FAIR WORK COMMISSION

Matter No. AM2017/42

FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

RESTAURANT INDUSTRY AWARD 2010

SUBMISSIONS OF UNITED VOICE IN REPLY TO THE SUBMISSIONS OF RESTAURANT AND CATERING INDUSTRIAL ON ITS APPLICATION FOR A RE-HEARING

A. INTRODUCTION AND OVERVIEW OF SUBMISSIONS

1. By submissions dated 4 December 2014 Restaurant and Catering Industrial (**RCI**) made application to reduce Sunday Penalty Rates from 175 to 150 per cent for all casual employees and from 150 to 125 per cent for permanent employees engaged under the *Restaurant Industry Award 2010* (the ***Restaurant Award***).[1] That claim sought to extend the reduction in Sunday penalty rates for certain casual employees, made by the Full Bench of the Fair Work Commission (the **Commission**) in the *Transitional Review* [2014] FWCFB 1996 (***2014 Transitional Decision***),[2] to all casual and permanent employees. United Voice opposed the RCI claim.

2. RCI prosecuted its claim throughout 2015 and 2016. RCI appeared during the hearings before the five-member Full Bench of the Commission in September, October, November and December 2015, and during final submissions in April 2016. RCI called evidence from lay witnesses, survey evidence, and common material, and relied on expert evidence called by other parties regarding labour economics, worker preferences, and the industry profile. Throughout 2016 and early 2017, RCI responded to the additional research and statistical data published by the Commission.

3. The decision in *Four Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (***Penalty Rates Decision***) was handed down on 23 February 2017. The Commission determined, amongst other matters, that RCI had failed to make out a merit case in support of

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1 See https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014267-sub-rci-041214.pdf

2 The transitional review Full Bench ordered that Sunday penalty rates for casual employees at Introductory, Level 1 and Level 2, be reduced from 175 per cent to 150 per cent. Sunday penalty rates for casual employees at Levels 3 to 6 were unchanged and remain at 175 per cent. Sunday penalty rates for permanent employees (at 150 per cent of the weekday rate) were also unchanged.

its application that Sunday penalty rates be reduced for employees employed under the *Restaurant Award*.

4. The RCI now seeks to re-hear the claim it commenced in December 2014. The claim is also similar to the claims it made in the Transitional Review. The RCI relies on a submissions filed on 29 September 2017 in support of its assertion that this further claim will be an improvement on the claim it ran and lost between 2015 and 2017. However, the submissions fail to identify the nature and scope of the evidence and material it proposes to rely on, and fail to address the considerable fairness and procedural challenges identified by United Voice in its submissions dated 24 March 2017.

5. Whilst the Commission's power to conduct the four yearly review is broad, it must operate within the subject-matter, scope and purpose of the *Fair Work Act 2009* (Cth) (**FW Act**).[3] Further, the Commission is required to exercise its powers in a manner that is, relevantly, fair, just, and quick,[4] and must take into account equity, good conscience, and the merits of any matter before it.[5]

6. The attempt by RCI to re-hear the penalty rates four yearly review to allow it to try to better the case it ran over the last two years and lost before a five-member Full Bench of the Commission will be expensive for the parties, involve a considerable use of the resources of the tribunal, and cannot be conducted in a manner that is fair to United Voice. Further, based on the submission filed by RCI on 29 September 2017, the Commission cannot be satisfied that RCI will address the deficiencies in its original case.

7. United Voice contends that the Commission should not permit RCI to re-hear the penalty rates case and should determine that the 2014 penalty rates review of the *Restaurant Award* is complete. These submissions, in support of that contention, are arranged as follows:

   (a) **Part B** sets out the conduct and conclusions of the 2014 review insofar as they relate to RCI. This is intended to provide the Commission with an understanding of the opportunities already afforded to RCI in the 2014 review;

   (b) **Part C** sets out the evidence proposed to be called by RCI in any re-hearing of the review and assesses that proposed evidence against the evidence, and conclusions about the

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3 *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 [106] (Hayne and Heydon JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [23] (French CJ).

4 FW Act, s 577(a), (b).

5 FW Act, s 578(b).

evidence, already led by RCI. This is intended to support the submission that the Commission cannot be satisfied that RCI's proposed case justifies the re-hearing of the review; and

(c) **Part D** sets out the relevant parts of the statutory scheme for modern award reviews and why that scheme:

(i) demonstrates that the Commission's discretion should be exercised against permitting RCI to re-hear the review; and

(ii) demonstrates how the requirements for fairness, justice, quickness, equity and the merits of the matter do not support RCI being permitted to re-hear the review;

(d) **Part E** sets out the conclusion based on the matters above and provides a draft order consistent with United Voice's submissions that the Commission should determine that the 2014 penalty rates review of the *Restaurant Award* is complete.

B. THE CONDUCT AND CONCLUSIONS OF THE PENALTY RATES CASE

The established standard of evidence required

8. The first four yearly review of modern awards was scheduled to commence on 1 January 2014. The Commission first heard and determined the jurisdictional scope of the four yearly review in *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdictional Decision***). The Full Bench of the Commission held that, relevantly, where a *significant change is proposed* by a party in the four yearly review:

> *… it must be 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.*[6]

9. Further:

> *…a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation… where a significant change is proposed it must be supported by a submission which addresses the relevant legislative*

6 *Preliminary Jurisdictional Decision*, [23].

> *provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*.[7]

10. In *Re Security Services Industry Award 2010* [2015] FWCFB 620, the Full Bench held:

> *... In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change*.[8]

The process adopted and opportunities afforded to RCI

11. Penalty rates were identified as a significant issue at an early stage of the four yearly review. Following the determination of a number of preliminary administrative matters, in December 2014, RCI filed submissions outlining the case it proposed to make. In February 2015, RCI filed a draft determination seeking reductions to Sunday penalty rates in the *Restaurant Award* for permanent staff from 150 per cent to 125 per cent, and for casual staff at Levels 3 to 6 from 175 per cent to 150 per cent, to bring the Sunday rate for casual staff down in line with the rates reduced by the Full Bench in the *2014 Transitional Decision*. Although RCI did not seek to reduce Saturday penalty rates, the effect of its proposed reductions to Sunday rates would have meant that Saturday and Sunday penalty rates were equalised, i.e., 125 per cent on weekends for permanent staff and 150 per cent for all casual staff.

12. Following the filing of draft determinations in February 2015, the parties took the following steps in preparation for the hearing in September 2015:

    (a) RCI was directed to file a list of expert witnesses to be called, and an outline of submissions and findings that it submitted the Commission should make based on the expert evidence to be called. RCI did not call evidence from any expert witness, although it indicated an intention to rely on expert evidence called by other employer parties. United Voice also filed a list of expert witnesses and associated material, in part directed to the expert evidence that RCI sought to rely upon.

    (b) RCI was directed to file an outline of any survey evidence to be relied on including information relevant to the conduct of the survey. RCI filed a document stating it would rely on four surveys.

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7 *Preliminary Jurisdictional Issues*, [60].

8 At [8] (Watson VP, Kovacic DP, Roe C).

(c) RCI was directed to file expert evidence and common material. As stated above, RCI did not call any expert evidence. RCI tendered a number of documents marked as common material.

(d) RCI was directed to file lay evidence and an outline of submissions and findings that it submitted the Commission should make based on the lay evidence to be called. RCI filed lay witness statements from Mr Hart, Mr Parker, and Ms Warren, and 10 restaurant operators. United Voice filed witness statements from workers employed under the *Restaurant Award*.

13. The Commission heard evidence on 8–25 September, 1 October, 4–6 November, and 15, 16 and 21 December 2015. There were in total 143 lay and expert witnesses of whom 128 were required for cross-examination. Together with the submissions and evidence of the principal parties, there were some 5,845 public contributions and 36 submissions from other organisations.[9]

14. At the conclusion of the hearings, RCI filed final written submissions on 3 February 2016, United Voice filed final written submissions on 21 March 2016, and RCI filed reply submissions on 4 April 2016. Additionally, all parties were invited to address the Commission's own research material, additional relevant research identified by the Commission's research staff, and the 5,845 contributions from members of the public. The Full Bench heard final oral submissions over five days in April 2016.

15. Approximately two years after RCI filed its draft determination, and after the conduct of the proceedings outlined above, the Full Bench published its *Penalty Rates Decision*, and found that RCI had failed to make out a merit case in support of its claim to vary the Sunday rate in the Restaurants Award.. In respect of the RCI's claim, the Full Bench held, relevantly:

> *[1155] As to the claims in respect of the Sunday penalty rate, on the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, RCI has not established a merit case sufficient to warrant the granting of the claim.*
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> *[1156] If these were simply inter partes proceedings we would dismiss the RCI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.*
>
> *[1157] We propose to provide RCI (and any other interested party) with a further opportunity to seek to establish that the weekend penalty rates in the Restaurant Award do not provide a 'fair and relevant minimum safety net'. In the event that a party wishes*

[9] See *Penalty Rates Decision*, [23]–[33].

to take up this opportunity, it will need to address the deficiencies in the case put to date, as set out above. In particular, any such case will need to:

- *provide material which would enable us to assess the impact of the variations proposed (see [1151]);*
- *provide evidence as to the effects (in terms of employment and service levels of the reductions in Sunday penalty rates consequent on the Restaurants 2014 Penalty Rates decision (see [1152]–[1153]);*
- *provide a cogent argument as to why we should depart from the Restaurants 2014 Penalty Rates decision in respect of Sunday penalty rates; and*
- *address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.*

[1158] In relation to the provision of additional evidence as to the effects of the 2014 reduction in Sunday penalty rates, we are not suggesting that quantitative evidence (or 'natural experiment' evidence) as to the impact of these changes is required. However we do expect significantly more extensive lay evidence as to this issue than was presented in these proceedings.

[1159] In relation to the last point, in the event that we were persuaded to depart from the Transitional Review Full Bench decision we put any applicants on notice that the outcome of any further proceedings may result in the acceptance of the Productivity Commission submission such that Sunday penalty rates are varied so that all casuals receive both the Sunday penalty rate applicable to full-time and part-time employees and the casual loading.

[1160] We deal with the future conduct of this aspect of these proceedings in Chapter 12, Next Steps.

16. The course described by the Commission at [1157] is subject to the Commission's satisfaction of the evidentiary matters set out in that paragraph. The course described at [1157] must also be subject to the scheme and provisions of the FW Act.

17. The need for RCI to address the *2014 Transitional Decision* (identified at [1157] above) in its conduct of the penalty rates case was obvious from the outset. In the *Preliminary Jurisdictional Decision,* the Full Bench held:

> *In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so*.[10]

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10 *Preliminary Jurisdictional Decision*, [27].

18. This failure of RCI to address the *2014 Transitional Decision* was raised during the course of evidence by United Voice, and was the subject of sustained criticism in final submissions,[11] but the importance of evidence of this nature was clear to RCI from as early as 2013.

19. In the first instance decision in the transitional review, Gooley DP noted the absence of any empirical evidence called by the Restaurant and Catering Association of Victoria (**RCAV**) of the effect on employment, if any, attributable to cuts to penalty rates.[12] Although Gooley DP's decision was overturned by the Full Bench in the 2014 Transitional Decision, the Full Bench endorsed Gooley DP's comments about the failure of Professor Lewis (called by the RCAV) to supply evidence supporting his theory that reductions to penalty rates will increase employment, and added:

> *There are clear examples in the history of industrial regulation of the restaurant industry in which weekend penalty rates have been abolished or reduced, but no evidence was forthcoming to demonstrate that this had discernibly positive effects in terms of turnover and employment. The Deputy President, correctly in our view, pointed to the period 2006 to 2010 in Victoria when restaurant operators not bound by the then-applicable federal award were not required to pay any penalty rates at all as providing an opportunity to test empirically what the business and employment effects of a removal of penalty rates would be. However, no evidence was called at first instance from any restaurant operator in Victoria, and the evidence did not otherwise touch upon this period. There was another historical opportunity which we can identify. Prior to the Work Choices period commencing in 2006, restaurants in New South Wales were largely regulated by an award of the Industrial Relations Commission of New South Wales, the Restaurant &c., Employees (State) Award. In 1996, the NSW Commission (Marks J) heard and determined various applications, including an application from the Restaurant and Catering Association of NSW and other employers, in respect of that award. The employers' application sought amongst other things a reduction in weekly penalty rates. In the Commission's decision issued on 23 August 1996, it was determined that the Saturday penalty rate should be reduced from 50% to 25% and the Sunday penalty rate reduced from 75% to 50% (with casual employees receiving casual loadings in addition). On the employers' case presented before the Deputy President, that change should have increased turnover and employment in the NSW restaurant industry. But there was no evidence that was actually the case.*[13]

20. It is difficult to conceive of any circumstances in which RCI could have had *more* notice that evidence of the effect of penalty rates cuts was highly relevant to an application of this nature. The issue was clear to RCI well before the four yearly review and they chose not to deal with it. The RCI has now informed the Commission and United Voice that the reason for its failure to tender any evidence – even lay evidence – about the impact of the cuts to penalty rates

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11 See United Voice final submissions in AM2014/305 dated 21 March 2016, [188]–[197].

12 [2013] FWC 7840, [235]–[238].

13 [2014] FWCFB 1996, [118] (citations omitted).

made in the transitional review was that there was not sufficient time between the commencement of the rate cuts on 1 July 2014 and the filing of the employer evidence in the four yearly review on 29 June and 10 August 2015.[14] This explanation was not raised during the hearing in 2015, in final submissions in 2016, or following the publication of the *Penalty Rates Decision* in February 2017. It emerged for the first time in response to United Voice's objection to this proposed course of action.

21. The RCI was provided with every opportunity to prepare, present and run its case. Those opportunities support a conclusion that the RCI should not be permitted to re-hear its application.

C. THE EVIDENCE PROPOSED TO BE CALLED BY RCI IN ANY RE-HEARING

22. RCI filed an application on 28 July 2017 to vary the *Restaurant Award* to reduce weekend penalty rates by 25 per cent on Sundays for permanent employees and for casual employees at Levels 3 to 6. On 4 August 2017, Ross J issued a Statement explaining that RCI's application had been referred to a newly constituted Full Bench (Hatcher VP, Catanzariti VP and Lee C) for hearing and determination, and allocated this new matter number (AM2017/42).

23. On 25 August 2017, the matter was listed for directions before Hatcher VP. At that hearing, counsel for RCI stated, relevantly, at PN 20:

> *The primary submission is that the Commission has not fully exercised its jurisdiction in regard to whether the award meets the modern awards objective and we seek to fully prosecute that to ensure the Commission has available* ***all of the evidence*** *to properly ensure that the award meets the modern award objective. (*Emphasis added*).*

24. It was explained to counsel for RCI in respect of the threshold issue that its submissions would need to '*articulate'* the case it intended to run. At PN 37, Hatcher VP said:

> *…your client no doubt understands that in this threshold process it will need to articulate what case it intends to run vis-á-vis the 2014 decision, because it seems to me that's the fundamental issue which the Penalty Rates Full Bench identified and which was not addressed, and you need to tell us what is the nature of the case you intend to run* ***having regard to what that decision s****aid.* (Emphasis added).

25. RCI was at all times on notice (including as part of this 'threshold process') of the concerns in respect of its case expressed by the Full Bench in the *Penalty Rates Decision*, and the matters it was required to put before this Full Bench to persuade the Commission to re-hear the claim

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[14] See RCI submissions in AM2014/305 dated 21 April 2017 at [19]–[20].

in the four yearly review.[15] Nevertheless, RCI's submissions dated 29 September 2017 are vague, lack detail, and do not address in any substantive way the matters required by the penalty rates Full Bench to be addressed. In light of the criticisms of the conduct of RCI's case in the *Penalty Rates Decision*, this Full Bench cannot be assured that RCI is able to put evidence before the Commission which will address the matters identified by the penalty rates Full Bench.

26. Further, at paragraph 2 of their submissions, RCI states that '*the variation proposed is to reduce Sunday rates for casuals employed under the Restaurant Award in levels 3 to 6*.' The submissions are then directed to the impact of the proposed variation on employment, service levels, et cetera, as a result of cuts to '*the lower grades'* [of casual employees], and the unfairness of distinguishing between career employees and transient employees for the purposes of assessing the appropriate weekend penalty rate. There is no reference to any evidence or arguments concerning the RCI's proposed cuts to Sunday penalty rates for permanent employees. Accordingly, United Voice has proceeded on the basis that RCI does not intend to pursue that part of its application and, if permitted to re-hear the four yearly review, will file an amended variation in due course.[16]

Evidence proposed to be called by RCI

27. In its submissions dated 29 September 2017, RCI proposes to rely on the following material:

    (a) Expert evidence about the numbers and relevant characteristics of people employed under the *Restaurant Award*: per [3(i)–(iii)];

    (b) Expert evidence as to the impact of the proposed variations on employment, per 3[v];

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15 On 24 March 2017, RCI wrote to the Commission in matter AM2014/305 confirming its intention to press its claim and stating that … 'RCI notes that it has given careful consideration to comments made in respect of its claim in paragraphs 2047 to 2049 of the decision, and other relevant paragraphs referred to therein. *RCI intends to address the deficiencies in RCI's case to date, and satisfy the specific requirements as outlined at paragraph 2048 of the decision*.' (Emphasis added).

On 21 April 2017, RCI filed submissions in AM2014/305 stating that, among other matters, evidence of the impact of the Transitional Decision was not available at the time it prepared its evidence in the four yearly review, but that this evidence is available now, if RCI is given the opportunity to present it: at [20] of those submissions.

On 9 May 2017, RCI's counsel explained to Ross J that RCI understood that ...if the association is to be granted a further opportunity to press its claim, then the Commission has identified at paragraph 1158 [of the *Penalty Rates Decision*] that it expects significantly more extensive lay evidence as to the issue that was presented in these proceedings: at PN 29200.

16 The Application by RCI filed on 28 July 2017 seeks a 25 per cent cut to Sunday penalty rates for full and part-time employees: at [2.1], p 5.

(c) Survey evidence "of the industry and the anticipated effect of the proposed variation," per [3(v)];

(d) Lay evidence from business operators attesting to "future business and employment outcomes" from the proposed variations, per [3(iv)];

(e) Lay evidence from business owners, including via documentary evidence, regarding the effect of the *2014 Transitional Decision* on the employment arrangements of '*lower grade'* casuals, both for workers who were employed before the 2014 decision, and those who became employees after the decision, which latter category of evidence is said to be "*significant"*, per [4(i)–(iii)] and [5]; and

(f) Lay evidence from '*industry participants'* to the effect that "'*service levels rose*"' following the *2014 Transitional Decision*, per [4(iv)].

28. The '*evidence'* referred to by RCI in its submissions is unhelpfully vague. The RCI submissions as to the evidence it proposes to call present as a 'wish list' of what the case "would be" without providing any detail. Given the significant undertaking of any RCI re-hearing the submissions do not justify such a re-hearing.

29. RCI does not identify the type or identity of the experts it proposes to call. RCI does not inform the Commission or United Voice of the questions or the particular matters any experts will be asked to address, and/or how it is proposed that any experts will engage with the findings in the *Penalty Rates Decision* about these matters. RCI does not identity any expert to be relied on or provide some description of his or her qualifications (the practise that was applied in the Penalty Rates Review).

30. RCI proposes to call survey evidence without identifying whether it will seek to rely on surveys already conducted, or intends to conduct a fresh survey or surveys for the purposes of this hearing. This is a critical matter given the findings of the Full Bench in the *Penalty Rates Decision*.

31. Whilst it may not be necessary for RCI to identify by name the lay witnesses it proposes to call, given the comments of the Full Bench about the paucity of the lay evidence called by RCI, and the need for '*significantly more extensive lay evidence'* in any further hearing,[17] it is remarkable that there is no material before the Commission about the number of lay witnesses proposed to be called, the size and locations of their businesses, the length of time that the

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17 *Penalty Rates Decision*, [1158].

businesses have been in operation, the approximate number of employees, or even if such businesses are covered by the *Restaurant Award*.

32. The vague and general assertions of RCI do not allow the Commission to assess, with any confidence, that if a re-hearing is permitted, the re-hearing will be a proper exercise of its statutory powers.

33. During the hearing in 2015, RCI called evidence from five lay witnesses, and relied on certain survey evidence. It also relied on expert evidence called by other parties concerning labour economics and the demographic profile of employees in the restaurant industry. The Full Bench was highly critical in the *Penalty Rates Decision* of RCI's evidentiary case.[18] The submissions of RCI filed in this matter must be read in that context. The proposed evidence should be assessed, as best as it can be given its vagueness, against the findings in the *Penalty Rates Decision* about the evidence already provided by RCI.

Relevant findings about the RCI evidence in the *Penalty Rates Decision*

Lay evidence

34. RCI filed 10 lay witness statements in advance of the hearing, but only made five of those witnesses available for cross-examination. The penalty rates Full Bench found that the RCI lay witness evidence was '*of limited assistance'*.[19] Of the five witnesses ultimately called by RCI, two out of five were unaware of the reduction to penalty rates for level 1 and 2 casuals;[20] none of the RCI witnesses suggested that there was any positive employment effect as a consequence of the previous reduction;[21] and there was a '*paucity of evidence'* about the likely impact on employment and service levels as a result of the cuts proposed by RCI.[22] The Full Bench noted that the limited lay evidence before it suggested the benefits of the variation proposed by RCI would be modest, '*yet the detriment to the employees affected would be significant'*.[23] This finding reinforces the necessity for RCI to mount a significant and persuasive evidentiary case in support of its proposal for cuts to Sunday penalty rates, a necessity which has not been addressed or considered by the RCI in its submissions of 29 September 2017.

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18 *Penalty Rates Decision*, [1010]–[1160].

19 *Penalty Rates Decision*, [1142].

20 *Penalty Rates Decision*, [1032], [1034], [1046]–[1047].

21 *Penalty Rates Decision*, [1039], [1052], [1056], and [1061].

22 *Penalty Rates Decision*, [1062].

23 *Penalty Rates Decision*, [1151].

Demographic evidence

35. In the four yearly review, RCI sought to rely on Professor Lewis, an economist called as an expert witness by Australian Business Industrial (**ABI**), to give evidence about (amongst other matters) the labour force characteristics and industry profile of the restaurant and café sector. Professor Lewis relied on Australian Bureau of Statistics (**ABS**) *Australian Industry* data.

36. The Commission published several versions of '*industry profile*' research collated and analysed by Commission research staff. The Full Bench held that '*the ABS data of direct relevance to the cafes and restaurants industry class is quite limited'*,[24] with only the 2011 Census data containing all of the employment characteristics for the sector.[25]

37. RCI has not identified in its submissions (a) the data sources from which it proposes to draw this information, including whether it has access to 2016 Census data; (b) the type of expert it proposes to call to explain the data (i.e., a statistician, a demographer, an economist?); or (c) how it intends to address the limitations in the data identified by the Full Bench in the *Penalty Rates Decision*. This Full Bench cannot be confident that RCI has considered these matters and will be in a position to put probative and reliable evidence before the Commission in any re-hearing.

Evidence of the employment effect

38. RCI did not call any expert evidence during the penalty rates case. It relied on the expert evidence of Professor Lewis, called by ABI, in support of its proposition that cutting penalty rates would increase employment in the sector. RCI had previously called evidence from Professor Lewis in the Transitional Review, and a significant number of paragraphs from his report in the Transitional Review were replicated in his evidence to the penalty rates Full Bench. United Voice called evidence from Professor Jeff Borland and Professor John Quiggin.

39. The Full Bench found that a number of assumptions made by Professor Lewis in his report had the effect of overstating any employment effect from cuts to wages.[26] Further, in its review of the evidence filed in the penalty rates case, the Productivity Commission reviewed the evidence of Professors Lewis, Borland, and Quiggin, and found that '*Borland and Quiggin correctly identified several deficiencies in Lewis* evidence *for policy change, and so*

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24 *Penalty Rates Decision*, [1018].

25 *Penalty Rates Decision*, [1020] and see Table 41 at page 230.

26 See *Penalty Rates Decision*, [670]–[690], and especially [674], and [680].

does the Productivity Commission'.[27] These criticisms were similar to the criticisms made of Professor Lewis' modelling in the *2014 Transitional Decision*, in which the Full Bench noted that:

> *The Commission and its predecessors have consistently rejected the proposition that labour market modelling of the type engaged in by Professor Lewis in his report based upon specific elasticities for the demand for labour are capable of providing a reliable guide as to the way in which changes to minimum wages and conditions actually affect employment levels in particular industries or the economy generally*.[28]

40. The Commission found that the lay evidence relied on by various employer organisations in the four yearly review '*cast some doubt on the proposition that a reduction in weekend penalty rates will have a positive impact on employment*.'[29] The Commission ultimately held that reducing penalty rates *may* have a *modest* positive effect on employment although '*it is difficult to quantify the precise effect*', and '*any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects*.'[30]

41. Further, the impact of small changes to wages on levels of employment is considered each year by the Expert Panel conducting the *Annual Wage Review*, with the Panel regularly finding that '*modest and regular increased in minimum wages have a small or even zero impact on employment*'.[31]

42. The nexus, if any, between small adjustments to wages and employment is by no means a straightforward matter, and it is an issue that the Commission is regularly required to assess by reference to detailed national and international labour market research and data. The findings on this issue oblige RCI to clearly identify and explain the expert evidence it proposes to call in support of its hypothesis that cuts to penalty rates for workers in the restaurant and café industry will have a net positive employment effect.

Other expert evidence

43. RCI has not identified if it intends to call evidence from the types of experts who gave evidence in the penalty rates case about employee choices and preferences (addressed by Professor Rose and Ms Pezzullo for the employer parties, and Professor Altman and Dr

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27 PC Report, 490 and see n 160.

28 [2014] FWCFB 1996, [104] et seq, especially [111].

29 *Penalty Rates Decision*, [681] and see [682].

30 *Penalty Rates Decision*, [688], [689]. Emphasis added.

31 *Annual Wage Review 2015–2016* [2016] FWCFB 3500, [492], cited in *Penalty Rates Decision*, [685], and see confirmation of this finding in *Annual Wage Review 2016–2017* [2017] FWCFB 3500, [542].

Muurlink for the unions). This evidence may fall within the scope of the expert evidence to be called by RCI regarding '*the impact of the proposed variation on employment*',[32] because it is relevant to questions of labour supply.

44. Further, RCI has not addressed what evidence it will call in support of its foreshadowed argument that there is no longer any difference between Saturday work and Sunday work.[33] During the hearing of the penalty rates case, numerous expert witnesses gave evidence about the changing nature of weekend work and the activities and purpose of weekends, including Professor Lewis, Professor Rose, and Ms Pezzullo for the employer parties, and Professor Borland, Professor Altman, Professor Markey, Ms Bartley, Dr Muurlink, Professor Charlesworth, and Dr Watson and Professor Peetz for the unions.[34] The Commission also published research papers, and considered the findings of the Productivity Commission, on this subject. In the *Penalty Rates Decision*, the Full Bench found that differences between Saturday and Sunday were and remained significant. Working on Saturdays is still more common than working on Sundays,[35] and '*while the differences between Saturdays and Sundays have converged over time, there remain significant differences in the activities performed on those days', and therefore 'the nature and role of Sundays…makes it a day that remains unique to Saturdays'.*[36] *Further, expert evidence called by the employer parties confirmed 'the relative disutility of weekend work of Sundays compared to Saturdays*'.[37]

45. While RCI proposes to argue that there is no longer, since the *2014 Transitional Decision*, any relevant difference between Saturdays and Sundays, it has failed to address the fact that the Full Bench determined in the *Penalty Rates Decision* that as at February 2017, the differences remain and are significant. The RCI's vague and unsupported submission that '*the position has changed since 2014 to 2017*' completely ignores the February 2017 findings of the Commission.

46. For the reasons set out below from paragraph 64, it will be necessary for this newly constituted Full Bench to conduct its own hearing of the relevant evidence. Accordingly, it is vital that RCI properly identify and explain the expert evidence it proposes to call at the hearing.

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32 RCI submissions dated 29 September 2017, [5(v)].

33 RCI submissions dated 29 September 2017, [6(ii)(c)].

34 See *Penalty Rates Decision*, [467]–[507] and [508]–[610].

35 *Penalty Rates Decision*, [503].

36 *Penalty Rates Decision*, [507].

37 *Penalty Rates Decision*, [563], [600].

Survey evidence

47. RCI sought to rely on three industry surveys at the hearing. Each survey was found to have significant deficiencies or be seriously flawed.

48. The first survey was conducted by Elections Australia and tendered through John Hart, then CEO of the Restaurant and Catering Association (**RCA**). RCI conceded at the hearing that it provided no information about the approach and methodology relating to the survey, and that for this reason its probative value was reduced.[38] The Full Bench found that Elections Australia survey was '*so flawed that it [was] of no assistance*'.[39]

49. The second survey was conducted by Jetty Research, and tendered through its managing director, James Parker. Among other matters, the Jetty Research survey asked participants questions about '*cuts to weekend penalty rates'* without specifying the magnitude of any cuts to penalty rates, or distinguishing between Saturday and Sunday rates.[40] The Full Bench found that the survey had '*a number of significant deficiencies when considered in the light of the proposals being advanced by the RCI in this Review*',[41] and '*expressly reject*[ed] *the proposition advanced by RCI that the results of the Jetty Survey can be extrapolated to all businesses covered by the Restaurants Award and that an estimate can be made of the aggregate employment effect of reducing penalty rates.*'[42]

50. The third survey was conducted by RCA of its members in 2014, and called the Benchmarking Survey. It was tendered through Carlita Warren, the Policy and Public Affairs Director of the RCA. The Benchmarking Survey is or was conducted annually by the RCA and had been relied on by it in the Annual Wage Review in 2012, 2013, and 2014. The Expert Panel conducting the Annual Wage Review has regularly found that small, self-selected member surveys conducted by employer organisations such as the Benchmarking Survey are of little probative value and that their findings cannot be relied on for any conclusions about the aggregate effects of changes to wages from an industry or economy wide perspective.[43] The 2011 Benchmarking Survey was relied on by RCI in the transitional review of modern awards, and was subject to criticism by the Full Bench in the *2014 Transitional Decision*.[44]

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38 *Penalty Rates Decision*, [1066].

39 *Penalty Rates Decision*, [1069].

40 See *Penalty Rates Decision*, [1081], [1083]–[1084].

41 *Penalty Rates Decision*, [1081].

42 *Penalty Rates Decision*, [1098].

43 See United Voice submissions in AM2014/305 dated 21 March 2016, [229]–[231].

44 *2014 Transitional Decision*, [113], cited in *Penalty Rates Decision*, [1087]–[1089].

The Full Bench found that the 2014 Benchmarking Survey had '*a number of significant deficiencies.*'[45]

51. The RCI has not explained how it proposes to deal with the criticisms made of its survey evidence by the Commission in the *Penalty Rates Decision.* Indeed, it does not appear (by its earlier submission of 21 April 2017) to have accepted the criticisms. The Commission cannot be satisfied on the RCI submission of 29 September 2017 that that any further survey material sought to be tendered by it will justify the re-hearing of the 2014 review.

Conclusion on RCI proposed evidence

52. The deficiencies and inadequacies of the RCI evidence set out above emphasises the need for RCI to properly articulate how its proposed evidence in any re-hearing will overcome these deficiencies and inadequacies. Indeed, that appears to be the premise of the course proposed by the Commission at [1157] of the *Penalty Rates Decision* (and set out above). Absent that explanation, the Commission should exercise its discretion against the re-hearing of the review.

D. THE STATUTORY FRAMEWORK OF THE FOUR YEARLY REVIEW

The statutory framework is against permitting RCI to re-hear the review

53. The Commission is required to conduct a four yearly review of modern awards, pursuant s 156(1) of the FW Act. In the review, the Commission must review all modern awards, and may vary, make, or revoke modern awards, pursuant to s 156(2)(b) of the FW Act.

54. The Commission has broad discretionary control over the conduct of a four yearly review.[46] The breadth of the review is reflected in the natural and ordinary meaning of '*review'*, which is to '*survey, inspect, re-examine or look back upon*.'[47] The powers to vary, make, or revoke modern awards are '*not expressed to be conditional on the FWC having reached any state of satisfaction'* either in the conduct of the review or otherwise.[48]

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45 *Penalty Rates Decision*, [1090].

46 *Shop, Distributive and Allied Employees Association v the Australian Industry Group* [2017] FCAFC 161 (***SDA v AIG***), [8], [28].

47 Per the Macquarie Concise Dictionary, 3rd ed, and cited with approval by the Full Court of the Federal Court in *SDA v AIG*, [25], [38].

48 *SDA v AIG*, [29].

55. However, the Commission's powers in conducting the four yearly review are not without limits. There is no such thing in Australian law as an '*unbridled discretion*'.[49] Every statutory power is limited by the '*subject-matter, scope and purpose of the Act*'.[50] For that reason, even discretionary powers can be reviewed for legal unreasonableness.[51]

56. The reasons why the statutory framework supports the Commission refusing to exercise its discretion to permit RCI to re-hear the review are as follows.

57. First, the Commission is required to conduct a four yearly review of modern awards starting as soon as practicable after the commencement of Part 2-3 of the FW Act.[52] The first four yearly review started on 1 January 2014. In *Shop, Distributive and Allied Employees Association v the Australian Industry Group* [2017] FCAFC 161, the Full Court of the Federal Court held that it was apparent from the words of s 156 of the FW Act that the next four yearly review is '*required to start as soon as reasonably practicable after each fourth anniversary of the commencement of Part 2-3 of Chapter 2 of the FW Act*'.[53] On this basis, the next four yearly review will commence on 1 January 2018.

58. Although there may be nothing in the express words of the FW Act that requires the present four yearly review to be concluded before the commencement of the next review, in the absence of any express provision, it is implied that the review ought to be completed within a reasonable time: see, e.g., *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* (1992) 39 FCR 225. It is unreasonable for the Commission to re-hear this four yearly review, given that the next one is to commence shortly. The imminent commencement of the 2018 review is another reason why the Commission should not exercise its discretion to permit RCI to re-hear the review.

59. Secondly, if a provision of a modern award is positively out of step with the modern awards objective, an application may be made under s 157 of the FW Act.[54] Section 157 is an alternative remedy under the scheme in the Act. The existence of such an alternative is another reason why the Commission should not exercise its discretion to permit RCI to re-hear the review.

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49 *Wotton v Queensland* (2012) 246 CLR 1, [10].

50 *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).

51 See generally *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1.

52 FW Act s 156(1).

53 *SDA v AIG*, [27].

54 See further paragraph 80 below.

60. Thirdly, for the reasons set out in these submissions concerning the history of the penalty rates case and the many steps taken so far in the four yearly review, it would be an unreasonable exercise of the Commission's discretion to permit RCI to re-hear its claim.

Fairness, justice, efficiency, equity, good conscience and the merits of the matter do not support a re-hearing of the review

61. In considering RCI's application to re-hear its claim for cuts to weekend penalty rates, the Commission must act in a manner consistent with the statutory imperatives in ss 577 and 578 of the FW Act. Those sections provide:

> ***577 Performance of functions etc. by the FWC***
>
> *The FWC must perform its functions and exercise its powers in a manner that:*
>
> *(a) is fair and just; and*
>
> *(b) is quick, informal and avoids unnecessary technicalities; and*
>
> *(c) is open and transparent; and*
>
> *(d) promotes harmonious and cooperative workplace relations.*
>
> ***578 Matters the FWC must take into account in performing functions etc.***
>
> *In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:*
>
> *(a) the objects of this Act, and any objects of the part of this Act; and*
>
> *(b) equity, good conscience and the merits of the matter; and*
>
> *(c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

62. The relevant sections for the purposes of this matter are s 577(a) and (b), and s 578(b).

The Commission's obligation to perform its functions quickly

63. The Commission is required to ('*must*') perform its functions and exercise its powers in a manner that is (a) '*fair and just'*; and (b) is '*quick*'. As to the latter, there is no controversy that despite the best efforts of the parties, it has taken over two and a half years to conduct the penalty rates case, from the end of 2014 to the middle of 2017. Because the RCI has not provided any estimates of the number of witnesses it proposes to call, it is difficult to estimate

the time for any hearing, but United Voice assumes that RCI will call *at least* ten lay witnesses (because it sought to do so at the previous hearing), plus at least two expert witnesses and survey evidence. There is then the necessity for evidence from United Voice and any reply evidence. There is then written submissions before and after the hearing, and final oral submissions. It is reasonable to assume the hearing will occupy several weeks. Taking into account the time necessary to prepare and respond to the evidence, it is not unreasonable to suppose that the matter may not be complete until well into the second half of 2018, well after the commencement of the next four yearly review, and nearly five years since the commencement of this four yearly review.

64. There is a further very significant consideration relevant to this issue. Matter AM2017/42 has been created to hear and determine this threshold issue and then, if the threshold issue is determined against United Voice, to hear the RCI's application. The creation of a separate and newly constituted Full Bench means that the four yearly review concerning weekend penalty rates in the *Restaurants Award* (i.e. matter AM2014/305), is not '*continuing'* in a way that would enable this Full Bench to simply add any additional evidence to the previous findings in the *Penalty Rates Decision*. This Full Bench must hear and evaluate the evidence before it. It cannot simply adopt the findings of the evidence by a differently constituted Full Bench. To do so would mean that it has not properly observed, heard and balanced the competing evidence. Rather this Full Bench will have heard only part of the evidence. It is a new and separately constituted panel and must *itself* assess all of the evidence relevant to its decision-making process. Taking into account the scale of the hearing and consideration by the Full Bench in AM2014/305, this task will be significant and compromises any ability to hear the matter 'quickly'.

The Commission's obligation to perform its functions fairly and justly taking into account equity and the merits of the matter

65. The Commission is required to exercise its powers in a manner that is '*fair and just*', and that takes into account '*equity, good conscience and the merits of the matter*'. The following matters are relevant to a consideration of whether these mandatory factors are met by permitting RCI to re-hear the review.

66. First, RCI has already tried and failed to make out its case. It is not entitled to any presumption that it has a better case to make.

67. Second, United Voice mounted a sustained and detailed defence of the RCI's case. This defence was successful. This was acknowledged by the Full Bench in the *Penalty Rates*

Decision, where it stated that if the proceedings were simply *inter partes* proceedings, it would dismiss the RCI claim.[55] RCI was a moving party in the four yearly review and in that sense, bore the evidentiary burden of persuading the Full Bench that the *Restaurant Award* was not meeting the modern awards objective. It failed to do so. By permitting RCI to adduce further and better evidence, this approach effectively allows RCI to run a rebuttal of United Voice's defence. This is neither fair nor just.

68. Third, although RCI's claim was made in the context of a statutory review that does not mean that all principles applicable to *inter partes* proceedings are irrelevant to the review. As the Commission stated during the hearing, RCI was the '*proponent of a change'* and a moving party in the review.[56] Further the opportunity the Commission has presented to RCI is the ability to re-hear specific claims. This is quite distinct from the Commission of its own accord conducting a further more general review. Such an invitation to a party to a proceeding could in some circumstances create an apprehension of bias.

69. That RCI was the proponent of change and a moving party is consistent with the following matters:

(a) The comments of the Full Bench in the *Preliminary Jurisdictional Decision* that a party proposing a '*significant change*' must support the proposal with a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[57]

(b) The requirement that an applicant for a variation is supported by probative evidence, submissions addressing the law, and sound and balanced reasoning, relevantly demonstrates the *inter partes* aspects of this proceeding. The statement in the *Preliminary Jurisdictional Decision* otherwise has no purpose;

(c) The conduct of the hearing, including all preliminary steps and the hearing itself, preceded in a manner consistent with *inter partes* proceedings, whilst in the context of the statutory review. The employer parties, including RCI, brought applications for variation, which were opposed by United Voice. The parties filed and served their evidence and submissions. Evidentiary objections were taken by the parties and ruled

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55 *Penalty Rates Decision*, [1156].

56 See the transcript extracted in United Voice's submissions dated 24 March 2017 in AM2014/305, [38].

57 *Preliminary Jurisdictional Decision*, [23], [60]. See also *4 Yearly Review of Modern Awards – Security Services Industry Award 2010* [2015] FWCFB 620, [8].

upon. Witnesses provided evidence in chief and were cross-examined. Submissions were made by all parties. The Commission determined to conduct this review with many of the key attributes of an *inter partes* proceedings.

In this way, it is fair and just that RCI not be provided with an opportunity to re-hear its case. Clearly, such a course would not be permitted in *inter partes* proceedings.

70. Fourth, Courts have repeatedly confirmed that their powers are limited by the general principle of the finality of litigation. In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 the majority (of Gleeson CJ, Gummow, Hayne and Heydon JJ) stated at [34]: '*A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances*.' Whilst the tenet does not have strict application in the Commission, the underlying principles are applicable, protecting parties involved in proceedings and statutory reviews from:

(a) having the same matters, as previously determined, from being raised against them a second time;

(b) having matters later raised against them that could and should have been raised early;

(c) having determined controversies reopened and traversing settled findings of fact.

71. The general systemic interest in finality informs abuse of process principles, which the High Court has held '*may be invoked to prevent attempts to litigate that which should have been litigated in earlier proceedings as well as attempts to re-litigate that which has already been determined.*'[58]

72. For the reasons set out above at paragraphs 11-19 and surrounding, RCI was on notice as to the standards of evidence required and the relevance of the *2014 Transitional Decision* to this four yearly review. It should not now be rewarded by its failure, particularly where the consequences of doing so will be unfair on United Voice, who will be forced to devote considerable resources to defending the case again. Notice can be taken of the considerable expense involved in this proceeding. United Voice engaged two counsel throughout the many days of hearing and during the preparation of the matter.

73. Sections 577 and 578 are intended to ensure fairness and equity. The principle of the finality of proceedings is entirely consistent with the requirements of sections 577 and 578.

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58 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, [33].

74. Fifth, the principles applicable when a party to litigation seeks leave to reopen its case are instructive. In *Break Fast Investments v Gravity Ventures [No 1]* [2015] VSC 497, Judd J quoted with approval the following passage from *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [24]:

> *The authorities indicate that, broadly speaking, there are four recognised classes of case in which a court may grant leave to re-open, although these classes overlap and are not exhaustive. These four classes are (1) fresh evidence … (2) inadvertent error … (3) mistaken apprehension of the facts … and (4) mistaken apprehension of the law … In every case the overriding principle to be applied is whether the interests of justice are better served by allowing or rejecting the application for leave to re-open …*

75. None of those classes have application in the present circumstances. The RCI do not point to any of those matters in support of its application for re-hearing. Rather it seeks a re-hearing so as to attempt to improve its failed case. Application, by analogy, of the above principles does not support any reopening of RCI's case.

76. Sixth, the '*status'* of the *Penalty Rates Decision* in relation to this application is uncertain. In the *Preliminary Jurisdictional Decision*, the Full Bench held that in conducting a review, it is appropriate that the Commission take into account previous decisions relevant to any contested issue, and that previous Full Bench decisions should generally be followed in the absence of cogent reasons for not doing so.[59] The *Penalty Rates Decision* is a '*previous decision relevant to a contested issue*' and a '*previous Full Bench decision*'. Although United Voice will rely on the *Penalty Rates Decision* in any re-hearing by RCI, the circularity of this exercise demonstrates the futility of re-hearing their proposals for variation.

77. Further, in light of the matters at paragraph 64 above, it will not be possible 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 by a differently constituted Full Bench. Nevertheless, it is inevitable that there will be a degree of repetitiveness in any hearing, given that the express purpose of the proposed re-hearing is to invite RCI to repeat its claim, but with improvements.

78. Seventh, during the hearing, the transcript was published in confidence and only provided to the parties' representatives. The full transcript has been available online since 24 March 2016, and the *Penalty* Rates *Decision* describes the cross-examination of each lay witness called by hospitality parties, and makes findings about that evidence. The purpose of publishing the transcript in confidence until the conclusion of the evidentiary hearing was to prevent

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59 *Preliminary Jurisdictional Issues*, [27].

witnesses from being forewarned of the approach taken to cross-examination and the concessions, errors and the like made by witnesses under cross-examination.[60] Since the publication of the transcript and the *Penalty Rates Decision*, any further witnesses called by RCI – bearing in mind the express purpose of calling those witnesses is to allow RCI to *improve* its case – will be able to access the transcript and read the decision, and will have an advantage over the witnesses called by those parties in the 2015 hearings. In those circumstances United Voice will be denied the protection intended by the original order that the transcript only be published in confidence. This is manifestly unfair and not in accordance with equity or good conscience.

79. Eighth, the preparation of further evidence and the conduct of additional hearings will involve significant cost to the parties and use of the resources of the Commission. As set out above United Voice engaged two counsel throughout the many days of hearing and during the preparation of the matter. This unfair cost is aggravated by the repetitive nature of the exercise.

80. Finally, there is no public interest in allowing RCI to re-hear its case, and no unfairness to RCI in concluding the four yearly review. Should RCI wish to bring a fresh application to cut weekend penalty rates, it has options available to it other than by re-hearing the four yearly review which is fraught with the difficulties identified here.[61]

81. At all times, RCI was afforded full procedural fairness over the course of more than two years of preparation and hearing; is an experienced, well-resourced, and active participant in industrial relations proceedings before the Commission and its predecessors; and was at all times on notice as to the deficiencies in its case. The invitation to RCI to *improve* its failed claims, along with directions on precisely how to achieve that improvement, is manifestly unfair to United Voice and its members, who will be required to fund the further defence of any additional applications that may be put in these further reviews. It is not fair to United Voice to have to continue to defend the same application by RCI to reduce weekend penalty rates until the review concludes at some indeterminate point in time. Such an approach cannot be seen to be impartial, in the interests of justice or consistent with how the Act requires the Commission to perform its functions.

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60 See Transcript, 10 September 2015, PN 2531–2537.

61 For example, RCI can bring an application under s 157 of the FW Act, or in the next four yearly review scheduled to commence on 1 January 2018.

E. CONCLUSION AND DRAFT ORDER

82. In all of the circumstances set out above the Commission should determine that the 2014 penalty rates review of the *Restaurant Award* is complete. That determination is appropriate because, in summary:

(a) The RCI was, as part of the 2014 review, on notice of the necessary standard of evidence required and was afforded every opportunity to lead probative evidence in support of its application for variation;

(b) The evidence called by RCI in the 2014 was deficient and/or inadequate to support its application for variation. For any discretion to be exercised in its favour the RCI should at least (a) properly detail and describe the evidence; and (b) properly detail and describe how that evidence will overcome the deficiencies and inadequacies identified in the evidence already tendered by it. It has failed to do so;

(c) The statutory scheme does not contemplate such a re-hearing in favour of the RCI. That is especially so where the scheme provides for alternative applications to be made under s 157 or under the 2018 review;

(d) Any re-hearing would not be fair, just, quick, equitable or supported by the merits of the matter.

83. United Voice contends that the Commission should determine that the 2014 penalty rates review of the *Restaurant Award* is complete as set out in the attached draft determination.

3 November 2017

C W Dowling
K Burke
Counsel for United Voice

DRAFT DETERMINATION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards–Penalty Rates
(AM2017/42)

RESTAURANT INDUSTRY AWARD 2010

Restaurants

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
COMMISSIONER LEE

SYDNEY, 16 November 2017

Penalty rates - public holiday penalty rates - evening work.

A. Subject to those decisions of the Fair Work Commission varying the above award[62] the 2014 four yearly review – penalty rates is now complete.

VICE PRESIDENT

[62] 23 February 2017 [2017] FWCFB 1001; 17 March 2017 [2017] FWCFB 1551; 5 June 2017 [2017] FWCFB 3001 and 21 June 2017 [2017] FWCFB 3334