

IN THE FAIR WORK COMMISSION

Matter No: AM2016/15

Section 156–Four Yearly Review of Modern Awards – Plain language re-drafting

REPLY SUBMISSION OF UNITED VOICE

22 June 2017

1. This submission concerns the plain language exposure drafts of the *Hospitality Industry (General) Award 2010* ('Hospitality Award') and the *Restaurant Industry Award 2010* ('Restaurants Award'). This submission is made in reply to the submission of ABI & the NSWBC filed on 8 June 2017 and the submission of the AHA filed on 13 June 2017.

I – HOSPITALITY AWARD

2. The following submissions concern the Hospitality Award.

Clause 1 – Title and commencement

3. The AHA submits that current award clause 2.2 should be inserted in the exposure draft at clause 1 and that exposure draft clauses 1.3 and 1.4 should be deleted. Current award clause 2.2 is standard clause inserted into all modern awards by the AIRC at Award Modernisation. It is commonly referred to as the 'absorption clause'. Exposure draft clauses 1.3 and 1.4 provides for take-home pay orders where the making of the modern award would result in a reduction of an employee's take home pay. They replicate the current award clause 2.4. Current award clause 2.4 is standard clause inserted into all modern awards by the AIRC at Award Modernisation These clauses are commonly referred to as the 'take home pay clause'.
4. United Voice opposes this submission. The AHA seeks to re-agitate a matter that was settled by the Full Bench in *Four yearly review of modern awards* [2015] FWCFB 6656 ('*September Decision*'). In that case, the Full Bench decided to delete the absorption clause from all modern awards.
5. The Full Bench found that the absorption clause was 'intended to be transitional in character' and was not intended to operate beyond the transitional period.¹ Now that the transitional period is over the Commission has no power to include the absorption clause in the modern award. The clause is neither a term permitted by s 139(1) of the *Fair Work Act 2009* (Cth) ('the Act') nor an 'incidental' term permitted by s 142(1).²
6. Moreover, the absorption clause is not necessary to meet the minimum wages objective. It is not the function of modern awards to regulate the interaction between minimum award

¹ *September Decision*, [27] and [36]-[37].

² *September Decision*, [56].

entitlements and overaward payments. This is dealt with by the common law principle of set off.³

7. The Full Bench also dealt with the issue of the take home pay clause. The Bench ruled that the matter would be dealt with later after interested parties had the opportunity to make submissions regarding the relevant source of power.⁴ It is inappropriate to deal with it in the plain language process. It is a significant issue, that is of interest to a number of parties in the Four yearly review of modern awards. The matter should be referred to a separately constituted Full Bench.

Clause 2 - Definitions

8. The AHA submits that the definition of ‘adult employee’ should be deleted. We agree.
9. The AHA submits that the definition of ‘appropriate level of training’ has been changed in the exposure draft. The AHA gives no explanation for its submission. We reserve our position on this matter.
10. The AHA submits that the current award definition of ordinary hourly rate should be retained. United Voice opposes this submission. The exposure draft definition is consistent with the decision of the Full Benches in the *Four yearly review of modern awards* [2015] FWCFB 4658 (‘*July Decision*’)⁵ and the *September Decision*.⁶ In the *July Decision*, the Full Bench set out the different definitions of ordinary hourly rate that would apply, depending on the terms of the award.
11. The Hospitality Award includes a number of all-purposes allowances that apply to some employees and does not include an industry allowance. The exposure draft definition is correct.

Clause 9 – Full-time employment

12. ABI objects to the inclusion of the words ‘in accordance with an agreed hours of work arrangement’ to exposure draft clause 9. We oppose the removal of these words. The exposure draft wording better explains the characteristics of full-time employment as provided by the Hospitality Award. The provision may be improved by a reference to clause 15.1(b).

³ *September Decision*, [74].

⁴ *September Decision*, [78].

⁵ *July Decision*, [35]-[47].

⁶ *September Decision*, [107]-[111].

Clause 11- Casual employment

13. We agree with the AHA that current award clause 13.1 is preferable to exposure draft clauses 11.1 and 11.2.
14. We do not agree with the AHA proposal to remove the reference to agreement from exposure draft clause 11.4.

Clause 12- Apprentices

15. We agree with the AHA that current award clause 14.4 is preferable to exposure draft clause 12.3.

Clause 15.1 – Full-time employee

16. We agree with the AHA that current award clause 14.4 is preferable to exposure draft clause 12.3.
17. We oppose the notes to clauses 15.1(c)(vi)-(vii) proposed by the AHA.
18. We agree with the amendments to clauses 15.1(d) and (e) proposed by the AHA.

Clause 15.2 – Catering in remote locations

19. We agree with the AHA that the exposure draft clause 15.2(a) expands the application of the provision and the current award wording should be retained.
20. We agree with AHA that the words ‘other than rostered days off’ should be deleted from clause 15.2(i).

Clause 15.3 – Make-up time

21. We agree with the AHA that the obligation to consult with employees provided by current award clause 29.4(a)(i) should be included in exposure draft clause 15.3(a).

Clause 16 - Breaks

22. We note our submission on clause 16 in our submissions of 8 June 2017. We agree with the AHA that where possible the exposure draft should revert to the current award wording.

Clause 22 – Annualised salary arrangements

23. ABI opposes the insertion of the words ‘an agreement must be one that is genuinely made without coercion or duress’. They submit that this changes the legal effect of the clause.
24. United Voice disagrees. The new words simply express what is implied by the words ‘by agreement’ in current award clause 27.1. This assists the reader, who is likely to be a lay

person, to understand the legal concept of ‘agreement’. We are unsure what role, if any, that ‘coercion and duress’ may legitimately play in a contract of employment.

II – RESTAURANTS AWARD

25. The following submissions concern the Restaurants Award.

Clause 1 – Title and commencement

26. The AHA submits that current award clause 2.2 should be inserted in the exposure draft at clause 1 and that exposure draft clauses 1.3 and 1.4 should be deleted. Current award clause 2.2 is standard clause inserted into all modern awards by the AIRC at Award Modernisation. It is commonly referred to as the ‘absorption clause’. Exposure draft clauses 1.3 and 1.4 deal provide for take-home pay orders where the making of the modern award would result in a reduction of an employee’s take home pay. They replicate the current award clause 2.4. These clauses are commonly referred to as the ‘take home pay clause’.

Clause 2.21 – Annualised salary arrangements

27. ABI opposes the insertion of the words ‘an agreement must be one that is genuinely made without coercion or duress’. They submit that this changes the legal effect of the clause.
28. United Voice disagrees. We note our submissions in regard to the annualised salaries in the Hospitality Award at paragraph 24 above.

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