IN THE FAIR WORK COMMISSION

Matter No: AM2016/15, AM2014/284, AM2014/272

Section 156 - Four Yearly Review of Modern Awards – Plain language redrafting –
Restaurant Industry Award 2010* & *Hospitality Industry (General) Award 2010

SUBMISSION OF UNITED VOICE

1. This submission concerns technical and drafting issues in the plain language redrafting exposure drafts of the *Hospitality Industry (General) Award 2010* ('Hospitality Award') and the *Restaurant Industry Award 2010* ('Restaurant Award'). They are made pursuant to the Statement[1] issued on 10 May 2017.

I - GENERAL SUBMISSIONS

2. The following submissions concern issues common to both the Hospitality Award and the Restaurant Award.

Clauses 13 – Casual Employment

3. The plain language exposure draft has altered the language of the casual employment clause in a way that alters the legal effect of the provision. The relevant clauses are set out in the table below:

Hospitality Award plain language draft	**Current Hospitality Award**
11.1 An employee who is not covered by clause 9—Full-time employment or clause 10—Part-time employment must be engaged and paid as a casual employee.	**13.1** A casual employee is an employee engaged as such and must be paid a casual loading of 25% as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment
Restaurant Award plain language draft	**Current Restaurant Award**
11.1 An employee who is not covered by clause 9—Full-time employment or clause 10—Part-time employment must be engaged and paid as a casual employee.	**13.1** A casual employee is an employee engaged as such and must be paid a casual loading of 25%. The casual loading is paid as compensation for annual leave, unpaid personal/carer's leave, notice of termination, redundancy benefits and the other

[1] [2017] FWC 2579.

	entitlements of full-time or part-time employment.

4. The plain language draft modifies the entitlement so that a casual employee is one who is not engaged under the part-time employment clause or the full-time employment clause. This change leaves it to the employer to decide the worker's employment type, without regard to the particular features of the worker's employment that would make it casual.

5. Currently, a casual employee must be 'engaged as such and must be paid a casual loading of 25%'. Under the formulation common to most modern awards, employment status will therefore be determined by reference to the employee's contract of employment and the applicable award. This leaves employment status largely, but not entirely, to the discretion of the employer.

6. As held by the Full Bench in *Telum Civil (QLD) v CFMEU* [2013] FWCFB 2434, casual employment will be regulated by the industrial instrument that covers the employee. This means that many workers who would not be casual employees under the general law, are considered causals for award purposes. The Full Bench stated:

> *[25] The Metals Casuals Case demonstrates how and why the specification of casual employment in Federal awards had diverged from the (ill-defined) general law position to a position where, by the time of award modernisation process, for many, if not most, Federal awards, an employee was a casual employee if they were engaged as a casual (that is, identified as casual at the time of engagement, perhaps with a requirement of a writing) and paid a casual loading.* ***The Full Bench recognised that this approach had led to a position where employees with regular and systematic hours on an ongoing basis could still be "casual employees" under a Federal award.*** (Emphasis added)

7. The current awards define casual employment by reference to both engagement as a casual and payment as a casual. There is an also implied requirement that the employee must also not be a full-time or part-time employee. This is evidenced by the fact that in both awards, the casual loading is described as being paid '*compensation for*' the benefits of full-time and part-time employment. The worker's employment must actually have the award-define features of casual employment to be casual.

8. This two limb test of casual employment was recently dealt with by the Full Bench in *Nardy House v John Perry* [2016] FWCFB. This case concerned the unfair dismissal of an employee under the *Social, Community, Home care and Disability Services Industry Award 2010*. The Full Bench found that employee was not a permanent employee, despite being regularly rostered to work a full-time week. However, the decision turned on the fact that the employee

was paid the casual loading and was engaged specifically as a casual in his contract of employment. The Full Bench held (at [27]):

> *In our view the definition is properly construed as a limitation on the concept of casual employment for employees covered by the award. Even though the definition incorporates the circumstances of engagement as the primary basis for casual status it also excludes full and part-time employees from the definition. Therefore to qualify as a casual employee under the award, it is necessary to find, not only that Mr Perry was engaged and paid as a casual employee, but also that he was not a full time or part-time employee.*

9. The exposure draft wording reduces casual employment to a catch-all type of employment for those employees whose employer has not specifically offered them employment under clause 9 or clause 10 of the relevant award. This reduces the issue of casual employment to the exercise of the employer's discretion by removing the reference to engagement and payment as a casual employee. If an employee is not specifically engaged as a part-time or full-time employee, they will be considered a casual employee by default. This removes the obligation that an employee be paid as a casual employee to be a casual employee.

10. This variation will simply regularise behaviour that would currently be an award contravention.

II – HOSPITALITY AWARD

11. The following submissions concern issues in the plain language draft of the Hospitality Award.

Clause 24 - Allowances

Clause 24.10 – Working away from usual place of work

12. The Fair Work Commission (the Commission) has asked the parties whether cl 24.10(c) complies with the requirements of the *Fair Work Act 2009* (Cth) ('the Act') regarding termination of employment. Clause 24.10 provides for an allowance to be paid to an employee who is required to work more than 80 kilometres away from their usual place of work to reimburse them for reasonable fares to travel from their usual place of work to the new place of work. Clause 24.10(c) provides:

> ***(c)*** *However, the employer may recover any amount paid to an employee under clause 24.10 if the employee leaves their employment, or is dismissed for misconduct, within 3 months after receiving that payment*

13. This provision permits an employer to recover an amount paid to an employee who has incurred expenses by travelling at the employer's direction simply because they have left their employment within an arbitrary period of time.

14. Clause 24.10(c) does not comply with the Act in a number of ways.

Clause 24.10(c) is not a term that may be included in a modern award

15. Modern Awards must only include terms permitted by s 136 of the Act. This includes terms that may be included in modern awards, under Part 2-3, Division 3, Subdivision B, and terms that must be included in modern awards, under Part 2-3, Division 3, Subdivision C.

16. Clause 24.10(c) is not a term that must be included in a modern award under Subdivision C.

17. Further, there is no provision in Subdivision B that permits the inclusion of a clause like cl 24.10(c). Section 139 provides for the types of terms that may be included in modern awards. Clause 24.10(c) is not a term that may be included in modern awards according so s 139 of the Act. That section makes no provision for terms that create liabilities for the employee to the employer.

18. The Commission does not have the power to include a term such as cl 24.10(c) in a modern award.

Clause 24.10(c) is an objectionable term

19. If cl 24.10(c) contravenes s 326(1), and so is a term that must not be included in a modern award under s 151, to the extent that it permits an employer to deduct a sum from an employee's pay.

20. Section 326(1) provides that a term of a modern award has no effect to the extent that the term permits an employer to deduct an amount that is payable to an employee in relation to performance of work if the deduction is both unreasonable in the circumstances and directly or directly for the benefit of the employer.

21. Section 326(2) provides that the regulations '*may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable*'.

22. Regulation 2.12 of the *Fair Work Regulations 2009* (Cth) ('the Regulations') lists a number of circumstances in which a deduction is reasonable for the purposes of s 326(1) of the Act. The recovery of fares paid to the employee is not one of the circumstances prescribed by the Regulations.

23. Further, cl 24.10(c) is unreasonable. It is unreasonable to permit an employer to recover an amount paid to an employee who has incurred expenses by travelling at the employer's direction simply because they have left their employment within an arbitrary period of time. The employee has travelled, performed work and incurred expenses at the direction of the employer. How long their employment continues after the termination of their duties has no rational connection to reimbursement for that travel. The only beneficiary of cl 24.10(c) is the employer.

Clause 24.11 – Travel allowance – Airport catering employees

24. The exposure draft has changed the employees who this allowance applies to. The relevant provisions are set out in the table below:

Exposure Draft	**Current Award**
24.11 The employer of an airport catering employee must pay the employee a travel allowance of $6.68 per day of work.	**21.1(i)** All employees engaged by airport catering employers must be paid a travelling allowance of $6.68 for each day the employee attends work.

(Emphasis added)

25. The allowance currently applies to '*all employees engaged by airport catering employers*'. The exposure draft has restricted the application of the allowance to '*airport catering employees*'. The current award usage should be retained.

Clause 24.13 – Airport catering supervisory allowance – Commission's question

26. The Commission has asked the parties whether the allowances in Table 9 of cl 24.13 of the exposure draft are all purposes allowances.

27. The allowances are all purposes allowances. Clause 21.2(c) of the current award describes the allowances as '*to be treated as part of the wage rate for all award payment calculations*'. This fits the definition of '*all purposes allowance*' at 24.2(a). A reference to cl 24.13 should be included in the list of all purpose allowances at cl 24.2(b).

Clause 24.13 – Airport catering supervisory allowance

28. The exposure draft has varied the allowance so that it is paid to supervisory '*airport catering employees*'. The allowance currently applies to supervisory '*employees of airport catering employers*'. The exposure draft has restricted the application of the allowance to '*airport catering employees*'. The current award usage should be retained.

III – RESTAURANT AWARD

29. The following submissions concern issues in the plain language draft of the Restaurant Award.

Clause 2 – Definitions – definition of 'rostered day off'

30. The plain language exposure draft includes the following definition of '*rostered day off*' :

> *rostered day off means a continuous 24 hour period between the end of the last ordinary shift, and the start of the next ordinary shift, on which an employee is rostered for duty.*

31. The Restaurant Award does not currently define the meaning of a rostered day off but employees are entitled to a '*minimum of eight full days off per four week period*' under clause 31.2(e). This means a full calendar day off work. The exposure draft definition changes the current entitlement to the detriment of employees. The time off provided by a 'full' day off is likely to be longer than the continuous twenty-four hours envisioned by the exposure draft's definition.

32. For example, if an employee finished work at 5.00 PM on one day and commenced work at 5.00 PM the following day, they would have had a '*continuous 24 hour period between the end of the last ordinary shift and the start of the next ordinary shift*'. However, the employee will not have had a 'full day' off work. Their rostered day off will commence in the evening after their shift. The majority of their 'rostered day off' will be at night, while they are sleeping. Then, their free time during daylight hours will be curtailed by the need to prepare for work prior to the evening shift. This is unfair to the employee, who will be denied the widely recognised benefits of a day off work.

33. If a definition of rostered day off is included in the Restaurant Award, it should refer to 'full' days off so it is consistent with the rostering provisions at cl 32.1(e) of the current award.

Clause 16 – Breaks

Timing of breaks

34. Clause 16.3 of the exposure draft has been varied in a confusing way:

Exposure Draft	**Current Award**
16.3 An unpaid meal break must not be taken within the first hour of work or later than the first 6 hours of work.	**32.1** ….The break must be given no earlier than one hour after starting work and no later than six hours after starting work.

(Emphasis added)

35. The current award form is preferable as it correctly identifies the time when breaks must be taken. The words '*or later than the first 6 hours of work'* should be deleted from the exposure draft.

When an employee is not given a break

36. The plain language draft has altered the breaks clause so that the onus is placed on the worker to ask for a break. This is a departure from the current award which places the onus on the employer to give the employee a break. See below for a comparison of cl 32.3 of the current award to cl 16.5 of the exposure draft:

Exposure Draft	**Current Award**
16.5 If an employee is not allowed to take an unpaid meal break at the rostered time, the employer must pay the employee at the rate of 150% of the employee's minimum hourly rate from when the meal break was due to be taken until either the employee is allowed to take it or the shift ends.	**32.3** If an employee is not given the unpaid meal break at the time the employer has told the employee it will be given, the employer must pay the employee 150% of the employee's ordinary base rate of pay from the time the meal break was to commence until either the meal break is given or the shift ends.

(Emphasis added)

37. An employee must be '*given*' a break by their employer, regardless of whether they have asked for one or not. If they are not '*given*' the break, they will be entitled to a penalty rate until they have been given the proper break or the shift ends. This is consistent with the rostering provisions of the Restaurant Award which place responsibility for rostering in the hands of the employer.[2] The purpose of this provision is to ensure that employees are given the appropriate breaks by placing a deterrent cost on non-compliance. This is term ensures that the modern award meets the modern awards objective.

38. The exposure draft variation implies that the employee must ask for the break before the penalty rate is paid. This is unfair given the difference in power between an employee and an employer in this industry. Restaurant Award employees are low-paid, younger and less-skilled than employees in other industries. Restaurant Award workplaces tend to be small and lack specialist HR teams: employees will need to negotiate with direct managers. There are significant barriers to self-help that may not be found in other industries. It is important that the breaks provision has sufficient deterrent power to ensure that the Award is followed.

[2] See cl 31.6 of the Restaurant Award, which is substantially replicated at cl 15.3 of the Award.

39. The words '*is not allowed*' should be deleted from this clause and replaced with '*is not given*'.

Clause 18 – Apprentice rates

40. The table describing minimum wages for apprentices at cl 20.2 of the current award has been changed at exposure draft cl 18.3(a). The new form of words is confusing. The change is show in the table below.

Exposure Draft	**Current Award**
Column 2 % of the Standard Rate	Percentage of the rate prescribed in clause 20.3 for a Cook grade 3.

41. The existing wording better explains the nature of the entitlement and should be retained.

Clause 21 – Annualised salary arrangements

Calculation of the annualised salary

42. The words '*multiplied by 52'* found in cl 28.1(a) of the current award have not been included in cl 21.3 of the exposure draft. The words should be retained to ensure the correct calculation of the annualised salary.

Breaches of the award

43. The exposure draft has varied the annualised salary arrangements clause in a way that changes its legal meaning. The effect of the changes is to reduce the number of potential ways that an employer may breach the Restaurant Award if they did not pay an employee an amount sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with. Clause 28.1 (a) of the current award and cl 21.3 and 21.11 of the exposure draft are set out below:

Exposure Draft	**Current Award**
21.3 An annualised salary must be at least 125% of the minimum weekly rate that would otherwise be applicable under Table 2—Minimum rates (see clause 18.1) over the year.	**28.1 (a)** As an alternative to being paid by the week, by agreement between the employer and an individual employee, an employee other than a casual, can be paid at a rate equivalent to an annual salary of at least 25% or more above the weekly rate prescribed in clause 20—Minimum wages, multiplied by 52 for the work being performed...
21.5 An annualised salary must not result in an employee being paid less over a year (or, if the employee's employment is terminated before a year is completed, over the period of	**28.1 (a)** …In such cases, there is no requirement under clauses 24.2, 33—Overtime, 34.1 and 34.2 to pay overtime and penalty rates in addition to the weekly wage, provided that the salary paid over a

that employment) than would have been the case if an annualised salary had not been agreed and the employee had instead been paid their weekly rate and any other amounts satisfied by the annualised salary.	year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.
21.11 If an annualised salary paid to an employee has the result mentioned in clause 21.5 at the end of a year or period of employment, the employer must pay the employee the difference.	**28.2** …The employer must keep all records relating to the starting and finishing times of employees to whom this clause applies. This record must be signed weekly by the employee. This is to enable the employer to carry out a reconciliation at the end of each year comparing the employee's ordinary wage under this award and the actual payment. Where such a comparison reveals a shortfall in the employee's wages, then the employee must be paid the difference between the wages earned under the award and the actual amount paid.

(Emphasis added)

44. This reduces the number of contraventions of the award that an employer may commit if they do not fulfil their obligations under this clause. The current award refers specifically to a number of clauses, which means that where the annualised salary is insufficient each breach is actionable. The exposure draft wording means that there is only one actionable breach.

45. This is a substantive variation to the Restaurant Award and reduces the protective power of the Restaurant Award.

Clause 22 - Allowances

Clause 22.5 (a) – Special clothing allowance

46. The exposure draft has condensed a number of specific entitlements provided by cl 24.3 of the current award into a single provision at cl 22.5(a) of the exposure draft. The exposure draft should be amended to properly describe the entitlements provided by the current award.

47. We propose the following form of words:

> ***22.5(a)*** *In clause 22.5 special clothing means any article of clothing that the employer requires the employee to wear or that it is necessary for the employee to wear, including:*
>
> - *dinner suit and evening dress;*
> - *waterproof or protective clothing;*
> - *coats, dresses, caps, aprons, cuffs; and/or*
> - *any other article of clothing;*

but does not include black and white clothing, shoes, hosiery and socks.

Clause 22.6 – Allowance for distance work – Fair Work Commission's question

48. The Commission has asked parties if the meaning of 'ordinary rate of pay' in clause 22.6 (a) includes applicable penalties.

49. The rate paid under clause 22.6 (a) is the ordinary rate of pay applicable at the time the work was performed. This may include penalties if the travel occurs at the appropriate time.

Clause 22.6 – Allowance for distance work

50. Clause 22.6(b)(iii) should be amended to clarify that the '*period of engagement*' referred to is the period of engagement on distance work.

Clause 26 – Annual leave

Cl 26.2 – Annual leave – Commission's question

51. The Commission has asked the parties if the reference to '*7 hours a shift'* in the third line of clause 26.2 should read '*7 days a week*'.

52. We disagree. It appears that the clause is the result of a drafting error dating to Award Modernisation. The current award words are found in the earliest exposure draft of the Restaurants Award released by the AIRC.[3] The error appears to have occurred when the relevant clause in the LHMU's draft award was adopted by the AIRC.[4]

53. However, even if the reference to '*seven hours a shift*' were deleted from the clause, it would remain nonsensical. The provision also requires that the employee work in a business that operates 24 hours in a day. No restaurant covered by this Award operates for 24 hours day. Given that the AIRC simply adopted the LHMU's clause, it is likely that this was a drafting as well.

54. Based on the LHMU's submissions in the hospitality industry Award Modernisation proceedings,[5] our intended wording would have been:

> *For the purpose of the additional week of leave provided by the NES, a shift worker is a seven day shift worker who is regularly rostered to work on Sundays and public holidays.*

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[3] *Restaurant Industry Award Exposure Draft*, AIRC, September 2009, (http://www.airc.gov.au/awardmod/databases/rest/Exposure/restaurant.pdf)

[4] LHMU Draft Restaurant Industry Award dated 24 July 2009 (http://www.airc.gov.au/awardmod/databases/rest/Draft/LHMU_draft.pdf), cl 30.1.

[5] LHMU Draft Hospitality Industry Award dated 1 August 2008, cl 7.1.3.

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