FAIR WORK COMMISSION

MATTER NO. AM2017/39

Four Yearly Review of Modern Awards

Revocation of the *Registered and Licensed Clubs Award*

SUBMISSIONS OF UNITED VOICE

Introduction

1. By its application dated 28 July 2017, Clubs Australia Industrial (**CAI**) seeks to revoke the *Registered and Licensed Clubs Award 2010* (***Clubs Award***) for the sole reason of achieving the cuts to weekend penalty rates that it failed to persuade the Fair Work Commission were necessary in the *Penalty Rates Case*.[1] In making this application, CAI have reversed their long-held position that there is a need for a separate *Clubs Award.* CAI have, since before the creation of the award in 2008, sought and maintained a separate *Clubs Award* throughout numerous proceedings and in this four yearly review since its commencement in 2014.

2. The CAI application is made in the face of overwhelming opposition from employers, employees, registered organisations, and other interested organisations. The CAI application is made with almost no evidence in support other than from office-holders of the CAI itself and its affiliates. The CAI application is made without any regard for the harm that cutting weekend penalty rates will cause to clubs employees, and without any regard to the proper approach to the statutory requirements for revocation and variation of modern awards.

3. The application to revoke the *Clubs Award* is an attempt by CAI to avoid the difficulties it experienced in the *Penalty Rates Case*. It is "a position based on assessment of what is industrially feasible instead of a detailed exposition of the merits of the particular proposal,"[2] an approach which the Full Bench criticised CAI for taking in the *Penalty Rates Case*.[3] In that case, the Full Bench found that CAI had failed to advance a merit argument to support the "significant changes" that it sought to the *Clubs Award*,[4] its

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1 [2017] FWCFB 1001.

2 *Penalty Rates Decision* [2017] FWCFB 1001, [983].

3 Ibid.

4 See, eg, *Penalty Rates Decision*, [985].

evidentiary case was "patently inadequate",[5] and CAI made only "cursory reference" to the relevant s 134(1) considerations.[6] Those deficiencies have not been remedied here. The Commission should dismiss CAI's application and determine that the four yearly review with respect to the *Clubs Award* is concluded.

4. This outline of submissions addresses the following matters:

   1 The application made by CAI
   2 The evidence proposed to be called by CAI
   3 The applicable principles
   4 The response to the proposed revocation and variation by reference to:
      a. The special nature of the Clubs sector;
      b. That the proposed award maintains the differences between Clubs and Hospitality;
      c. Competition between sectors is legally and factually irrelevant;
      d. The impact on employees; and
      e. The modern awards objective.

5. Together with this outline United Voice (**UV**) rely upon the following witness statements:

   (a) Daniel Constable, Chief Executive Officer, Port Macquarie Golf Club, New South Wales;

   (b) Robert Docker, Chief Executive Officer, the Tradies Group, Australian Capital Territory;

   (c) Neale Genge, Company Secretary and General Manager, Casino Returned Servicemen's Memorial Club, New South Wales;

   (d) Peter Cooper, Senior Industrial Advocate, Club Managers' Association of Australia;

   (e) Vicki Crowe, National Human Resources Manager, the Professional Golfers Association of Australia;

   (f) Mark Unwin, Chief Executive Officer, the Australian Golf Course Superintendents Association;

   (g) Magdalena Gorman, supervisor, Doyalson Wyee RSL, New South Wales;

   (h) Deanna Kelly, gaming attendant, Central Coast League's Club, New South Wales;

   (i) Sandra King, cashier and gaming attendant, Tewantin Noosa RSL, Queensland;

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5 Ibid, [993].
6 Ibid, [985].

(j) Raymond Marsh, food, beverage and gaming attendant, Caboolture RSL, Queensland; and

(k) Emilio Valenti, bar supervisor, Tea Tree Gully Club, South Australia.

The application by CAI

6. The sole premise of CAI's application of 28 July 2017 is that the clubs sector, which is said to be similar to the hospitality sector, faces an unfair disadvantage because employers in the hospitality sector can pay reduced Sunday and public holiday penalty rates to permanent employees. Significantly, this purported 'disadvantage' can only have been in place since 1 July 2017 (a period of only 28 days before the application), when the first of three cuts to penalty rates in the *Hospitality Award* took effect.

7. The premise is flawed. CAI do not claim that cuts to penalty rates will ameliorate competition between clubs and other venues. No financial modelling, estimates, or evidence has been provided to support the connection between reduced penalty rates payable to a portion of the workforce, and a more favourable competitive market for clubs. CAI has not addressed how competition is relevant to the exercise of the Commission's modern award powers.

8. The inadequacy of CAI's merit-based case is not limited to its failure to properly address the allegation of competition. CAI has also failed to address the statutory framework in which the FWC must function. CAI do not explain how the modern awards objective applies to the revocation of the *Clubs Award*, or how the variations sought to the *Clubs Award* and, separately the *Hospitality Award*, are necessary to meet the modern awards objective.[7] CAI has not addressed the numerous variations to the *Clubs Award* other than the cuts to penalty rates,[8] or the proposed amendments to the *Hospitality Award* for hospitality employees and employers.

9. CAI does not assert that cutting penalty rates will increase employment in the sector.[9] It has not addressed how cutting penalty rates will meet the needs of the low paid. The proposed amalgamated award retains many of the special features of the *Clubs Award*, but the differences between the provisions applicable to clubs and hospitality mean the proposed amalgamated award is complex, unwieldy, and will be difficult to use.

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7 This issue was raised in United Voice's submissions dated 14 November 2017.

8 For example, CAI have not addressed the revocation of cl.10.5(e) of the *Clubs Award,* (overtime for casuals); or parts of 26.3 (maximum daily hours for full-time employees, cf cl 29.1 of the *Hospitality Award*).

9 Other than by letter to United Voice dated 20 April 2018: see paragraph 13 below.

The evidence to be called by CAI

Witness statements and common evidence

10. CAI have filed witness statements from four representatives of state and territory affiliates of itself (CAI), and one employer (Lisa Petrie). CAI have also filed as common evidence the National and NSW 2015 Clubs Census' conducted by KPMG, and a report produced by the FWC in January 2017 titled *Industry Profile – Accommodation and Food Services*. United Voice has been served with only this material.

'Anticipated' evidence

11. In addition to the evidence described above, CAI has stated that it 'anticipates' that it will rely on the following material:

    (a) Data from the Australian Bureau of Statistics *2016 Census*.[10]

    (b) 'Relevant legislation' (only two of which have been identified) relating to the clubs industry;[11]

    (c) The 2011 KPMG National Clubs Census, which is the predecessor to the 2015 National Clubs Census.[12]

    (d) Six chapters of the report of the Productivity Commission titled *Workplace Relations Framework* (**PC Report**).[13]

12. CAI has not provided any of the above material to United Voice, or identified which specific parts of the material it proposes to rely on, or identified the findings that it will be asking the FWC to make based on that evidence, where applicable. However, by letter dated 20 April 2018, CAI confirmed that it would tender the 2011 KPMG Clubs Census, and the identified chapters of the PC Report.

A new case

13. By letter dated 11 April 2018, United Voice requested that CAI clarify its position with regard to the use of parts of the PC Report, which covers over 100 pages. The request was made on the basis that as a necessary element of procedural fairness, United Voice is entitled to know the factual findings that CAI will ask the Full Bench to make based on the evidence sought to be tendered. United Voice has put CAI on notice that, in order to test the conclusions contained in the PC Report, it will require the authors of the PC Report to be available for cross-examination.

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10 See CAI submissions, [11].
11 CAI submissions, [14].
12 CAI submissions, [16(a)].
13 CAI submissions, [16(b)].

14. By letter dated 20 April 2018, CAI responded by setting out a number of matters that it intends to ask the FWC to draw from the PC Report, but without reference to which parts of the PC Report support such matters. Many of the propositions that CAI seek to establish from the PC Report, particularly those relating to the relationship between penalty rates and labour supply and demand, have not been previously identified in CAI's submissions, and appear to constitute a new case. The PC Report included commentary on expert evidence filed by other parties (but *not* CAI, which did *not* file any expert evidence, did *not* participate in the hearing of the expert witnesses' evidence, and did *not* make submissions after the expert evidence was heard as to the application of that evidence to the *Clubs Award*) in the *Penalty Rates Case*, and many of the findings of the Productivity Commission as to the employment effect are at odds with parts of the findings in the *Penalty Rates Case*. In circumstances where CAI will ask the FWC to find based on the PC Report that (for example) "there is excess demand in the HERRC industries for Sunday jobs" and "a reduction in Sunday penalty rates for the club industry will have some positive employment effects" (see the 20 April letter at 21(g) and (l)), it is necessary as a matter of procedural fairness that United Voice be able to test the evidence by cross-examination. This fundamental tenant of procedural fairness was relied on by the High Court in *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, where Keifel J refused to allow the applicant to rely on a draft Productivity Commission report about market competition in the gambling industry because, among other reasons, "the respondents have not had the opportunity to test the opinions contained within it".[14]

15. In the event that CAI are not able to make the authors of the PC Report available for cross-examination, they should not be permitted to rely on that evidence.

16. United Voice reserves its rights to make any necessary objection, application or submissions, including by calling new evidence and reopening its case, in the event that CAI attempt to tender or rely on evidence without providing fair and proper notice of the specific evidence, the specific findings that it seeks to be made from that evidence, and the opportunity to test the evidence.

Evidentiary findings in previous cases

17. In its amended outline of submissions dated 14 December 2017, CAI identified 39 paragraphs from the *Penalty Rates Decision*, and 14 paragraphs from the decision in *Casual and Part-Time Employment Decision* [2017] FWCFB 3451, that it intends to rely on at the hearing of its application. By letter dated 11 April 2018, United Voice sought clarification from CAI about precisely how it intends those paragraphs to be used by the

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[14] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at [128].

Full Bench in this case. Although CAI agreed to withdraw reliance on paragraphs 689 and 964 of the *Penalty Rates* Case and paragraph 456 of the *Casual and Part-Time Employment Decision,*[15] many of the issues between the parties as to the appropriate use of those passages remains in dispute. The position of United Voice remains that it is not appropriate, fair or proper for this Full Bench to apply the findings of the *Penalty Rates* Full Bench to this proceeding. This Full Bench must hear and evaluate the evidence before it. It cannot simply adopt the findings of the evidence in a different case heard and determined by a differently constituted Full Bench. These matters were set out in the submissions of United Voice dated 14 November 2017,[16] raised in the Commission on 16 November 2017,[17] and set out in the letter from United Voice dated 11 April 2018.

18. The common theme of CAI's response to this issue is that because the rules of evidence do not apply in the Commission, it is appropriate that this Full Bench treat factual findings in the *Penalty Rates Case* and other cases as factual findings made in this case. This response misses the point. The rules of evidence in this context are about fairness. The Commission's powers are very broad but they are not unconstrained,[18] and are specifically limited by the "subject-matter, scope and purpose of the Act",[19] which includes the obligation to provide procedural fairness to interested parties.[20]

19. As the Commission has frequently acknowledged, while it is not bound by the rules of evidence, those rules are not irrelevant. In *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 288, Evatt J said at 256:

> [The rules of evidence represent] the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.

20. *R v War Pensions Appeals Tribunal* has been consistently and historically adopted and followed by the Commission. In *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354 (Ross VP, Duncan SDP, Bacon C), the AIRC said:

> [48] While the Commission is not bound by the rules of evidence that does not mean that those rules are irrelevant. As the then President of the Industrial

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15 Per the 20 April 2018 letter at [16], [19].

16 At paragraphs 8–9.

17 See PN 37–42.

18 There is no such thing in Australian law as an unbridled discretion: see *Wotton v Queensland* (2012) 246 CLR 1, [10].

19 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (Mason J); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 316 [106] (Hayne and Heydon JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 348 [23] (French CJ).

20 See, eg, *Penalty Rates Decision*, [110].

Relations Commission of Western Australia said in respect of a similar provisions in the then *Industrial Relations Act 1979* (WA):[21]

> "However, this is not a licence to ignore the rules. The rules of evidence provide a method of enquiry formulated to elicit truth and to prevent error. They cannot be set aside in favour of a course of inquiry which necessarily advantages one party and necessarily disadvantages the opposing party ((*R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 Evatt J, at 256 (dissenting)). **The common law requirement that the Commission must not in its reception of evidence deny natural justice to any of the parties acts as a powerful control over a tribunal which is not bound by the rules of evidence."**
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> (emphasis added).

21. United Voice reserves its right to object to the admissibility of evidentiary findings in previous cases at the hearing of this application, and to make any other relevant application or submissions about this issue.

Applicable principles

22. Part 2-3 of the *Fair Work Act 2009* (Cth) (**FW Act**) deals with modern awards. Section 134(2) of the FW Act provides that the modern awards objective applies to the performance or exercise of the FWC's functions or powers under Part 2-3. This includes the power to revoke a modern award under s 164, and to vary a modern award in the four yearly review pursuant to s 156 of the FW Act.

Section 164

23. Section 164 of the FW Act states that the FWC must not revoke a modern award unless it is satisfied that (a) the award is obsolete or no longer capable of operating; or (b) all the employees covered by the award are or will be covered by a different modern award that it appropriate for them.[22]

24. CAI has not filed any evidence to demonstrate that the *Clubs Award* is obsolete or no longer capable of operating. In their outline of submissions at paragraph 23(a), CAI argue that the *Clubs Award* will become obsolete when their proposed variations are made to the *Hospitality Award* – in other words, the *Clubs Award* is not at present obsolete. United Voice will call evidence from employers, employees, Peter Cooper, Vicki Crowe, and Mark Unwin of the Australian Golf Course Superintendents Association, to the effect that the *Clubs Award* continues to be relevant and operative. Accordingly, the FWC cannot be satisfied that the prerequisite in s 164(a) has been met.

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21 *WA Meat Commission v Australasian Meat Industry Employees Union, Industrial Union of Workers WA Branch Matter* No. 890 of 1993, 5 August 1993 WAIRC per Sharkey P, Coleman C and Gregor C at p 7 per Sharkey P.

22 FW Act s 164.

25. The second limb of s 164 permits the FWC to revoke a modern award only where it is satisfied that all of the employees covered by the award are or will be covered by a different award that is "appropriate to them". United Voice will call evidence from employers, employees, Peter Cooper, Vicki Crowe, and Mark Unwin to the effect that the *Hospitality Award* is not appropriate for clubs employees.

26. Further, one effect of the proposed revocation and variation is that clubs employees who receive penalty rates on weekends and public holidays will suffer a pay cut. In considering whether this variation is "appropriate" to those employees, the FWC must have regard to the modern awards objective.[23] CAI have not addressed the modern awards objective in this context (or in any substantive way at all), and have failed to make a merit-based case, properly supported by probative evidence, in support of the argument that the *Hospitality Award* is or will be "appropriate" for clubs employees.

Variation of modern awards terms

27. Regardless of whether the application is framed as a revocation application or a variation application, in considering the merits of the proposal, the FWC must have regard to the modern awards objective. This has not been addressed by CAI.

28. In the *Preliminary Jurisdictional Issues* decision concerning the conduct of the four yearly review, the Full Bench held that a party proposing a "significant change" *must* ensure that the proposal is "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".[24] In the *Penalty Rates Decision*, the Full Bench described CAI's application in that case as constituting "significant changes to the modern award".[25] CAI is therefore required to make submissions about the relevant legislative provisions, and to have an evidentiary basis for the facts relied on in support of the revocation of the *Clubs Award* and the variations sought to the *Clubs Award* and the *Hospitality Award*. It is difficult to ascertain what facts are relied on by CAI in support of its application, but there is no difficulty in identifying the absence of probative evidence.

29. A term should be included in a modern award "only to the extent necessary to achieve the modern awards objective".[26] The determination of what is 'necessary' requires the Full Bench to form "a value judgment" based on the considerations delineated in s. 134(1) of

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23 Per s 134(2).

24 *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 (***Jurisdictional Issues Decision***), [23].

25 *Penalty Rates Decision*, [984].

26 FW Act, s 138.

the FW Act,[27] and having regard to the evidence and submissions directed to those considerations.

30. In forming a value judgment about what modern award terms are 'necessary', the general provisions relating to the Commission's performance of its functions apply. Section 578 requires that in performing functions or exercising powers, the FWC must take into account the objects of the Act and any part of the Act, and, relevantly, "equity, good conscience and the merits of the matter".[28]

31. The modern awards objective provides:

> **134(1)** The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or
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> (ii) employees working unsocial, irregular or unpredictable hours; or
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> (iii) employees working on weekends or public holidays; or
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> (iv) employees working shifts; and
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> (e) the principle of equal remuneration for work of equal or comparable value; and
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> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
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> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
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> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
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> This is the ***modern awards objective***.

32. The modern awards objective is very broadly expressed, and the criteria "do not set any standard against which a modern award could be evaluated". Many criteria are properly described as "broad social objectives."[29] No particular weight should be attached to any

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27 *Jurisdictional Issues Decision*, [36].

28 FW Act s 578(a).

29 Ibid.

one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.[30]

33. To the extent there is any tension between some of the considerations in section 134(1), "the Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions."[31] Further, while the Commission must take the s 134 considerations into account, the relevant question is whether the modern award, together with the NES, provides a guaranteed fair and relevant minimum safety net of enforceable terms and conditions of employment.[32]

34. In conducting the four yearly review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue.[33] Two matters are particularly relevant here.

35. First, in making the *Clubs Award*, the AIRC determined that it was appropriate that there be a separate award for the clubs industry. While this was not a 'contested issue', because all parties agreed that a separate award was necessary, the AIRC did not uncritically accept this position, but expressly stated that it would form its own view as to whether such a course was appropriate. It can be inferred from the subsequent creation of the *Clubs Award* that this is what happened. The evidence of Peter Cooper sets out the history of the making of the modern *Clubs Award* to this effect.

36. Second, the Full Bench in the *Penalty Rates Decision* heard CAI's case for a change to the penalty rates provision of the *Clubs Award*. This was a strongly contested issue. The Full Bench was not satisfied that CAI had established a merit case sufficient to vary the weekend penalty rates in the *Clubs Award*.[34] The fact that the Full Bench held that weekend penalty rates in some (but not all) awards were *not* meeting the modern awards objective does not operate as a presumption in favour of CAI in this application. If the findings in the *Penalty Rates Decision* are relevant at all, their relevance is limited to those in relation to the *Clubs Award* only. In that respect, the last decision on the contested issue about penalty rates was that that specific modern award was meeting the modern awards objective.

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30 *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406, [19], [20] (***Annual Leave Decision***), [19], [20].

31 *Annual Leave Decision*, [20].

32 *Fire Fighting Industry Award* [2016] FWCFB 8025, [28].

33 *Jurisdictional Issues Decision*, [27].

34 See *Restaurant Industry Award* [2017] FWCFB 6034, [15].

The proposed revocation and variation

The history of the *Clubs Award* and the nature of the Clubs sector

37. The modern *Clubs Award* commenced operation on 1 January 2010. In 2008, along with other interested parties including the LHMU (as the predecessor to United Voice), CAI made submissions urging the AIRC to create a separate *Clubs Award* to take account of the unique features of the industry. The CAI submissions emphasised that clubs in Australia are a separate and distinct industry that can be distinguished from the hospitality industry on grounds including that:

    (1) clubs are not-for-profit organisations;

    (2) clubs offer a variety of sports, activities, and entertainment for its patrons and members that are not normally offered at other hospitality venues;

    (3) clubs are community based and community run;

    (4) clubs' employees in regional areas are multi-skilled;

    (5) clubs are established on the basis of interest mutuality with high numbers of volunteers;

    (6) clubs are subject to separate and distinct regulations and regulatory framework;

    (7) clubs are required to adopt a constitution, and are subject to control by members and only members and bona-fide visitors can avail themselves of the facilities;

    (8) clubs are committed to maximising local support and offering affordable social opportunities in a fun, safe and friendly environment in order to raise funds in furtherance of their community objectives; and

    (9) employees of Clubs provide a service to their members which goes beyond the service provided in a commercial establishment.[35]

38. The Award has been subject to continual review since its creation, first in the transitional review in 2012, and then this four yearly review, which commenced on 1 January 2014. Throughout the life of the *Clubs Award*, from its creation in 2009 to the numerous applications for variation made by CAI in the four yearly review, CAI have conducted all matters before the FWC and its predecessors on the basis that there is a need for a separate *Clubs Award*. There is no suggestion by CAI that the matters identified by it in the submissions to the Commission in August 2008 have changed. The *only* thing that has changed is that CAI lost its application to cut penalty rates in 2017, whereas the AHA – which ran a very different case about the hotels sector – did not.

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[35] See witness statement of Peter Cooper at [8] and Appendix 3 to that statement.

39. To the extent that CAI contest that the clubs sector has a number of features that differentiate it from the hospitality sector (it appears that many of their witnesses do not dispute this), United Voice will address the features of the clubs industry, including employment in the clubs sector, by calling evidence from Peter Cooper, Vicki Crowe, Mark Unwin, and employers Robert Docker of the Tradies Group, Daniel Constable of the Port Macquarie Golf Club, and Neale Genge of the Casino RSM. The evidence of employee witnesses Magdalena Gorman, Deanne Kelly, Sandra King, Emilio Valenti and Raymond Marsh will also be relied on to establish the nature of work in the sector.

40. Finally, it is also relevant that there appears to be very little support, and considerable opposition, from employers to CAI's application. CAI has filed a statement from one employer in the clubs' industry, Lisa Petrie, in support of the cuts to penalty rates. Ms Petrie's statement does not address the question of revocation. Her evidence represents the *only* employer evidence in support of CAI's application. By contrast, United Voice will call evidence from three employers (Docker, Genge and Constable) in opposition to the application. In addition, as at the date of these submissions, the Commission has, received **57** written objections to the revocation application. The scale of objections to this application from employees *and* employers is highly relevant including as to the question of whether the *Hospitality Award* is the "appropriate award" within the meaning of s 164(b), and the Commission should take these matters into account when considering whether all of the statutory prerequisites for revocation have been met.

<u>The proposed amalgamated award maintains the distinction between Clubs and Hospitality</u>

41. The amalgamated HIGA proposed by CAI is effectively two awards within one document. CAI have sought to retain many of the features of the *Clubs Award* that are not in the *Hospitality Award*. This factor strongly supports the argument that the revocation application is really a variation application in disguise, and that CAI does not, in reality, consider that the clubs and hospitality sectors are comparable.

42. The following is not an exhaustive list (the differences are visible in the proposed HIGA by the use of different coloured text), but the differences include:

    (a) For part-time employees, clubs, but not hospitality, employees must not be rostered to work more than 12 and less than 3 hours per day: cl 12.5(b).

    (b) Different rates of pay apply to junior employees depending on whether they work in a hotel or a club: cl 20.5.

    (c) Clubs employees' rate of pay, but not hospitality employees', is inclusive of the award rate and the first aid allowance (where applicable), for first aid: cl 20.1. While employees under both Awards can be forklift drivers, only hospitality

employees receive an additional allowance of 1.5 per cent and have that allowance counted as part of their rate of pay: cl 21.2(a).

(d) Different allowances apply for broken periods of work, make-up time, meal breaks, as between clubs and hospitality employees: cl 21.3(a), 29.4, 31.

(e) Hospitality employees, but not clubs employees, who earn $350 or more are entitled to superannuation contributions: cl 28.2(b).

(f) Managers of clubs, but not hotels, have access to rates of pay from Levels 7 to 13. The minimum annual salary payable to hotel managers is $45,987. By contrast, clubs' managers minimum salaries range from $47,189 to $58,056: cl 20.1, cl 20.2.

(g) Management trainee provisions apply to clubs' trainee managers, but not hotels: cl 20.7. Club managers continue to receive meal allowances and uniforms, to be reimbursed certain expenses, to be entitled to RDOs and professional development leave, but these are not available to hotel managers: see proposed clauses 21.1(a), 21.1(c), 21.1(k), 29.1(f), 40.

43. In the *Penalty Rates Case*, the Full Bench considered, on a preliminary basis, that the differences between the *Clubs* and *Hospitality Awards* "could be accommodated by either appropriate transitional arrangements or the inclusion of clubs-specific sector arrangement within the *Hospitality Award*."[36] However, the proposed amalgamated award that CAI have produced makes it clear that incorporating two awards in one does *not* result in an award that is simple and easy to understand as required by s 134(1)(g) of the FW Act. United Voice witnesses Peter Cooper and Robert Docker will give evidence about the complexity of proposed amalgamated award.

44. Finally, with regard to the need to avoid "unnecessary overlap" of modern awards per s 134(1)(g), it should be noted that there are a number of common terms in *all* modern awards, and so it is important to focus on the matters of substance relating to the particular industry covered by the award. The similarities between classification levels and rates of pay between the *Clubs Award* and the *Hospitality Award* are not sufficient to overcome the numerous differences between the Awards.

Competition between sectors is legally and factually irrelevant

45. The CAI witnesses complain that the clubs sector (logically, only since July 2017), suffers an unfair disadvantage compared to the hospitality sector. United Voice does not accept the premise that the sectors are properly comparable, nor that there is 'unfair' competition between the sectors and CAI has not provided any evidence to establish this. Even

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36 *Penalty Rates Case*, [1005].

accepting for the sake of argument that there are some similarities between aspects of the sectors, it is not sufficient to argue that because the clubs and hospitality industries are similar, clubs employees should suffer a wage cut.

46. Further, CAI have not drawn any causal connection between market competition and the ability of a wage cut to ameliorate it, and there has been no attempt to show how a reduction in competition is relevant to the exercise of the Commission's modern award powers, and particularly how cutting wages to grant a particular sector a competitive advantage meets the modern awards objective and is "necessary" rather than desirable, within the meaning of s 138 of the FW Act.

The harmful impact on employees under the *Clubs Award*

47. United Voice has filed evidence from five employees (Magdalena Gorman, Deanna Kelly, Sandra King, Raymond Marsh, and Emilio Valenti). The employees will each give evidence of the serious impact that cutting penalty rates will have on their income, household budgets, and ability to meet daily expenses. The employee witnesses will also describe the disutility of weekend work, including the constant time away from friends, family, and community.

The modern awards objective

48. The Commission should not revoke the *Clubs Award* and vary the *Hospitality Award* (and by proxy, vary the *Clubs Award*), unless it is satisfied, based on the evidence before it, that the revocation and variations are necessary (not 'desirable') to achieve the modern awards objective. This application fails to meet that test.

49. Section 134(1) of the FW Act requires that the Commission ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions of employment.

50. Section **134(1)(a)** expressly requires the Commission to take into account relative living standards and the needs of the low paid. The needs of the low paid are relevant to the consideration of the appropriate level of penalty rates.[37] It is not contested that clubs workers covered by the award are low paid, and the lay evidence relied on by United Voice demonstrates the reality of living on award wages. The needs of the low paid will not be met by this application.

51. Section **134(1)(c)** requires the Commission to take into account the need to promote social inclusion through increased workforce participation, which is a reference to higher employment.[38] This objective is relevantly the same as s 284(1)(b) of the Minimum Wages

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37 See *Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, [278].

38 See, eg, *2014-2015 Annual Wage Review* [2015] FWCFB 3500, [51].

Objective in Part 2-6, Division 2 of the FW Act. When considering the application of s 284(1)(b) of the FW Act, the Expert Panel "must form a view on the employment impacts of an increase in the national minimum wage and modern award minimum wages of the size that we have in mind and in the economic circumstances that we face".[39] The Full Bench should undertake the same exercise when considering the impact of the proposed cuts to penalty rates. In this case, there is no evidence that cuts to penalty rates will increase employment in the clubs sector, but there is evidence from Neale Genge, Vicki Crowe, and Mark Unwin that reduced wages will threaten an already precarious labour supply, particularly in regional areas.

52. Section **134(1)(da)** of the FW Act requires the Commission to take into account, relevantly, the need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours, or working weekends or public holidays. The need to provide additional remuneration in such cases arises from the disruptive and harmful effects of working at the times and in the circumstances identified in section 134(1)(da)(ii) and (iii). The evidence filed by United Voice demonstrates that working on weekends and public holidays has a negative effect on the social and community life of workers and their families. Employers have recognised and acknowledged this by seeking to maintain the current penalty rates.

53. Section **134(1)(f)** requires the Commission to take into account the likely impact of the exercise of modern award powers on business, including productivity and employment costs. There is no evidence that clubs are suffering productivity problems or high employment costs at all, let alone that they are attributable to higher weekend and public holiday penalty rates for permanent employees since July 2017, as compared to the hospitality sector. Indeed, the employers to be called by United Voice (and those amongst the 57 objectors to the application) support the maintenance of the current penalty rates in the *Clubs Award.*

54. Section **134(1)(g)** requires the Commission to ensure that the modern award system is simple, easy to understand, and stable and sustainable. This objective is not met by the proposed revocation or variation. The proposed amalgamated *Hospitality Award* is complex, cumbersome, and excessively large. The revocation of the *Clubs Award* does not serve the interests of those who use the Award and have done so for years.

55. The stability of the award system is threatened by permitting or encouraging parties to run multiple iterations of the same application over many years until the desired result is

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[39] *2014-2015 Annual Wage Review*, [52].

achieved. The penalty rates in the *Clubs Award* have now been under continual review for four years. This is the opposite of a stable award system.

56. Section **134(1)(h)** requires the Commission to take into account the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. As stated already, there is no evidence of any positive employment effect associated with cutting penalty rates, and the evidence before this Full Bench is that cutting penalty rates will threaten labour supply and is accordingly not consistent with s 134(1)(h).

57. Further, s 134(1)(h) is not so broad that it would permit the Commission to take into account the competitiveness of a particular *sector* as compared to another. Even if this were so, there is no logical basis to conclude that cutting penalty rates for clubs workers on two days out of seven (and 13 public holidays each year) would reduce or ameliorate competition between clubs and hospitality venues. Rather, the labour supply risk would negatively affect productivity, which is contrary to s 134(1)(f).

58. Sections 134(1)(b), (d), (e) are neutral considerations in this context.

Conclusion

59. CAI has brought this application for the sole purpose of cutting weekend penalty rates for some of the lowest paid workers in Australia. That same application failed in the *Penalty Rates Case* and was held to be "patently inadequate."[40]

60. The CAI application is made contrary to the long-held view of CAI that there is a need for a separate *Clubs Award*, and is against the interests of members of CAI, employers, employees, and member organisations. The application is made against the objection of United Voice and 57 other written objections filed with the Commission.

61. The application fails to properly address the statutory criteria in Part 2-3 of the FW Act. The application is premised *only* on the need for clubs to remain 'competitive' with hotels and pubs. That premise is flawed. That premise fails to take into account the significant differences in services offered by clubs compared to hospitality venues, and is unsubstantiated by any evidence.

62. The CAI application fails to address the fact that many of the employees who are facing a wage cut work full-time, and long weekend hours, will be unable to make up the income lost as a result of the proposed cuts. The impact of weekend work means that they regularly miss out on time with family and friends. The current penalty rates appropriately compensate clubs employees for the disutility of weekend work.

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40 Ibid, [993].

63. CAI have failed to advance a merit argument to support the significant changes that are sought to the *Clubs Award*, and its evidentiary case is again "patently inadequate"[41] and should fail.

64. The *Clubs Award* remains relevant, operative, and necessary for the industry and clubs employees. The *Hospitality Award* is not the appropriate award for clubs employees. The modern awards objective will not be met by revoking the *Clubs Award* and varying the *Hospitality Award.*

14 May 2018

C W Dowling
K Burke

41 Ibid, [993].

List of Attachments

The attachments can be viewed via the following links:

- Statement of Daniel Constable, Chief Executive Officer, 10 May 2018, Port Macquarie Golf Club, New South Wales;
- Statement of Robert Docker, 10 May 2018, Chief Executive Officer, the Tradies Group, Australian Capital Territory;
- Statement of Neale Genge, 8 May 2018, Company Secretary and General Manager, Casino Returned Servicemen's Memorial Club, New South Wales;
- Statement of Peter Cooper, 7 May 2018, Senior Industrial Advocate, Club Managers' Association of Australia;
- Statement of Vicki Crowe, 11 May 2018, National Human Resources Manager, the Professional Golfers Association of Australia;
- Statement of Mark Unwin, 10 May 2018, Chief Executive Officer, the Australian Golf Course Superintendents Association;
- Statement of Magdalena Gorman, 10 May 2018, supervisor, Doyalson Wyee RSL, New South Wales;
- Statement of Deanna Kelly, 14 May 2018, gaming attendant, Central Coast League's Club, New South Wales;
- Statement of Sandra King, 14 May 2018, cashier and gaming attendant, Tewantin Noosa RSL, Queensland;
- Statement of Raymond Marsh, unsigned, food, beverage and gaming attendant, Caboolture RSL, Queensland; and
- Statement of Emilio Valenti, bar supervisor, 1 May 2018, Tea Tree Gully Club, South Australia.