arrangements.
45. Further, Dr Oliver reports that the median earnings for hospitality employees in the Australian Workplace Relations Survey ('AWRS') sample is \$820 a week.<sup>8</sup> Note that this falls between the EEH- and COE-based estimates of low paid status. Full-time and older employees are overrepresented in the AWRS sample,<sup>9</sup> which suggests that low-paid status is unlikely to vary with age or employment status in these industries.
46. These facts suggest that overtime and penalty rates are vital to the living standards of workers covered by the Hospitality Awards. Award provisions that allow employers to avoid the payment of the full value of the hours worked at penalty or overtime rates, such as the Hospitality Awards' annualised salary provisions, diminish the incomes of these employees, and therefore do not provide a fair and relevant safety net.

### **The hospitality industries are characterised by employees working unsocial hours, weekends,**

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<sup>4</sup> The 2013-2014 C5 rate is still greater than the current (2014-2015) minimum wage for all employees covered by the *Hospitality Awards* except *Clubs Award* employees at Level 8 and above.

<sup>5</sup> AFS refers to data from the Accommodation and Food Services ANZSIC category.

<sup>6</sup> See also the ABS *Survey of Employee Earnings and Hours*, various, Catalogue No. 6306.0.cited in *Annual Wage Review* [2016] FWCFB 3500, [240] (Table 4.8).

<sup>7</sup> ABS, *Employee Earnings and Hours, Australia, May 2014*, Catalogue No. 6306.0. cited in cited in Fair Work Commission, *Industry Profile – Accommodation and Food Services Fair Work – data as at September 2016*;

<sup>8</sup> Oliver Report I, [18]. Note that Dr Oliver constructed a special 'Hospitality' sector distinct from the AFS sector, which excluded fast food and take away employees and included casino employees.

<sup>9</sup> Oliver Report I, [18] and [68].

**public holidays and overtime which needs to be compensated**

47. Work in industries covered by the Hospitality Awards is characterised by working unsociable hours, weekends and public holidays. This is demonstrated by the expert report of Dr Damian Oliver filed in the Part-time employment and Casual employment common issue proceedings (AM2014/196 and 197).<sup>10</sup>
48. According to the HILDA survey, a minority of employees (43.1 per cent) in the industry worked a regular day time schedule in 2014.<sup>11</sup> Most full-time employees (61 per cent) usually work weekends.<sup>12</sup> This has been demonstrated by the expert reports of Dr Damian Oliver filed in *Part-time employment* and *Casual employment* common issues.
49. There are also a significant number of employees who work long hours in the hospitality industry. The dangerous physical and psychological impacts of long hours were discussed by Dr Olav Muurlink in his reports filed in the Penalty Rates Case and the Part-time and Casual employment Common Issues.<sup>13</sup>
50. HILDA data from the 2013 wave shows that the median weekly hours for employees working full-time hours in the hospitality industry was 41.<sup>14</sup> More recent data shows that the average working hours of full-time hospitality industry employees are higher than the all industries average. The table below describes the average hours for full time employees in each industry group of the AFS sector.<sup>15</sup>

Industry Group	Average hours actually worked by full-time employees
Accommodation	46.0
Cafes, restaurants and takeaway food services	44.1
Pubs, taverns and bars	44.2

<sup>10</sup> Report of Dr Damian Oliver, dated 22 February 2016, tendered as Exhibit UV-28 in tendered as Exhibit #289 in AM2014/196 *Part-time employment* and AM2014/197 *Casual employment* on 16 August 2016 (**Oliver Report II**).

<sup>11</sup> Oliver Report II, 39, see table 5.

<sup>12</sup> ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2016*, Catalogue No. 6291.0.55.003, cited in Fair Work Commission, *Industry Profile – Accommodation and Food Services Fair Work – data as at September 2016*; see also Oliver Report II, [49], table 8.

<sup>13</sup> Report of Dr Muurlink (**Muurlink Penalty Rates Report I**), tendered as Exhibit UV-26 in AM2014/305 *Penalty Rates Case* on 4 November 2015; Report of Dr Muurlink (**Muurlink Report II**), tendered as Exhibit #290 in AM2014/196 *Part-time employment* and AM2014/197 *Casual employment* on 16 August 2016;

<sup>14</sup> Oliver Report from *Casual Employment*. P 16.

<sup>15</sup> Fair Work Commission, *Industry Profile*, p 28, table 5.3

Clubs (Hospitality)	40.7
<b>Total accommodation and food services</b>	<b>44.2</b>
<b>All industries</b>	<b>40.6</b>

51. The clubs industry (to which the *Clubs Award* applies) has lower average weekly working hours than any other AFS sector industry group. It should be noted that that annualised salary arrangements in the *Clubs Award* do not apply to anyone other than managers and horticultural and maintenance staff.
52. There is a significant incidence of employees working unsocial hours, weekends, public holidays and overtime in the hospitality industry. Conditions of employment must account for these working patterns in order to be fair and relevant.

### The Modern Awards Objective

#### Paragraph 134(1) (da)

53. Section 134 (1) (da) was inserted by the *Fair Work Amendment Act 2013*(Cth) with effect from 1 January 2014.
54. Section 134 (1) (da) provides that the Commission is to take account of:
- (da) the need to provide additional remuneration for:*
- (i) *employees working overtime; or*
- (ii) *employees working unsocial, irregular or unpredictable hours; or*
- (iii) *employees working on weekends or public holidays; or*
- (iv) *employees working shifts...*
55. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* stated, in respect of the addition of s134 (1) (da):
- This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.*
56. Subsection 134 (1) was not in force when the Hospitality Awards were made or when they were reviewed in the Transitional Review in 2012. This new component of the modern

awards objective provides an additional necessity for the variations proposed by United Voice.

**There is evidence that poor employment conditions in the industry could cause issues for its productivity, sustainability and growth**

57. The poor conditions associated with working in this industry may harm its productivity, sustainability and competitiveness. This consideration concerns 134(1) (c), (f) and (h) of the modern awards objective. Proper pay will assist in the maintenance of skills and provides incentives for skilled employees to remain in the sector
58. The AFS is one of the largest employers in Australia, accounting for 6.9 per cent of all employment. The sector has demonstrated significant growth since 2009, the year before the modern award system commenced. Using a survey of private dwellings, the ABS Labour Force Survey estimated that approximately 829,100 people were working in the AFS sector in November 2015, compared to 736,000 in November 2009. ABS surveys of industry reported a similar increase over the period: at the end of June 2014, employment in AFS was 915,000, compared to 811,000 at the end of June 2009. In both surveys, which use different definitions of ‘employment’, the sector displayed employment growth of between 12.82 per cent and 12.64 per cent over five years. By contrast, employment in the Australian economy grew at a rate of 11.63 per cent or 8.82 per cent over five years.
59. Australian Government figures suggest that demand for employees in higher-skilled occupations is projected to grow faster than demand for employees in lower-skilled occupations (which are still growing fast). For instance, the demand for chefs is expected by 22.6% over the next 5 years.<sup>16</sup> Café and Restaurant managers are expected to grow by 21.4% over the next 5 years.<sup>17</sup> These occupations are, unlike most other occupations in the industry, characterised by working full time hours.<sup>18</sup>
60. Industry groups have voiced concerns about employers finding enough skilled workers to meet the demand in the industry.<sup>19</sup> Labour shortages may create an incentive to abuse the annualised salary provisions to fill the shortfall in labour by making existing employees work longer hours. Recent research suggests that the skilled workers such as chefs and managers leave the industry because of poor job quality due to long hours and poor remuneration.<sup>20</sup>

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<sup>16</sup> Department of Employment, *Australian Jobs 2015*, 2015, pp 35 and 44.

<sup>17</sup> *Ibid*, 44.

<sup>18</sup> *Ibid*.

<sup>19</sup>

<sup>20</sup> Belardi S, Knox A and Wright CF 2016 'The role of job quality in recruitment and retention challenges in the Australian restaurant industry', *30th Association of Industrial Relations Academics of Australia*

61. Some of the reasons that senior and skilled employees leave the hospitality industry are the long hours and poor remuneration associated with annual salaries. Unless annualised salary arrangements have effective provisions to avoid abuse, the hospitality industry is likely to experience increased problems attracting and retaining skilled employees.

### *The National Employment Standards*

62. The current annualised salary arrangement of the Hospitality Awards are inconsistent to varying degrees with Division 3 of Part 2-2 of the Act which deals with the National Employment Standards ('NES') entitlements regarding weekly working hours.
63. Section 62 of the Act provides that an employer must not request or require a full-time employee to work more than 38 hours per week unless the additional hours are reasonable. Subsection 62(2) of the Act provides a right for employees to refuse additional work beyond 38 hours a week if it is unreasonable.
64. Section 63 of the Act provides that modern awards may provide for the averaging of hours of work and, at s 63(2), may also provide for average weekly hours that exceed 38 hours per week *'if the excess hours are reasonable for the purposes of subsection 62(1)'*.
65. Section 62(3) lists the criteria to judge the reasonableness of a request or direction to work additional hours for the purposes of s 62(1). These criteria are:
- (a) *any risk to employee health and safety from working the additional hours;*
  - (b) *the employee's personal circumstances, including family responsibilities;*
  - (c) *the needs of the workplace or enterprise in which the employee is employed;*
  - (d) *whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;*
  - (e) *any notice given by the employer of any request or requirement to work the additional hours;*
  - (f) *any notice given by the employee of his or her intention to refuse to work the additional hours;*
  - (g) *the usual patterns of work in the industry, or the part of an industry, in which the employee works;*
  - (h) *the nature of the employee's role, and the employee's level of responsibility;*
  - (i) *whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;*
  - (j) *any other relevant matter.*
66. Currently, there is no clear statement within each of the Hospitality Awards that an employee

on an annualised salary arrangement has the right to refuse unreasonable directions to work additional overtime.

67. Additionally, subsection 62 (3) (f) provides that the averaging term included under s 63 must be taken into account when considering whether additional hours are reasonable or unreasonable.
68. The annualised salary arrangement provisions in the Hospitality Awards are terms providing for the averaging of hours. Each of the Hospitality Awards appears to envisage that the average hours will, from time to time, exceed 38 hours per week. They do not provide for any clear statement that the maximum weekly hours of a full time employee should be generally 38 hours a week.
69. An assessment of reasonableness of these additional hours must require a clear understanding of the level of remuneration (whether in the form of overtime or some other means) that an employee will receive for working those additional hours. Since the salary arrangements average remuneration over the length of a year, the arrangements will only be reasonable if the level of remuneration for the year (or a shorter period if the salary arrangement ends before a year) reflect the actual hours the employee works.
70. Unless the employee's remuneration is compared with the actual hours worked it will be impossible to properly assess the reasonableness of any additional hours worked by the employee.

## V – CONCLUSION

71. The proper approach to the review has been dealt with by United Voice elsewhere in the four yearly review of modern awards.<sup>21</sup>
72. For the reasons outlined above, the current annualised salary clauses in the Hospitality Awards do not provide a '*fair and relevant minimum safety net of terms and conditions*'.
73. The annualised salary provisions of the Hospitality Awards were not contested at either Award Modernisation or in the Transitional Review in 2012. The Commission should not proceed on the basis that the modern awards objective was met when the decision was made to include these provisions in their respective Awards. Their defects are an anomaly of the modernisation process that should be corrected in this four yearly review.
74. Even if the annualised salary provisions did meet the modern awards objective at the time they were made, the amendment of the Act to include subsection 134(da) invites fresh consideration. It should be noted that the Hospitality Awards are unusual among modern awards for the absence of span of hour and shift work provisions. These matters reinforce the

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<sup>21</sup> United Voice submission dated 21 March 2016, [17]-[53]; United Voice submission dated 22 February 2016, [12]-[16]

significance of the penalty rates and overtime in ensuring compliance with the Act's modern award objectives and should be recognised in annualised salary provisions of these awards.

75. In their current form the annualised salary provisions in the Hospitality Awards do not make apparent the NES right to refuse additional hours if the request is unreasonable. The variations sought by United Voice would ensure that the annualised salary arrangements are compliant with s 136 of the Act.

United Voice

**10 October 2016**

## DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 – 4 yearly reviews of modern awards

### **Four yearly review of modern awards - annualised salaries**

(AM2016/13)

### **Hospitality Industry (General) Award 2010**

(MA000009)

[FULL BENCH]

SYDNEY, XX YYY 2016

*4 yearly review of modern awards – Annualised salaries*

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Hospitality Industry (General) Award 2010* be varied as follows.

[1]. Delete existing clauses 27.1 (c) and insert new clause 27.1 (c) and (g) as follows”

- “(c) *Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 20 of this award and also paid all appropriate penalties, loadings and allowances (“Award Payments”), with the actual payments made under the annualised salary arrangement.*
- (d) *The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.*
- (e) *Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.*
- (f) *An employee on an annualised salary arrangement has the right to refuse unreasonable requests to work additional hours in accordance with the NES and clause 33.1(b) of this award.”*

[2] Renumber existing clauses 27.1 (d) and (e), clauses 27.1 (g) and (h).

[3] After new clause 27.1(h) add:

- “(h) *An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to clause 27.1(h). If the employer possesses copying*

*facilities, the employee should be able to use these facilities free of charge.”*

[4] Add new clause 27.2 (e) as follows:

- “(f) Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 20 of this award and also paid all appropriate penalties, loadings and allowances (“Award Payments”), with the actual payments made under the annualised salary arrangement.*
- “(g) The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.*
- “(h) Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.*
- “(i) An employee on an annualised salary arrangement has the right to refuse unreasonable requests to work additional hours in accordance with the NES and clause 33.1(b) of this award.*
- “(j) An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to clause 27.1(h). If the employer possesses copying facilities, the employee should be able to use these facilities free of charge.”*

B. The determination comes into operation from XX Month 2016. In accordance with s.165 (3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX Month 2016.

VICE PRESIDENT

## DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 – 4 yearly reviews of modern awards

### **Four yearly review of modern awards - annualised salaries**

(AM2016/13)

### **Registered and Licensed Clubs Award 2010**

(MA000058)

[FULL BENCH]

SYDNEY, XX MONTH 2016

*4 yearly review of modern awards – annualised salaries*

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2) (b) (i) of the *Fair Work Act 2009*, that the *Registered and Licensed Clubs Award 2010* be varied as follows.

1. Insert a new subclause 17.3 (c) as follows:

- “(i) Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 17 of this award and also paid all appropriate penalties, loadings and allowances (“Award Payments”), with the actual payments made under the annualised salary arrangement.*
- (ii) The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.*
- (iii) Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.*
- (iv) An employee on an annualised salary arrangement has the right to refuse unreasonable requests to work additional hours in accordance with the NES and clause 28 of this award.*
- (v) The employer must keep a daily record of the hours worked by an employee which will show the date and start and finish times of the employee for the day. The employer must ensure that the record is countersigned weekly by the employee and must be kept at the place of employment for a period of at least six years.*

(vi) *An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to this clause. If the employer possesses copying facilities, the employee should be able to use these facilities free of charge.”*

B. The determination comes into operation from XX Month 2016. In accordance with s.165 (3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX Month 2016.

VICE PRESIDENT

## DRAFT DETERMINATION

*Fair Work Act 2009*

s.156 – 4 yearly reviews of modern awards

### **Four yearly review of modern awards - annualised salaries** (AM2016/13)

### **Restaurant Industry Award 2010** (MA0000119)

[FULL BENCH]

SYDNEY, XX YYY 2016

*4 yearly review of modern awards – annualised salaries*

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Restaurant Industry Award 2010* be varied as follows.

[1] Delete clause 28.2 and insert new clause 28.2 as follows:

***“ 28.2 Review, record keeping and other matters***

- (i) *Where an employee is paid under an annualised salary arrangement made under this clause, the employer will carry out a review in consultation with the employee after every six months of employment comparing what the employee would have earned had he or she been paid for all the hours worked under clause 20 of this award and also paid all appropriate penalties, loadings and allowances (“Award Payments”), with the actual payments made under the annualised salary arrangement.*
- (ii) *The employer must also carry out a review in consultation with the employee where the employment is terminated or the annualised salary ends prior to the completion of the 6 months of employment or if for some reason a review has not taken place.*
- (iii) *Where a review reveals a shortfall between the salary paid and the Award Payments, then the employer must pay the shortfall within 14 days.*
- (iv) *An employee on an annualised salary arrangement has the right to refuse unreasonable requests to work additional hours in accordance with the NES and clause 28 of this award.*
- (v) *The employer must keep a daily record of the hours worked by an employee which will show the date and start and finish times of the employee for the day. The records must be countersigned weekly by the employee and must be kept at the place of employment for a period of at least six years.*

(vi) *An employee on an annualised salary arrangement has the right to inspect and make copies of any record made and maintained by his or her employer pursuant to clause. If the employer possesses copying facilities, the employee should be able to use these facilities free of charge.”*

B. The determination comes into operation from XX Month 2016. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX Month 2016.

VICE PRESIDENT