**Part time and casual employment**

**Common issue**

**AM 2014/196 and 197**

**Submission in reply**

**Application by the Australian Hotels Association and others for revised part time employment clauses in the:**

***Hospitality Industry (General) Award* 2010;**

***Registered and Licenced Clubs Award* 2010; and**

**in aid of the Commission's review of the part time employment clause in the *Restaurant Industry Award* 2010.**

## Background and preliminary matters

1. This submission is directed to the Full Bench's review of the substantive part time employment clauses in the *Hospitality Industry (General) Award* 2010 ('the Hospitality Award'), the *Registered and Licenced Clubs Award* 2010 ('the Clubs Award') and the *Restaurant Industry Award* 2010 ('the Restaurants Award') (collectively: 'the Hospitality Awards').

2. We note the submission made on behalf of the Australian Hotels Association, Accommodation Association of Australia and Motor Inn and Motels Accommodation Association ('the Associations' submission') and the submission of Clubs Australia Industrial ('the Clubs submission') both filed with the Commission on 16 September 2016 and earlier submissions made.

3. On 19 August 2016, United Voice filed an '*Outline of final submission*' ('the overtime submission') concerning our application for overtime provisions in the Hospitality Awards ('the overtime claim'). The Association and the Clubs are both respondents in the overtime claim. Some of the matters pressed in aid of the overtime claim are relevant here and rather than repeat the material we will reference it where appropriate.

4. On 6 October 2016, United Voice filed additional claims and draft determinations in the award stage review of each of the Hospitality Awards. We have made 2 common additional claims that we have asked to be transferred to these proceedings.

5. The first is an alternate claim to the Australian Council of Trade Union's claim for a 4 hour minimum engagement. If the ACTU's claim is unsuccessful, United Voice asked that the minimum engagement be 3 hours for all employees covered by the Hospitality Awards. Currently, there is a differential and casual employees can be engaged for a minimum of 2 hours.

6. The second matter concerns reducing and equalising the maximum ordinary hours that part time and full time employees can work. Currently under the Hospitality Award and the Restaurant Award the maximum engagement is 12 hours (this includes a half hour break) and notionally under the Clubs Award the limit is 38 hours. This claim seeks a uniform 10 hour maximum engagement on the ordinary hours for full time and part time employees. 10 hours is also the criterion for intra-day overtime for casual employees in United Voice's overtime claim.

7. The provisional view of the Full Bench made on 2 September 2016 in relation to proposed part time employment clauses in the Hospitality Award and Clubs Award is noted. This submission shall proceed on the basis of the possibility of change as expressed in the Full Bench's provisional view and will not dwell on the threshold issue of whether some substantive review is necessary under subsection 156(2)(b) of the *Fair Work Act* 2009 ('the Act').

8. United Voice does not support the variation applications of the Associations and the Clubs.

9. United Voice has concerns about the provisional view expressed by the Full Bench in relation to the part-time employment clauses in the Hospitality Award and the Clubs Award. We later in this submission set out what we say are appropriate amendments.

10. Each of the Hospitality Awards' part time employment clauses reflects the current federal standard concerning part time employment that requires agreement at the time of engagement between the employer and employee as to the pattern of work and fixed start and finish times. Any variation needs to be in writing and work outside the agreed pattern of work is paid at overtime rates. It is a desirable standard and it or important elements of it should be maintained.

11. The Award Modernisation Full Bench in [2009] AIRCFB 826 (4 September 2019) in relation to the current Clubs Award and competing claims for flexible part-time employment provisions observed at paragraphs [135] to [144]:

> *[142] A review of current federal awards and NAPSAs discloses three types of provision. First there is the provision in the Victorian clubs award, common to most modern awards, providing a high degree of certainty and regularity of working patterns for part-time employees and payment at overtime rates for work beyond agreed regular hours. Secondly there is the New South Wales provision which does not provide certainty and regularity of working patterns, although the statements provided by Clubs Australia suggest a proportion of employees are provided with regular times. Third, a number of NAPSAs applying in other states which provide for two types of part-time employees, those with specified hours and those without. A loading is paid to those without specific hours to compensate for the absence of regularity and certainty of work. In one case there is a single category of part-time employee with flexible hours and a loading.*
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> ....
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> *[144] The weight of current regulation supports the adoption of the New South Wales NAPSA provision. However, that provision removes the essential characteristics of part-time employment of some degree of regularity and certainty of employment. It does not reflect a conventional concept of part-time employment*

*as was conceded by Clubs Australia in submitting that "it is perhaps time to look at part-time in a different light and not with the conventional outlook of what is part-time." The New South Wales provisions for part-time employees provide a bare guaranteed minimum of 32 hours over a four week period, no certainty beyond the roster as to when work is to be done and a capacity to alter the roster with 12 hours' notice in cases of absences or shortages of staff. These part-time provisions give little predictability to part-time employees and do not appear to be consistent with "the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38." The concerns we expressed about variation of hours by consent in relation to the awards in the health and welfare services industry apply equally in this context.*

12. Up until 1 January 2015, the Clubs Award contained a state based difference term that the Award Modernisation Full Bench retained which replicated the NSW Clubs Award part time employment provision that applied in NSW despite the concerns note above.

13. We note that the provisional view of the Full Bench concerning the part time employment clause in the Clubs Award is broadly identical to the provisional clause for the Hospitality Award. We agree that there should be some uniformity and it is not desirable that the clause in the Clubs Award is distinct. We note our comments made in our overtime submission concerning the requirements of subsection 156(5) of the Act to review a modern award '*in its own right.*'[1]

14. There is no formal variation for the Restaurants Award in these proceedings. There is significant benefit in any change being applied consistently among the 3 Hospitality Awards. The Hospitality Awards share many substantive terms and traversed a sector of the economy which possesses homogeneity and distinctness. The Restaurants Award should be included in any proposed changes that the Commission intends to make and unless otherwise stated this submission is intended to apply to the 3 Hospitality Awards.

**Context**

15. Issues concerning part time employment under the Hospitality Awards cannot be abstracted from the persistently high levels of casualisation, award reliance and the low income of the work within this sector. The industries covered by the Hospitality Awards are consistently found to contain the lowest paid work in Australia as well as the highest rate of casualisation.[2]

16. Insofar as the Association and the Clubs urge the Commission to exercise its review powers under subsection 156(2) of the *Fair Work Act* 2009 ('the Act'), United Voice does not dispute that there is a case for review. We disagree with the principal justification advanced by the employer groups. We do not concede that the problem is properly characterised as one of a lack of flexibility in the substantive part time employment clause but a broader issue of the cost profiles of the various categories of employment under the Hospitality Awards.

17. Much of the evidence and the submissions made have been directed toward employer recruitment preference. The Association notes:

[1] Overtime Submission, paragraphs [53] to [54].

[2] As above, paragraphs [9] to [17].

*The primary reason influencing an employer's decision not to employ a part time employee is the lack of flexibility in the part-time employment clause.*[3]

18. Clubs Australia's case almost entirely has been premised on the disinclination of employers in its sector to engage part time employees after the end of the state based difference terms that maintained the part time provisions of the NSW notional agreement preserving a state award ('NAPSA').

19. The categories of employment represent choices for employers when undertaking recruitment. Whether to engage someone as a casual, part timer or full timer is an important decision. In an area like the hospitality sector that is low paid and over award payments are unusual: quite small cost differences in these categories may be significant.

20. The Hospitality Awards currently give preference to casual employment. If an employer engages a casual employee there is no requirement for any written contract or '*paper work*', no overtime is payable under any circumstances, the employee can be sent home after 2 hours if the venue is slow or asked to stay as long as required if it is a busy night, the employee does not have to be included in the roster and can be engaged at short notice or not at all. No systems are required to maintain records for the purposes of any form leave. Long service leave is the only entitlement a casual employee might accrue.

21. The apparent undesirability of part time employment as a recruitment preference for employers should not be assessed in isolation and the apparent cost advantages associated with casual and full time employment against permanent part time employment must be taken into consideration.

22. United Voice's application that causal employees under the Hospitality Awards be provided with an entitlement to overtime on an equivalent basis to permanent employees is noted. The additional claims made concerning differentials in minimum terms of engagement and the ACTU's claims concerning the adequacy of casual conversion clauses in the Hospitality Awards are also relevant matters.

23. Permanent employment under the Hospitality Awards is a significant category of employment. According to the 2013 Household, Income, Labour and Dynamics Australia survey ('HILDA') the area it designates as '*hospitality*' 19.8% of employment is full-time employment. Full time employees in hospitality are usually more senior staff such as managers, senior floor staff and chefs.

24. This review has identified significant issues with the terms of conditions of permanent full time staff particularly those employed under the Clubs Award.[4] There is a now a separate annualised salary common issue (AM2016/13) which is competent to deal with some of these issues.

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3 The Associations' submission, paragraph [68].

4 Transcript, PN2029 – PN2070 (cross examination of Richard Tait on 12 July 2016) and PN2824 to PN2938 (discussion, 13 July 2016).

25. The position under the Clubs Award is that there is no maximum number of ordinary hours that a permanent employee can work. Mr Warren, Counsel for Clubs, observed on 13 July 2016 (PN2936):

> *There is no provision if you apply 26.3(e) (of the Clubs Award) in conjunction with 26.5 (of the Clubs Award) as to the maximum number of hours a full time person can be rostered to work.*

26. Lisa Petrie, the HR manager, St George Leagues Club, when asked what shift length she considered ideal noted:

> *Your Honour, I would say nine hours would be the max. For productivity, we realise that if we roster staff for exceptionally long shifts, that's not - we're not going to get the best out of them. It's not good for either party. But occasionally there will be a time that somebody calls in sick and, particularly a casual, they will agree to stay back half an hour or an hour until the next person comes in. So it might - it might go over to a nine and a half, but that's generally the maximum.*[5]

27. The maximum ordinary hours in the Hospitality Awards and Restaurants Award for full time employees are 12 hours which includes the required break.[6] Dr Olav Muurlink in his evidence filed in the casual claim summarised the research that such shift lengths are problematic and demonstrably unhealthy.[7]

28. An additional measures that would be a proper variations in terms of paragraph 156(2) (b) of the Act is the equalisation of minimum engagements for all employees to 3 hours. There has been a significant merit and evidential case heard on minimum engagements in relation to the Hospitality Awards in the context of the Australian Council of Trade Unions' claims for a 4 hour minimum engagement. United Voice supports the ACTU's claim but in the event that the Commission determines that a 4 hour minimum engagement is not appropriate, there is ample evidence and merit to determine that all employees under the Hospitality Awards should have a 3 hours minimum engagement. We note the provisions of section 577 of the Act.

29. We note these matters as support for the submission that these other matters should be dealt with in this common issue. United Voice also says these matters are directly relevant to '*fixing*' part time employment. If this Full Bench is to adequately address the issue of part time employment, unhelpful distortions in the cost structures of the categories of employment must be remedied.

**The substantive part time clause**

30. United Voice confirms its early submission that it considers that the current part time employment standard appropriate, that it should be maintained and that it is in accordance with the Act's modern award objective. The standard reflects a model of part time work that is aligned with permanent full time work, provides predictability, and requires agreement between the employer and the employee as to the pattern of work and then adherence to the

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5 Transcript, PN3069.

6 Hospitality Award, clause 29.1(b) (i); Restaurants Award, clause 31.2(a).

7 Exhibit 290, statement of Dr Olav Muurlink, 29 February 2016, Annexure C, *Impact of intraday or Intra-week overtime on physical and psychological health*, pp 9-10 and p. 16.

pattern. What is being proposed by employer groups in these proceedings is a form of part time employment that devalues agreement between the employee and the employer, diminishes an employee's ability to predict with any certainty their pattern of work and gives to the employer the ability to unilaterally alter the pattern of work without cost consequences.

31. Some premium should be paid and protections must be provided to part time employees in exchange for greater flexibility as a matter of fairness and to ensure a level playing field in terms of recruitment preference amongst the categories of employment. The protection of full time employment becomes a consideration and it would be undesirable for some form of flexible part time employment to become the principal form of permanent employment under the Hospitality Awards.

32. United Voice's preferred position is that flexible part time employment arrangements should be on the basis that a premium is paid by the employer for flexibility. The *Cleaning Services Award* 2010 ('the Cleaning Award') provides a precedent. Clause 12.4(b)(iii) of the Cleaning Award provides that a part time employee:

    *... receives, in addition to the hourly rate for a full-time employee, an allowance of 15% of the hourly rate. This allowance allows the employer to roster a part-time employee to work up to 7.6 hours per day, five days per week or 38 ordinary hours per week without the payment of overtime.*

33. In the alternate, if this Full Bench intends to progress a version of part time employment in terms of its provisional view expressed on 2 September 2016 where greater capacity to roster the ordinary hours of part time employees is provided, this needs to occur within certain parameters that ensure that part time employees have reasonably predictability in their pattern of work and that there is some disincentive to roster employees outside the agreed pattern of work.

**The provisional clause**

34. The central concern of United Voice about the provisional clause is that in its present form it is open to abuse. The provisional clause would allow employers to set the guaranteed hours lower than the regular hours worked. This would avoid liability to pay the guaranteed wage by rostering past the guaranteed hours but within the availability. The clause needs to be amended to ensure that the guaranteed hours reflect or come close to the actual practice.

35. There are no current minimum hours for part time employment under the substantive part time employment clauses in the Hospitality Awards other than the minimum shift engagement of three hours. This is partly explicable in terms of the primacy given by the current clauses to initial agreement between the employer and the employer as to the regular pattern of work and actual start and finish times.

36. If agreements concerning part time patterns of work are to become aspirational, there must be fixed weekly hours. Ideally there should be a guarantee of hours per week rather than hours spread over a month. United Voice considers that at least 10 hours work a week is a reasonable lower limit. Without a guarantee of hours, an essential characteristic of part time work would

be absent. It is not appropriate to rely on the '*good grace*' of employers in determining rosters.[8]

37. United Voice has concerns about averaging out provisions that allow notional weekly hours to be worked at any stage of a 4 week cycle. It is not part time work if the employee is left for significant periods without any income. We have nevertheless retained an averaging facility in our draft.

38. The importance of agreement between the employer and the employee should be maintained in relation to rostered days and the spread of hours although substantive provisions need to be contained within any clause to ensure that the poor bargaining position of individual employees does not results in agreements that provide in effect no limitation as to when ordinary hours work is performed. An employee should be able to agree to when the ordinary hours will be worked on certain days and times to a limit of less than 35 hour per week.

39. We have made the maximum ordinary hours that a part time employee can work 35. This is done to differentiate part time employment from full time employment. If flexible part-time employees can work 38 ordinary hours, there is a risk that full time employment would be diminished. Employers would prefer flexible part time employment. Reducing the ordinary hours that a part time employee can work to 35 creates a difference. This is an appropriate difference in the cost structure of part time employment. The intention is that full time employment is maintained and the part time employment is increased at the expense of casual employment.

40. United Voice also submits that provisional sub-clause 10.4(f) is important in maintaining the autonomy currently preserved by clause 10.4(iv) of the Clubs Award and like provisions. United Voice accepts that the clause in its current form creates the ability for an employee to change their availability in such a way that frustrates the guarantee. It is important that the employee's position is maintained without sacrificing the employer's prerogative to structure rosters. United Voice submits that this objective is best achieved by qualifying the right to change availability. This would be achieved by excluding '*unreasonable*' variations to availability. Further; alterations should be with notice unless notice is waived by the employer. The evidence heard overwhelming indicated that employees were compliant and co-operative with their employers in terms of roster changes and requests to work additional hours.

41. Annexed and marked respectively **A** and **B** are model part time employment clauses for the Hospitality Award and the Clubs Award that are consistent with United Voice's minimum conditions for change. We have included a 15% loading in these drafts.

[8] Transcript, Vice President Hatcher, PN2766, (12 July 2016).

42. We reiterate that change should not be considered in isolation and that the context of the '*choice*' to engagement a particular type of employee needs to considered to ensure that the decision to engage a part time employee is at least cost neutral for an employer.

United Voice

**13 October 2016**

# Annexure A

*Flexible part time employment – Hospitality Industry (General) Award 2010*

**12. Part-time employment**

**(a)** An employer may employ part-time employees in any classification in this award.

**(b)** A part-time employee is an employee who is employed in a classification in **Schedule D Classification Definitions** and who:

- is engaged to work at least 10 and less than 35 ordinary hours per week or, where the employer operates a roster, an average of at least 10 and fewer than 35 hours per week over the roster cycle;
- has reasonably predictable hours of work; and
- receives, on a pro rata basis, equivalent pay and conditions to those of fulltime employees who do the same kind of work.

**(c)** At the time of engagement the employer and the part-time employee will agree in writing upon:

(i) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle ('*the guaranteed hours*'); and

(ii) the days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed hours ('*the employee's availability*').

**(d)** Any change to the guaranteed hours may only occur with the written consent of the employee.

**(e)** The guaranteed hours must not be so low that they frustrate the entitlement to reasonably predictable hours of work described in clause 12 (b). The guaranteed hours should accurately reflect the number of hours that the employer expects an employee will be rostered each week.

**(f)** The employee may request a review of their guaranteed hours every 26 weeks.

**(g)** Where an employee has worked in excess of their guaranteed hours over a 26 week period then they may elect to increase their guaranteed hours to the average number of hours that they have worked each week over the 26 week period. Hours worked as overtime will not count towards the average.

**(h)** The employer may roster the employee's guaranteed hours and any additional hours in accordance with **clause 30 - Rostering**, provided that:

(i) the employee may not be rostered for work for any hours outside the employee's availability;

(ii) the employee must not be rostered to work in excess of 10 or less than 3 hours in a day; and

(iii) the employee must have two consecutive days off each week.

**(i)** The employee may alter the days and hours of the employee's availability on 28 days' notice to the employer, provided that the alteration is not unreasonable.

**(j)** All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 33 - Overtime**.

**(k)** An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.

**(l)** A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed and an allowance of 15% of the hourly rate.

**Transitional Provision**

**(m)** A part time employee who immediately prior to *(insert date)* has a written regular pattern of work must be rostered in accordance with that regular pattern of work unless the part time employee requests an arrangement in accordance with the preceding provisions of this clause.

# Annexure B

## Flexible part time employment - Registered and Licensed Clubs Award 2010

### 10.4 Part-time employment

**(a)** An employer may employ part-time employees in any classification in this award.

**(b)** A part-time employee is an employee who is employed in a classification in **Schedule C Classification Definitions** and who:

- is engaged to work at least 10 and less than 35 ordinary hours per week or, where the employer operates a roster, an average of at least 10 and fewer than 35 hours per week over the roster cycle;
- has reasonably predictable hours of work; and
- receives, on a pro rata basis, equivalent pay and conditions to those of fulltime employees who do the same kind of work.

**(c)** At the time of engagement the employer and the part-time employee will agree in writing upon:

(i) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (*'the guaranteed hours'*); and

(ii) the days of the week, and the periods in each of those days, when the employee will available to work the guaranteed hours (*'the employee's availability'*).

**(d)** Any change to the guaranteed hours may only occur with the written consent of the employee.

**(e)** The guaranteed hours must not be so low that they frustrate the entitlement to reasonably predictable hours of work described in clause 10.4 (b). The guaranteed hours should accurately reflect the number of hours that the employer expects an employee will be rostered each week.

**(f)** If the employee works more than their guaranteed hours for 20 weeks, then the guaranteed hours will be varied to reflect the actual hours being worked by the employee. The guaranteed hours will become the average worked in that period.

**(g)** The employer may roster the working of the employee's guaranteed hours and any additional hours in accordance with **clause 25 - Rostering**, provided that:

(i) the employee may not be rostered for work for any hours outside the employee's availability;

(ii) the employee must not be rostered to work in excess of 12 or less than 3 hours in a day; and

(iii) the employee must have two consecutive days off each week .

**(h)** The employee may alter the days and hours of the employee's availability on 28 days' notice to the employer. The employee will not unreasonably change their availability.

**(i)** All time worked in excess of the employee's rostered hours will be overtime and paid for at the rates prescribed in **clause 28 - Overtime**.

**(j)** An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 10.5.

**(k)** A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed and an allowance of 15% of the hourly rate.

**<u>Transitional Provision</u>**

**(j)** A part-time employee who immediately prior to (*insert date*) has a written regular pattern of work is entitled to be rostered in accordance with that arrangement, unless the part-time employee makes a written agreement to replace that arrangement with an arrangement under clause 10.4 (c).