**IN THE FAIR WORK COMMISSION**

**Matter No:**
AM2014/197
FOUR YEARLY REVIEW OF MODERN AWARDS
CASUAL EMPLOYMENT COMMON ISSUE

**Applicant:**
UNITED VOICE

**Respondents:**
AUSTRALIAN HOTELS ASSOCIATION
ACCOMMODATION ASSOCIATION OF AUSTRALIA
CLUBS AUSTRALIA INDUSTRIAL
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION
RESTAURANT & CATERING INDUSTRIAL

## FINAL SUBMISSIONS IN REPLY TO UNITED VOICE

1. These are the final written submissions put on behalf of the Australian Hotels Association ("the AHA"), the Accommodation Association of Australia ("the AAA"), Clubs Australia Industrial ("the CAI"), the Motor Inn and Motels Accommodation Association ("the MIMAA") and Restaurant and Catering Industrial ("the RCI") (collectively "the Associations") in reply to the final submissions filed on behalf of United Voice on 19 September 2016.

2. United Voice has applied to vary the *Hospitality Industry (General) Award 2010*, the *Registered and Licensed Clubs Award 2010* and the *Restaurant Industry Award 2010* ("the three awards"), to include provisions into the three awards which introduce the concept of overtime for casual employees.

3. The Associations oppose the variations sought by United Voice.

4. In addition to these submissions, the Associations rely on their submissions filed on 24 June 2016.

**THE PROCEEDINGS - 4 YEARLY REVIEW OF MODERN AWARDS**

5. In submissions dated 24 June 2016, the Associations referred to the legislative requirements and jurisdictional issues applying to the conduct of a 4 Yearly Review of Modern Awards, and the onus that must be met by a proponent of a variation.[1]

6. There are three key matters referred to therein that warrant further emphasis.

7. *First,* in *National Retail Association v Fair Work Commission* [2014] FCAFC 118, the Full Court of the Federal Court of Australia held:

> *"[T]he purpose of the requirement to review a modern award "in its own right" is to ensure that* ***the review is conducted by reference to the particular terms and the particular operation of each particular award*** *rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations."*[2] (emphasis added)

8. *Second,* notwithstanding the designation of this matter as a common issue, different outcomes in different modern awards may be achieved. In *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 ("the Jurisdictional Issues Decision"), a Full Bench of the Commission identified:

> *"...The need to balance the competing considerations in s.134 (1) and the diversity in the characteristics of the employers and employees covered by different modern awards* ***means***

[1] Associations' Submissions, dated 24 June 2016 at [4]-[13]; [17]-[24];
[2] ([2014] FCAFC 118 at [85]);

> ***that the application of the modern awards objective may result in different outcomes between different modern awards****...there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions.* ***Different combinations or permutations of provisions may meet the modern awards objective.****"*[3] (emphasis added)

9. *Third*, in the context of the merit argument in support of a proposed variation (the extent of which will depend upon the nature of the variation sought), a Full Bench of the Fair Work Commission made the following observation:

> *[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required.* ***The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be.*** *Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found 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."*[4] (emphasis added)

10. The combined effect of these principles is that the submissions and evidence in support of a proposed variation must be probative, detailed and directly relevant to the particular term/s and the particular operation of the award(s) the subject of review. The evidentiary case should be compelling. The evidence put before the Commission in these proceedings does not meet that test.

11. This is a critical consideration, as the manner in which particular terms operate within a particular award can vary considerably with respect to the characteristics of the industry or occupations covered by the particular award.

[3] Jurisdictional Issues Decision at [33]-[34];
[4] *Re Security Services Industry Award* 2010 [2015] FWCFB 620 at [8];

## THE MODERN AWARDS OBJECTIVE

12. The modern awards objective is set out at s.134 (1) of the *Fair Work Act 2009* ("the FW Act") as follows:

> ***Section 134 The modern awards objective***
>
> *What is the modern awards objective?*
>
> *(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:*
>
> *(a) relative living standards and the needs of the low paid; and*
> *(b) the need to encourage collective bargaining; and*
> *(c) the need to promote social inclusion through increased workforce participation; and*
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
> *(da) the need to provide additional remuneration for:*
> *(i) employees working overtime; or*
> *(ii) employees working unsocial, irregular or unpredictable hours; or*
> *(iii) employees working on weekends or public holidays; or*
> *(iv) employees working shifts; and*
> *(e) the principle of equal remuneration for work of equal or comparable value; and*
> *(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
> *(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*
> *(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.*
>
> *This is the **modern awards objective**.*

13. The modern awards objective is directed at ensuring that modern awards, together with the National Employment Standards, provide a fair and minimum safety net of terms and conditions taking into account the factors set out in s.134 (1) of the FW Act.[5]

[5] Jurisdictional Issues Decision at [31];

14. As none of the matters identified in s.134 (1) of the FW Act have any particular primacy over the other, the task of the Commission is to balance those matters and ensure a fair and relevant minimum safety net of terms and conditions.[6]

15. The submission of United Voice regarding the interrelationship between the modern awards objective and s.138 of the FW Act[7] is misguided and ill conceived for the following reasons.

16. *First*, contrary to the submission of United Voice, the modern awards objective does not '*demand*' that "*additional remuneration be provided for working overtime*".[8] Rather, the modern awards objective requires the Commission to take into account or consider, the '*need*' for a modern award to provide additional remuneration for employees working, *inter alia*, overtime.

17. *Second*, s.138 of the FW Act states:

> ***SECTION 138 ACHIEVING THE MODERN AWARDS OBJECTIVE***
> *138 A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wage objective.*

18. The discretion that a modern award "*may include terms that it is permitted to include*" is directed to Subdivision B of Division 2 of Part 2-3 of the FW Act. The requirement that a modern award "*must include terms that it is required to include*" is directed to Subdivision C of Division 2 of Part 2-3 of the FW Act.

19. This is supported by the *Fair Work Bill Explanatory Memorandum* which states, "*the scope and effect of permitted and mandatory terms of a modern award must be directed*

[6] Jurisdictional Issues Decision at [32]-[33];
[7] United Voice Submissions dated 19 August 2016 at [74]-[75];
[8] United Voice Submissions dated 19 August 2016 at [74];

*at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations*."[9]

20. A term in a modern award which provides for overtime rates is a term that ***may*** be included in a modern award.[10]

21. The submission of United Voice that a term of a modern award providing for overtime rates for all or some types of employment provided for in the relevant modern award is *mandatory* or *necessary* solely by reference to the modern awards objective and s.138 of the FW Act, is a mischaracterisation of the legislative provisions and should be rejected.

22. Indeed, and contrary to the submission of United Voice, it is open to the Commission, and urged upon it, to find, that having taken into consideration and account the modern awards objective and the evidence and submissions before it, that the particular operation of the particular existing provisions in the three awards regarding the provision of overtime rates, provide a fair and relevant minimum safety net of terms and conditions.

**THE APPLICATIONS BY UNITED VOICE**

23. United Voice is seeking to include provisions into the three awards which introduce the concept of overtime for casual employees. Such overtime (to be paid at a penalty rate) is claimed in terms even more beneficial than those applicable to full-time or part-time employees in the three awards.

24. Although casual employees receive a loading of 25% as compensation for, not receiving the same entitlements of full-time and part-time employees, the rationale put for the applications is described as seeking "*to as near as possible treat casual employees in the same manner as permanent employees and avoid the situation where a casual employee doing the same work as a permanent employee is deprived of the premium paid for*

[9] *Fair Work Bill Explanatory Memorandum* at [527];
[10] FW Act at s.139 (1) (d);

*overtime while experiencing all the disability associated with the work*."[11]

25. This reasoning is fundamentally flawed, as is evident in the fact that full-time and part-time employees receive benefits such as annual leave, personal leave and other entitlements not provided to casual employees who receive the said 25% loading in lieu.

26. Notwithstanding the apparent intention to place casual employees as near as possible to the same position as permanent employees, it is noted that the applications go further than that and seek to introduce overtime entitlements that would be triggered in circumstances when they would not be triggered for full-time or part-time employees.

**CASUAL EMPLOYEES: THE RELEVANCE OF THE EXTENT OF OVERTIME ENTITLEMENTS IN MODERN AWARDS**

27. The submissions of United Voice seem to suggest that the inclusion of an overtime entitlement for casual employees in other industry or occupational awards is a sufficient basis for the introduction of such provisions in the three awards.[12]

28. In doing so, United Voice submit that "*the provision of an entitlement for casual employees to some form of overtime is commonplace*"[13] and provide a table summarising the working hours threshold/s which trigger the various entitlements.

29. However, modern awards are to be reviewed in their own right and by reference to the particular terms and the particular operation of each particular award, which is directed to *excluding* extra-award considerations.[14]

[11] Submissions of United Voice dated 29 February 2016 at [2];
[12] Submissions of United Voice dated 29 February 2016 at [37]-[52]; Submissions of United Voice dated 19 August 2016 at [18]-[19];
[13] Submissions of United Voice dated 19 August 2016 at [18];
[14] See paragraph [7] above;

30. As set out earlier in these submissions, *different outcomes* in *different modern awards* may be achieved, which position is not contrary to, but consistent with the jurisprudence of the Commission.[15]

31. As such, a basic summary of what is contained in other industry or occupational modern awards, which we submit is in any event not accurate, is not relevant to the question of whether there is, taking into account *all* of the matters in s.134 (1) of the FW Act, a '*need*' to provide additional remuneration to casual employees in the three awards.

**THE EVIDENCE**

32. United Voice relied upon the evidence of:

    (i) Dr Oliver, from the University of Technology Sydney;
    (ii) Dr Muurlink, from the Central Queensland University and Griffith University;
    (iii) Mr Harvey, a retired official, formerly Australian Services Union and currently from time to time an independent contractor and researcher for, among other entities, the Australian Institute of Employment Rights;
    (iv) Ms Alvero, at the time of hearing, a casual employee at the Irish Club in the ACT; and
    (v) Mr Gibney a casual bar tender/waiter in Queensland.

33. Dr Oliver's evidence centred on a survey he had conducted into the hospitality industry generally and in particular hospitality employees. In cross examination, Dr Oliver agreed that his survey as to hospitality did not differentiate between the three awards.[16] The survey did not differentiate between café-restaurant workers and those who work in accommodation/hotel establishments.[17] His survey results were heavily reliant on ABS

[15] See paragraph [8] above;
[16] Transcript dated 16 August 2016 at PN1282;
[17] *Ibid* at PN1283;

statistics, which defined casual, part-time and full-time employment differently from the way industrial awards define such employment.[18]

34. Because of the generalist nature of Dr Oliver's survey and subsequent evidence, his evidence is of limited use to this Commission as it does not assist the Commission to address the fundamental requirement when conducting its review, to "*review a modern award 'in its own right'…to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award."*[19]

35. Dr Muurlink gave evidence and, in cross examination, conceded that, with respect to his report, that:

> *"There is very little evidence in the report that specifically relates to casual employees in, for example, the hospitality industry in Australia."*[20]

36. Furthermore, Dr Muurlink agreed with the proposition put, that his report drew principally on material from overseas.[21]

37. When dealing with a National survey of Australian employees, Dr Muurlink agreed that the "National Survey of 1786 adult Australians" was from a mixed industry study and was unable to give any indication to the Commission as to the types of industries from which the survey was drawn.[22]

38. Dr Muurlink indicated that he would be not surprised at all if casual employees see as a principal benefit of their employment the capacity for flexibility and added:

> *"Many people will actively choose casual or flexible employment of this sort because*

[18] *Ibid* at PN1309 to PN1318;
[19] *National Retail Association v Fair Work Commission* [2014] FCAFC 118.
[20] Transcript dated 16 August 2016 at PN1431;
[21] *Ibid* at PN1432;
[22] *Ibid* at PN1444 to PN1445;

*it suits their particular requirements."*[23]

39. To the extent that Dr Muurlink's evidence was in many ways reliant upon overseas data, it is of little benefit to this Commission in the particular circumstances of this case. Furthermore, the extent that his survey material relates to Australian circumstances, it was deficient in not being specific to particular industries and cannot be used as evidence of what actually occurs in the specific industries covered by the three awards the subject of these proceedings.

40. With respect to Mr Harvey's evidence, he could not be qualified as an expert and was particularly focused on assertions of employers' non compliance with award obligations. Such evidence, which may be relevant to another case, can be of no assistance to this Commission when assessing whether casual employees, employed in accordance with the terms of the three awards, should or should not be paid overtime at a penalty rate where they work extended hours. With respect to Mr Harvey's evidence, it was of no practical assistance to the claim by United Voice in this case.

41. Ms Alvero gave evidence that she has held a number of positions in hospitality as well as more recently for a short period of time as a full-time employee in the childcare industry. A position she apparently relinquished to return to casual employment at the Irish Club.

42. Whist working as a casual chef, Ms Alvero has been requested to work, and has worked in past employment in the hospitality industry, a 13 hour shift during the busy holiday period around Christmas. Whilst she gave evidence that she felt that she could not really refuse to work extended shifts on an apparent concern as to what would happen to her ongoing employment should she refuse to work extended shifts, she readily accepted that on the times she has been unable to work extended shifts at the request of her employer, there were no adverse consequences for her in her employment.[24]

[23] *Ibid* at PN1437;

[24] Transcript dated 16 August 2016 at PN1718-PN1721;

43. Ms Alvero further indicated to the Commission that the main benefit of being a casual employee, in her opinion, is the flexibility it offers.

44. Mr Gibney generally described his work history as a waiter/bar tender who has worked in restaurants attached to hotels, bars and small live music venues in Brisbane.[25]

45. In relation to this current situation, Mr Gibney described it as follows:

> *"I am currently employed as a casual waiter/bar tender with Kwan Bros, which is part of the DG hotels group that includes Limes Hotel and a steakhouse called Bubbles. All of these venues are located within close proximity to each other. In one shift I can work across up to five different venues."*[26]

46. Mr Gibney, as a university student, clearly relied upon his casual employment income to cover living, and other expenses, outside of his university studies. He was limited in the amount of time he could devote to wage earning work during semester, regularly working a 10 hour shift two days a week during these times.[27]

47. Mr Gibney was able to work for longer periods during semester breaks, which it appears he did willingly in order to obtain more income. This is an understandable situation. At no stage of Mr Gibney's evidence did he raise objection or concern that employers were asking him to work extended hours when he was available to accept such work.

48. A large bundle of pay advice slips were tendered through Mr Gibney apparently to indicate to the Commission the extended hours he was working and presumably that, although he was working these extended hours, he was not receiving overtime payments when such extended hours were worked. However, it became apparent during cross examination that, when working long hours during semester breaks, Mr Gibney was

[25] Exhibit 292 at [6];
[26] Exhibit 292 at [7];
[27] Transcript dated 16 August 2016 at PN1529 to PN1531;

working for more than one employer. The following evidence was given during cross examination:

*"Once again, nowhere in your payslips does it reflect those hours of work. Is there a reason for that?....Sorry?*

*Nowhere in your pay slips. Could it be you were working another job? …Yes I do work two jobs as is required at times. But again, I suppose, given the nature of casual employment in the hospitality industry, a three-month snapshot is not typically a very informative look at how your working hours might have average out over an entire year.*

*But you see, you mention hours there that are simply not supported by your pay slip. Is it that you're also including in your notations in paragraphs 10 and 11, your work at the Fox Hotel?... I suppose that's entirely possible, yes.*

*So you're working at the employer you indicate here at the times, Limes Hotel and Steakhouse which has a couple of locations, doesn't it?....It does yes.*

*On top of that employer, you're also working for – you were working for the Fox Hotel?...I was during this period, correct.*

*So when you're speaking in paragraph 11 of your typical working hours during semester breaks between Wednesday through to Sunday, that's a combination of two employers, isn't it?...Yes."*[28]

49. During further cross examination, and following observations from the Commission, it became apparent that there was only one occasion when Mr Gibney worked, and apparently without objection, beyond 38 hours per week for one employer.[29] Mr Gibney's

[28] Transcript dated 16 August 2016 at PN1533 to PN1538;
[29] Exchange between the Commission and Counsel for the AHA and Anor; PN1580 to PN1585;

evidence must be viewed in the light that he appears to have sought to work such hours as he was able, particularly during semester breaks, and that, one could assume in common with any employee, he would appreciate earning a greater income than he was currently being paid. However, when viewed in detail, Mr Gibney's long hours of work, when they occurred, were principally for more than one employer which work would in any event not qualify, under any standard, for the payment of overtime in accordance with any industrial award of this Commission. Furthermore, the granting of United Voice's application would not prevent Mr Gibney, or necessarily any other student, from seeking work from more than one employer on any day or consecutive days, nor would it prevent consecutive employers employing students for what would be cumulative long hours, nor would it provide penalty rate recompense to Mr Gibney for working such extended hours.

**CONCLUSION**

50. In addition to relying upon submissions earlier made in these proceedings the Associations can summarise their position as follows:

(a) Each modern award needs to be treated independently when the Commission makes an assessment of whether United Voice has put a sufficiently compelling case to warrant a variation in the terms sought;

(b) Each modern award has a long history of casual employment which has not attracted a penalty rate when employees work extended shifts or time beyond that which for full-time or part-time employees may be paid a penalty rate, for what is then termed overtime. This long history mitigates against United Voice's application absent compelling evidence warranting change;

(c) The evidence before the Commission from United Voice in support of its claim is extremely sparse. Two academics, who could be qualified as experts, gave evidence of limited benefit when that evidence is critically analysed. It did not specifically address the point of the need for a penalty rate for overtime to be paid

to employees in the particular industries the subject of this application. A third witness being Mr Harvey, a retired trade union official, gave evidence which was of little or no relevance to this specific claim before the Commission;

(d) Only two employee witnesses were called from the entire industry covering the three awards the subject of this application. When analysed, even those two witnesses evidence was of little benefit in support of United Voice's application, and to an extent supported the Associations positions, that no change should be made to the existing award arrangement for the payment of casual employees.

51. The dearth of specific supporting evidence must be of significant concern and lead the Commission to reject the claim by United Voice for overtime payments to be imposed on the employment of casual employees in the three awards the subject of this application.

**Ralph Warren**
**Frederick Jordan Chambers**
**10 October 2016**

On behalf of the Australian Hotels Association; Accommodation Association of Australia; Clubs Australia Industrial; Motor Inn and Motel Accommodation Association; and Restaurant and Catering Industrial.