

SUBMISSIONS OF UNITED VOICE
ON THE REPORT-BACK OF MATTER AM2017/39

1. By application dated 28 July 2017 in matter number AM2017/39 (the **Application**) Clubs Australia Industrial (**CAI**) seeks to revoke the *Registered and Licensed Clubs Award 2010* (**Clubs Award**) and to amend the *Hospitality Industry (General) Award 2010* (**HIGA**) to become the *Hospitality Industry and Clubs Award* (**HICA**). CAI seeks that the Application form part of the four yearly review that resulted in the *Penalty Rates Decision* [2017] FWCFB 1001.
2. One of the effects of the Application is to reduce penalty rates for permanent employees covered by the Clubs Award by 25 per cent on Saturdays, Sundays, and public holidays. However, the effect of the application, if granted, goes beyond the reduction of weekend penalty rates for permanent employees.¹ Many of the changes sought in the Application (by way of variations to the HIGA) were not sought by CAI in the *Penalty Rates Case*.
3. The Application is to be heard by different Full Bench to that which determined the *Penalty Rates Case*.
4. On 26 October 2017 CAI filed submissions and evidence in support of the Application.
5. United Voice submits that the CAI submissions and evidence gives rise to the following issues:
 - (a) The CAI submissions indicate an intention to provide further evidence and submissions. United Voice should not be required to respond to CAI's evidence and submissions until they are complete;
 - (b) The CAI submissions state an intention to rely on passages from the *Penalty Rates Decision*. It is not proper or fair that CAI be permitted to rely upon findings made in a matter concerning a different application and heard by a different Full Bench;

¹ For example, cl 29.2 of the Clubs Award provides for special penalty rates for maintenance and horticultural employees, which are not in the proposed HICA. Clause 15 of the Clubs Award directs outdoor staff to prioritise certain work, and not be compelled to do work, but this provision is not in the proposed HICA. These changes (along with numerous other examples) are not identified in the 'summary of changes' document that CAI was directed to file: see Directions dated 28 August 2017 at [1(d)].

- (c) The CAI submissions do not address how the Application, insofar as it seeks the revocation of the Clubs Award, satisfies s 164 of the *Fair Work Act* (the **Act**); and
- (d) Whilst the CAI submissions address ss 134 and 138 of the Act in respect of the revocation of the Clubs Award, the submissions do not address ss 134 and 138 in respect of the proposed amendments to the HIGA.

Further evidence and submissions

- 6. It is clear that CAI intends to file further evidence beyond what has been filed so far. The CAI submissions state that “at this stage”, it will rely on the five witness statements filed to date.² Further, CAI otherwise intends to rely “at this stage” on the common evidence filed to date, and “anticipates that it will rely on some portions of” detailed data from the 2016 Census.³ Finally, CAI states that it intends to rely on relevant legislation relating to the clubs industry “such as” the NSW and SA clubs legislation.⁴
- 7. CAI should file and serve all of the evidence and submissions it proposes to rely on before United Voice is required to file responsive material.

Improper reliance upon findings in different application

- 8. CAI has stated that it intends to rely on passages from the *Penalty Rates Decision*, including (but not limited to) a number of identified paragraphs which contain findings based on, and about, the evidence heard by the Penalty Rates Full Bench.⁵ For example, paragraph 67 of the *Penalty Rates Decision* (which CAI seeks to rely on) states that the Full Bench’s decision to reduce Sunday and public holiday rates in the HIGA, the *Fast Food Award*, the *General Retail Industry Award* and the *Pharmacy Award* was “based on *our conclusions* with respect to the common evidence (see Chapter 6) and *our assessment* of the evidence in relation to each of these particular awards (see Chapters 7.2, 7.5, 8.2 and 8.3).” (emphasis added).
- 9. A new matter (AM2017/39), and a new and differently constituted Full Bench have been created to hear and determine the Application. This Full Bench must hear and evaluate the evidence before it that is relevant to this Application. It cannot simply adopt the assessment of and conclusions with respect to evidence made by a differently constituted Full Bench about a range of different applications, none of which are similar to this Application. To do so would mean that this Full Bench has not properly observed, heard and balanced the all of the competing evidence

² CAI submissions, [12].

³ CAI submissions, [11].

⁴ CAI submissions, [14].

⁵ CAI submissions, [13].

relevant to *this* Application. This Full Bench is a new and separately constituted panel and must itself assess all of the evidence relevant to its decision-making process.

Section 164 not addressed

10. Under s 164 of the Act, the Commission must not make a determination revoking a modern award unless the Commission is satisfied that (a) the award is obsolete or not capable of operating; or (b) all the employees covered by the award are covered by a different modern award that is appropriate for them, or will be so covered when the revocation comes into operation.
11. The Application seeks both the revocation of the Clubs Award and the variation of the HIGA. However, the CAI submissions do not address s 164 of the Act. The CAI submissions appear to suggest only that the Clubs Award should be revoked because is not presently meeting the modern awards objective in s 134 of the Act.⁶
12. It is necessary for United Voice to be fully informed of CAI's case with respect to the application of s 164 of the FW Act before the preparation of evidence and submissions in response to the Application.

Sections 134 and 138 not addressed

13. The modern awards objective in s 134 of the FW Act applies to the performance or exercise of the Commission's powers in conducting the four yearly review.⁷ Section 134 of the Act provides, relevantly, that the Commission must ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters in s 134(1) of the FW Act. Further, the Commission's power to include terms in modern awards is limited to those terms "necessary to achieve the modern awards objective", per s 138 of the FW Act.
14. The Application seeks the variation of the HIGA to incorporate the proposed amendments found in the HICA. The CAI submissions do not address how the proposed amendments to the HIGA satisfy the requirements of s 134 or s 138 of the FW Act. As a matter of fairness, United Voice should be given notice of how CAI says that the variations to the HIGA are necessary, within the meaning of s 138 of the FW Act, to achieve the modern awards objective.

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⁶ CAI submissions, [18]–[19].

⁷ *Penalty Rates Decision* [2017] FWCFB 1001, [113].