FAIR WORK COMMISSION

AM 39 of 2017

FOUR YEARLY REVIEW OF MODERN AWARD
CLUBS AWARD ISSUE

OUTLINE OF SUBMISSIONS OF CLUBS AUSTRALIA (INDUSTRIAL) ON AMENDED PROPOSED MERGED AWARD

1. By an amended proposed merged award filed 13 July 2018, Clubs Australia (Industrial) ("**CAI**") sought that the Commission vary the *Hospitality Industry (General) Award 2010* (MA00009) (the "**Hospitality Award**") so that it reflected the terms of the amended proposed merged award and thereby contained the minimum terms and conditions for employees in the club industry.

2. By the amended proposed merged award, CAI intended that each clause operate indefinitely.

3. By a covering email sent 13 July 2018, CAI sought (as an alternative case) that specified clauses in the amended proposed merged award cease effect on 1 January 2020.

4. By this outline, CAI summarises the nature of the changes between the proposed merged award filed 15 June 2018 and the amended proposed merged award.

5. By this outline, CAI summarises (as an alternative case) the rationale for specified clauses ceasing effect on 1 January 2020.

6. Additionally, by this outline, CAI responds to the Statement of the Commission issued on 11 July 2018 (see [2018] FWCFB 4116).

Nature of Changes

7. The amended proposed merged award removed some phrases or some clauses that were contained in the (earlier) proposed merged award filed 15 June 2018:

   (a) the phrases in green in clause 11 of the proposed merged award;
   (b) clause 12.5(b) of the proposed merged award;
   (c) clause 13.3 of the proposed merged award;
   (d) the phrase "(other than in clubs)" in the heading to clause 21.2(a) and the phrase "other than in a club" in clause 21.2(a) of the proposed merged award;
   (e) the provision under the heading "Broken periods of work (clubs)" in clause 21.3 of the proposed merged award;
   (f) the phrase "other than in clubs" in clause 25.1 of the proposed merged award;
   (g) the phrase "other than club employers" in clause 28.2(b) of the proposed merged award;

(h) the provisions in green in in clause 29.1(d) of the proposed merged award;
(i) the phrase "(or 12 hours for club employees)" in clause 29.2(a) of the proposed merged award; and
(j) the phrase "Other than clubs" and the provision under the heading "Clubs" in clause 29.4 of the proposed merged award.

8. CAI provides an explanation for the removal of each phrase or clause from the proposed merged award.

Phrases in Clause 11 of the Proposed Merged Award

9. Clause 11 of the proposed merged award (headed "Full-time employment") provided:

> "*A full time employee is an employee who is engaged as such and employed in a classification in Schedule D – Classification Definitions and engaged to work 38 ordinary hours per week, or, where the employee is employed on a roster, an average of 38 hours per week over the roster cycle."*

(The underlining represents the phrases in green in the proposed merged award.)

10. Clause 11 of the amended proposed merged award provides:

> "*A full time employee is an employee who is engaged to work an average of 38 hours per week."*

11. Clause 11 of the amended proposed merged award is identical to clause 11 of the Hospitality Award.

12. By the amended proposed merged award, CAI removes the references in clause 11 to the classifications and removes the references in clause 11 to averaging of hours over a roster cycle.

13. CAI submits that a reference in clause 11 to the classifications is unnecessary, given that the amended proposed merged award only operates in respect of employees in the classifications (see clause 4.1 of the amended proposed merged award).

14. CAI also submits that a reference in clause 11 to the averaging of hours over a roster cycle is identical in substance to references in clause 11 to averaging of 38 hours per week.

15. CAI submits that no employee in the clubs industry is disadvantaged by the removal of the references to classifications or the removal of the averaging of hours over a roster cycle.

16. (CAI is aware that the Commission issued a revised Hospitality Plain Language Exposure Draft (the "**Hospitality PLED**") on 8 August 2018 (see also *Plain Language Re-drafting – Hospitality Award* [2018] FWCFB 4468 at [77]) and that clause 11 of the Hospitality Award appears as clause 9 of the Hospitality PLED. CAI submits that clause 11 of the Hospitality Award is of the same effect as clause 9 of the Hospitality PLED.)

Clause 12.5(b) of the Proposed Merged Award

17. Clause 12.5(b) of the proposed merged award (dealing with part-time employment) provided:

> "*a club employee must not be rostered to work in excess of 12 hours or less than 3 hours in a day"*

18. The amended proposed merged award removes the clause and re-numbers the subsequent subclauses in clause 12.

19. CAI thus removes an express clause specifying the minimum daily hours (3 hours) and maximum daily hours (12 hours) for a part-time employee in the club industry.

20. CAI notes that clause 29.2(a) of the amended proposed merged award specifies the minimum daily hours (3 hours) and the maximum daily hours (11.5 hours) for part-time employees in both the clubs and hospitality industries.

21. CAI submits that the removal of clause 12.5(b) of the proposed merged award, and the specification of minimum and maximum daily hours in clause 29.2(a) of the amended proposed merged award for employees in both industries, benefits employees in the club industry by reducing the maximum daily hours (from 12 hours to 11.5 hours).

22. CAI submits that no employee in the clubs industry is disadvantaged by the removal of clause 12.5(b).

23. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 29.2(a) of the Hospitality Award appears as clauses 15.2(a) and 15.2(b) of the Hospitality PLED. CAI submits that clause 29.2(a) of the Hospitality Award is of the same effect as clauses 15.2(a) and 15.2(b) of the Hospitality PLED.)

Clause 13.3 of the Proposed Merged Award

24. Clause 13.3 of the proposed merged award (dealing with overtime rates for casual employees) provided:

> "*A casual employee shall be paid at the overtime rates specified in clause 33.3 for any work in excess of:*
>
> *(a) 12 hours per day or per shift;*
> *(b) In excess of 38 hours per week or, where the employee works in accordance with a roster, an average of 38 hours per week over the roster cycle (which may not exceed 4 weeks).*"

25. The amended proposed merged award removes the clause and re-numbers the subsequent subclauses in clause 13.

26. CAI notes that clause 13.2 of the amended proposed merged award is of the same effect as the removed clause.

27. CAI submits that, whilst the removal of clause 13.3 of the proposed merged award has changed the source of the entitlements of a casual employee in the club industry, the amended proposed merged award maintains the overall entitlement and does not disadvantage a casual employee in the club industry.

28. CAI submits that no employee in the clubs industry is disadvantaged by the removal of clause 13.3.

29. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 13.2 of the Hospitality Award appears as clauses 11.3 and 11.5 of the Hospitality PLED. CAI submits that clause 13.2 of the Hospitality Award is of the same effect as clauses 11.3 and 11.5 of the Hospitality PLED.)

Clause 21.2(a) of the Proposed Merged Award

30. Clause 21.2(a) of the proposed merged award (dealing with forklift driver allowances) distinguished between the entitlements of employees in the clubs industry and employees in the hospitality industry (with forklift drivers in the latter group, and not the former group, being entitled (at least in clause 21.2(a)) to an allowance for all purposes). The distinction occurred by means of the inclusion of the phrase "*other than in a club*" in clause 21.2(a) of the proposed merged award.

31. The amended proposed merged award removes the phrase "*other than in a club*" from clause 21.2(a).

32. CAI notes that clause 20.1 of the amended proposed merged award (dealing with minimum wage rates) includes (where applicable) the forklift driver allowance as a component of the ordinary hours of pay (and so it is clear that employees in the club industry and employees in the hospitality industry with the relevant qualification are entitled (under the amended proposed merged award) to the allowance for all purposes).

33. CAI submits that the removal of the phrase from clause 21.2(a) omits the apparent distinction between employees in the two industries in the clause and confers a benefit on employees in the club industry who are forklift drivers by including the allowance in the calculation of award remuneration for all purposes.

34. CAI submits that no employee in the clubs industry is disadvantaged by the removal of the phrase from clause 21.2(a).

35. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 20.1 of the Hospitality Award appears as clause 26.3 of the Hospitality PLED. CAI submits that clause 20.1 of the Hospitality Award is of the same effect as clauses 15.2(a) and 26.3 of the Hospitality PLED.)

Clause 21.3 of the Proposed Merged Award

36. A portion of clause 21.3(a) of the proposed merged award (dealing with broken periods of work in clubs) provided:

> "*An employee (other than casual) who is required to work any of their ordinary hours on any day in more than one period of employment, other than for meal breaks as prescribed in accordance with the provisions of clause 24 – Meal breaks, will be paid an allowance of 0.4% of the standard weekly rate per day for such broken work period worked.*"

37. The amended proposed merged award removes the portion of the clause.

38. CAI notes that the remaining portion of clause 21.3(a) of the amended proposed merged award provides:

> "*Employees other than casuals who have a broken work day must receive an additional allowance as follows:*
>
> - *Where the time between periods of work is two hours and up to three hours – an allowance per day equal to 0.33% of the standard weekly rate; or*
> - *Where the time between periods of work is more than three hours – an allowance per day equal to 0.5% of the standard weekly rate.*"

39. CAI submits that the effect of the removal of the clubs portion of clause 21.3(a) and the application of the remaining position of clause 21.3(a) is that:

    (a) an employee in the clubs industry whose broken shifts is between two hours and up to three hours will be paid 0.33 per cent of the standard weekly rate (currently $837.40) per shift (that is, $2.76 per shift) rather than 0.4 per cent of the standard weekly rate ($3.35 per shift); and

    (b) an employee in the clubs industry whose broken shifts is more than three hours will be paid 0.5 per cent of the standard weekly rate per shift (that is, $4.18 per shift) rather than 0.4 per cent of the standard weekly rate ($3.35 per shift).

40. CAI submits that the removal of the clubs portion of clause 21.3(a) and the application of the remaining portion of clause 21.3(a) provides:

    (a) on balance a neutral outcome (in that some employees in the club industry (those having a broken shift of more than three hours) will be better off ($4.18 per shift rather than $3.35 per shift) whilst other employees in the club industry (those having a broken shift of between two and three hours) will be worse off ($2.76 per shift rather than $3.35 per shift)); and

    (b) in any event a minimal actual disadvantage (59 cents per shift) for the other employees in the club industry (those having a broken shift of between two and

three hours) in that the reduction is from 0.4 per cent to 0.33 per cent of the standard weekly rate (or $2.76 per shift from $3.35 per shift).

41. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 21.3(a) of the Hospitality Award appears as clause 26.14 of the Hospitality PLED. CAI submits that clause 21.3(a) of the Hospitality Award is of the same effect as clause 26.14 of the Hospitality PLED.)

Clause 25.1 of the Proposed Merged Award

42. Clause 25.1 of the proposed merged award (dealing with higher duties) provided:

> "*Except for Food and beverage attendants grade 2 and grade 3 as defined in Schedule D – Classification definitions, <u>other than in clubs,</u> an employee engaged for two or more hours of one day on duties carrying a higher rate than their ordinary classification must be paid the higher rate for such day. If for less than two hours the employee must be paid the higher rate for the time worked.*"

43. The amended proposed merged award removes the underlined phrase.

44. CAI notes that clause 18.1(h) of the Clubs Award provided:

> "*(i) Any employee employed for two or more hours of one day on duties carrying a higher rate than the employee's ordinary classification will be paid the higher rate for each day. If the employee is employed for less than two hours on such duties, the employee is entitled to be paid the higher rate for the time so worked.*
>
> *(ii) A higher paid employee will, when necessary, temporarily relieve a lower paid employee without loss of pay."*

45. CAI submits that the only change from the removal of the underlined phrase, and the application of the exception at the start of clause 25.1, is that food and beverage attendants grade 2 and 3 in the club industry are no longer entitled to the higher duties rate of pay, due to the exception set out in the first eighteen words of clause 25.1 of the amended proposed merged award.

46. CAI notes that the current hourly rates for food and beverage attendants in the club industry for grade 2 are $20.22, for grade 3 are $20.91 and for grade 4 are $22.04 (see clause 17.2 of the Clubs Award).

47. CAI submits the removal of the underlined phrase, and the application of the exception at the start of clause 25.1, is of limited effect:

(a) the disadvantage to the food and beverage attendants grade 2 performing the duties of a food and beverage attendant grade 3 for less than two hours is that, instead of being paid the higher grade 3 rate ($20.91) for a maximum of two hours, they are paid the lower rate ($20.22) for the maximum two hours, thereby producing a maximum reduction of $1.38 (69 cents for 2 hours);

(b) the disadvantage to the food and beverage attendants grade 2 performing the duties of a food and beverage attendant grade 3 for eight hours is that, instead of being paid the higher grade 3 rate ($20.91) for the eight hours, they are paid the lower rate ($20.22) for the eight hours, thereby producing a reduction of $5.52 (69 cents for 8 hours);

(c) the disadvantage to the food and beverage attendants grade 3 performing the duties of a food and beverage attendant grade 4 for less than two hours is that, instead of being paid the higher grade 3 rate ($22.04) for a maximum of two hours, they are paid the lower rate ($20.91) for the maximum two hours, thereby producing a maximum reduction of $2.26 ($1.13 for 2 hours); and

(d) the disadvantage to the food and beverage attendants grade 2 performing the duties of a food and beverage attendant grade 3 for eight hours is that, instead of being paid the higher grade 3 rate ($22.04) for the eight hours, they are paid the lower rate ($20.91) for the eight hours, thereby producing a reduction of $9.04 ($1.13 cents for 8 hours).

48. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 25.1 of the Hospitality Award appears as clauses 22.1 and 22.2 of the Hospitality PLED. CAI submits that clause 25.1 of the Hospitality Award is of the same effect as clauses 22.1 and 22.2 of the Hospitality PLED.)

Clause 28.2(b) of the Proposed Merged Award

49. Clause 28.2(b) of the proposed merged award (dealing with superannuation) provided:

> "*The employer, <u>other than club employers,</u> must make contributions for each employee for such month where the employee earns $350.00 or more in a calendar month.*"

50. The amended proposed merged award removes the underlined phrase.

51. CAI notes that clause 23.3 of the Clubs Award requires an employer to "*make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee*".

52. CAI notes that section 27 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) provides that an employer is not required to take into account payments to an employee less than $450 by way of salary and wages in a calendar month when calculating a superannuation guarantee shortfall (with the superannuation guarantee shortfall being the basis for the imposition of a superannuation guarantee charge under section 5 of the *Superannuation Guarantee Charge Act* 1992 (Cth)) and thus an employer is practically not required to make contributions to a superannuation fund for employees who earn less than $450 by way of salary and wages in a calendar month.

53. CAI submits that the removal of the underlined phrase benefits a club employee who earns between $350 and $450 in a calendar month.

54. CAI submits that no employee in the clubs industry is disadvantaged by the removal of the underlined phrase.

55. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 28.2 of the Hospitality Award appears as clause 27.2(b) of the Hospitality PLED. CAI submits that clause 28.2 of the Hospitality Award is of the same effect as clauses 27.2(b) of the Hospitality PLED.)

Clause 29.1(d) of the Proposed Merged Award

56. Clause 29.1(d) of the proposed merged award (dealing with ordinary hours of work) contained a number of subclauses in green:

> "*(i) Employees will be entitled to a maximum of 12 accrued days off in any calendar year.*
> *(ii) Accrued time will be reduced pro rata for any unpaid non attendance.*
> *(iii) For the purposes of the overtime provisions of the award, the standard day for the full time employees engaged on an accrued day off arrangement will be deemed to be eight ordinary hours.*
> *(iv) A full time employee who is absent from duty (other than on annual leave, long service leave, paid personal/carer's leave, compassionate leave, public holidays or other paid leave) will have eight hours ordinary time rate of pay deducted from their wages for each day the employee is absent.*
> *(v) The hourly rate of pay will be calculated by dividing the ordinary weekly rate by 38 hours.*
> *(vi) Any accrued time granted to an employee in advance or owing to an employee, at the time of termination of employment, and not offset by time worked, will be deducted from or added to the final payment on termination.*"

57. The amended proposed merged award deletes each of these subclauses in green.

58. Each of the deleted clauses related to an employee working 160 hours in each four week period and accruing one rostered day off.

59. CAI submits that each of the subclauses is unnecessary as either (i) the subclause reflects an axiomatic proposition; or (ii) the subject matters and entitlements in relation to the subject matters are covered elsewhere in the amended proposed merged award:

    (a) For an employee in the clubs industry working 160 hours in each four week period and accruing one rostered day off in each such period, and taking annual leave during the year (see also clause 29.1(d)(vi)(A) of the amended proposed merged award, the maximum number of accrued days off that could accrue (mathematically) is 12 and it is unnecessary for subclause 29.1(d) to state that fact (noting too that the Hospitality Award permits an employee in the hospitality industry working 160

hours in each four week period to accrue rostered days off but does not state the maximum number of accrued days off that could accrue).

(b) For an employee in the clubs industry working 160 hours in each four week period and being absent from work on an unpaid basis, it is axiomatic that accrued time will be reduced pro-rata to reflect the unpaid absence and (in any event) the subject-matter is now contained in clause 29.1(d)(vi)(B) of the amended proposed merged award.

(c) For an employee in the clubs industry working 160 hours in each four week period, the average number of hours per day worked will be on average 8 and so the standard daily hours will be 8 and it is unnecessary for subclause 29.1(d) to state that fact (noting too that the Hospitality Award permits an employee in the hospitality industry working 160 hours in each four week period to accrue rostered days off but does not state the standard daily hours).

(d) For an employee in the clubs industry working 160 hours in each four week period, the average number of hours per day worked will be on average 8 and so 8 hours will be deducted for each daily absence and it is unnecessary for subclause 29.1(d) to state that fact (noting too that the Hospitality Award permits an employee in the hospitality industry working 160 hours in each four week period to accrue rostered days off but does not state the number of hours deducted for daily absences).

(e) For an employee in the clubs industry working 160 hours in each four week period, the hourly rate of pay will obviously be calculated by dividing the ordinary weekly rate by 38 (especially given clause 11 (38 ordinary hours per week for full-time employment) and clause 20.1 (hourly rate of pay calculated by dividing weekly rate by 38)) and it is unnecessary for subclause 29.1(d) to state that fact (noting too that the Hospitality Award permits an employee in the hospitality industry working 160 hours in each four week period to accrue rostered days off but does not state the means of calculating the hourly rate of pay).

(f) For an employee in the clubs industry working 160 hours in each four week period who has accrued but not taken days off, it is axiomatic that the employee will be paid for the accrued but untaken days off (noting too that the Hospitality Award permits an employee in the hospitality industry working 160 hours in each four week period to accrue rostered days off but does not state the need to pay for accrued but untaken days off).

60. CAI notes that on 17 July 2018 the Commission proposed (as a provisional view) a new model term to be included in all awards, including the Hospitality Award, addressing payment on termination of employment (see *Re Payments on Termination Decision* [2018] FWCFB 3566 at [119], [137], [158] per Ross J, Booth and Clancy DPP, Cribb and Hunt CC). CAI submits that the removal of the subclauses in green (and in particular subclause (vi) in green) is consistent with the provisional new model term.

61. CAI also notes that on 18 July 2018 the Commission finalised a new model term to be included in all awards, including the Hospitality Award, addressing termination of

employment (see *Plain Language Re-drafting – Standard Clause E1* [2018] FWCFB 4177 at [2] per Ross J, Hatcher VP, Hunt C). CAI submits that the removal of the subclauses in green (and in particular (vi) in green) is consistent with the new model term.

62. CAI submits that no employee in the clubs industry is disadvantaged by the removal of the subclauses in green.

Clause 29.2(a) of the Proposed Merged Award

63. Clause 29.2(a) of the proposed merged award (dealing with the rostered hours of work for part-time employees) provided:

> "*A minimum of three hours and a maximum of 11 and a half hours (or 12 hours for club employees) may be worked on any one day. The daily minimum and maximum hours are exclusive of meal break intervals.*"

64. The amended proposed merged award removes the underlined phrase.

65. CAI has thus removed the maximum daily hours (12 hours) for a part-time employee in the club industry.

66. CAI submits that the removal of the underlined phrase in clause 29.2(a) benefits part-time employees in the club industry by reducing the maximum daily hours (from 12 hours to 11.5 hours).

67. CAI notes that the removal of the underlined phrase is similar in effect to the removal of clause 12.5(b) of the proposed merged award.

68. CAI submits that no employee in the clubs industry is disadvantaged by the removal of the underlined phrase.

69. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 29.2(a) of the Hospitality Award appears as clauses 15.2(a) and 15.2(b) of the Hospitality PLED. CAI submits that clause 29.2(a) of the Hospitality Award is of the same effect as clauses 15.2(a) and 15.2(b) of the Hospitality PLED.)

Clause 29.4 of the Proposed Merged Award

70. A portion of clause 29.4 of the proposed merged award (dealing with make-up time by club employees) provided:

> "*A club employee may elect, with the consent of their employer, to work make-up time, under which the employee takes time off ordinary hours, and works those hours at a later time, during the spread of ordinary hours in the award.*"

71. The amended proposed merged award removes the portion.

72. Another portion of clause 29.4 (retained in the amended proposed merged award) deals with make-up time in hospitality venues, including by allowing an employer to introduce make-up time arrangements following consultation with its employees and their representatives (see clause 29.4(a)(i)) and following an agreement with a majority of employees in a workplace (see clause 29.4(a)).

73. CAI notes that an employer and an employee may agree in an individual flexibility agreement to vary arrangements for when work is performed (see clause 7.1(a) of the amended proposed merged award).

74. CAI submits that, whilst the ability of an employer and an employee in the club industry to make an individual agreement on make-up time has been removed under the clubs portion of clause 29.4 (see also Transcript, 11 July 2018, PN 7542), such an individual agreement will continue to be permitted to be made as an individual flexibility agreement under clause 7.

75. CAI submits that the removal of the clubs portion does not disadvantage a club employee.

76. (CAI is aware that the Commission issued the Hospitality PLED on 8 August 2018 and that clause 7.1(a) of the Hospitality Award appears as clause 6.1(a) of the Hospitality PLED and that a new facilitative provision appears as clause 7 of the Hospitality PLED. CAI submits that clause 7.1(a) of the Hospitality Award is of the same effect as clauses 6.1(a) and 7 (especially the third item in Table 1 in clause 7.2) of the Hospitality PLED.)

Specified Clauses Ceasing Effect on 1 January 2020

77. The primary position of CAI is that all clauses in the amended proposed merged award should operate indefinitely.

78. However, recognising some issues raised by the Commission, the alternative position of CAI is that specified clauses in the amended proposed merged award could operate until 31 December 2019, could cease effect from 1 January 2020 and could be replaced by other clauses in the amended proposed merged award.

79. The rationale for the alternate position is to provide employers and employees in the club industry with notice that the specified clauses in the amended proposed merged award will cease effect from 1 January 2020 and that similar provisions in the current Hospitality Award will apply in their stead.

80. The specified clauses (contained in the amended proposed merged award) are:

    (a) clause 20.5(c) of the amended proposed merged award (dealing with junior rates);

    (b) clause 29.1(b) of the amended proposed merged award (dealing with ordinary hours of work); and

    (c) clauses 31.7, 31.8, 31.9 and 31.10 of the amended proposed merged award (dealing with breaks).

Statement

81. On 11 July 2018, the Commission issued a Statement (see [2018] FWCFB 4116) that posed a number of queries.

First Query

82. The first query related to the proposed reduction in penalty rates only applying to new full-time and part-time employees (that is, employees engaged for the first time in the club industry after the operative date of the variation to the Hospitality Award to make the amended proposed merger award).

83. CAI submits that the Commission should not confine the reduction in penalty rates to new employees:

    (a) First, such a result would entail that existing employees in the club industry would continue to be overcompensated for the disutility of working on Saturdays, Sundays and public holidays.

    (b) Secondly, such a result would entail that the interests of employers in the club industry would be totally subjugated to the interests of the existing employees which the Full Bench in the *Penalty Rates Transitional Decision* [2017] FWCFB 3001; (2017) 272 IR 1 refused to countenance (see at [69]).

    (c) Thirdly, such a result would entail a form of "red circling" which the Full Bench in the *Penalty Rates Transitional Decision* [2017] FWCFB 3001 wished to avoid, due to different employees of the employer being engaged on different terms and conditions (see at [10], [110], [111], [115], [119], [120], [126]).

    (d) Fourthly, such a result would introduce a degree of complexity in the transitional arrangements and would add to the regulatory burden of business, an outcome which the Full Bench in the *Penalty Rates Transitional Decision* [2017] FWCFB 3001 wished to avoid (see at [119], [120]).

84. CAI submits that the Commission should adopt the type of transitional arrangements applicable to both existing and new employees set out in the *Penalty Rates Transitional Decision* [2017] FWCFB 3001, including three stages of reduction (of five per cent, 10 per cent and 10 per cent), but with effect from 1 July 2019 (see proposed clause 32.1 of the amended proposed merged award).

Second Query

85. The second query related to the application of the public holiday penalty rates to employees in the club industry, given that the Full Bench in the *Penalty Rates Decision* deferred consideration of the appropriate public holiday penalty rate for club employees.

86. CAI submits the public holiday penalty rates should be the same for both employees in the club industry and employees in the hospitality industry:

(a) First, there is no demonstrated difference in the disutility on working on a public holiday for employees in the club industry and for employees in the hospitality industry.

(b) Secondly, employees in the club industry have the same characteristics, substantial overlap in duties and identical minimum wage rates as employees in the hospitality industry and it is appropriate that the employees be paid the same level of public holiday penalty rates.

Third Query

87. The third query related to the application of club-specific club manager provisions to hospitality establishments more broadly.

88. CAI submits that, given the importance of career path and career structure in the clubs industry, it is important to maintain the club manager provisions in the amended proposed merged award (see, for example, Cooper Statement (Exhibit 39), pars 25, 26; CMAA Submissions, pars 13(i), 16; see also Cooper Cross Examination (5 July 2018, PN 5091 to PN 5093, PN 5105)).

89. CAI submits that, on the evidence that exists in these proceedings, there is no basis to conclude that a career path and career structure is an important aspect of employment in hospitality establishments.

90. CAI otherwise adopts a position of neutrality on the application of club-specific club manager provisions to hospitality establishments.

Fourth Query

91. The fourth query related to the existence of different working hours and related arrangements between club employees (other than club managers and maintenance and horticulture employees) and hospitality employees.

92. CAI submits, as its primary submission, that the current working hours provisions in the Clubs Award ought be maintained in the amended proposed merged award (particularly insofar as those provisions have a smaller spread of ordinary hours than the Hospitality Award and insofar as those provisions reflect a historical work arrangement in the industry).

93. CAI submits, as its alternative case, that the Commission could maintain the current working hour provisions for a period of time (say, until 31 December 2019), thereby providing a period of notice of change to the provisions, and adopt the current working hours provisions in the Hospitality Award from a specified date (say, 1 January 2020).

Fifth Query

94. The fifth query related to a delayed implementation of an amended proposed merged award rather than an interim period of differing working hours and related arrangements.

95. CAI submits that the delayed implementation method would seem to be similar to its alternative case but would avoid the need for an interim period as is part of the alternative case.

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A B Gotting

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15 August 2018