IN THE FAIR WORK COMMISSION

Matter No: AM2016/15, AM2014/69

Section 156 - Four Yearly Review of Modern Awards –Plain Language redrafting – *Cleaning Services Award 2010*

SUBMISSION OF UNITED VOICE

27 July 2018

1. This submission relates to outstanding items in the plain language redrafting of the *Cleaning Services Award 2010* ('Cleaning Award'), is made pursuant to the Statement[1] dated 29 June 2018 and filed in reply to the submission of the Australian Industry Group (AiG) dated 24 July 2018.

Item 12: Clause 12. Classifications in the Plain Language Exposure Draft

2. United Voice objects to AiG's contention that there is no requirement in the current Cleaning Award to classify employees in accordance with the classification definitions in Schedule D-Classifications.

3. The obligation to classify employees within the current Cleaning Award arises from clause 15. Classifications, clause 12. Employment categories and Schedule D-Classifications.

4. Clause 15.1 states:

   'Classifications are set out in Schedule D—Classifications. An employee, other than an excluded employee, must be employed in a classification in Schedule D and paid as such.'

5. The words *'must be employed in a classification in Schedule D'*, on their ordinary meaning, clearly create an obligation for the employer to classify an employee in accordance with an award classification.

6. Clause 12.2 states:

   'At the time of engagement, an employer will inform each employee of the terms of their engagement and in particular whether or not they are to be full-time, part-time or casual, their usual location of work and the employee's classification. This will then be recorded in the time and wages record of the employee.'

[1] [2018] FWC 3842

7. Clause 12.2 requires an employer to inform an employee of their classification on engagement. This requirement can only be met if the employee has been classified in accordance with the award.

8. Schedule D –Classifications states:

'All employees will be classified according to the following classification definitions and paid as such.'

9. Again, the words '*all employees will be classified according to the following classification definitions*' requires the employer to classify an employee in accordance with an award classification.

10. Classification in accordance with the award is a significant matter. Minimum rates of pay are paid according to an employee's classification. Without having a classification, an employee would be unable to identify if they were being paid the correct rates of pay. Similarly, an employer would be unable to identify if they were paying employees the correct rates of pay. This would lead to uncertainty and confusion for both employees and employers.

11. Clause 12.1 of the Plain language Exposure Draft of the Cleaning Services Award dated 25 January 2018 states:

'An employer must classify an employee covered by this award in accordance with Schedule A—Classification Definitions.'

12. The wording in clause 12.1 of the Exposure Draft accurately reflects the current obligations in the Cleaning Award and should be retained.

Item 32 –Clause 23.6(c) Call back for non-cleaning purposes in the Plain Language Exposure Draft

13. AiG have submitted that that the wording '*despite anything else to the contrary elsewhere in this award'* in clause 24.6 dealing with call backs for non-cleaning purposes overrides any entitlement to overtime.

14. This is a narrow and inaccurate reading of the current award and does not take into account the matter that clause 24.6 was intended to address nor s62 of the *Fair Work Act 2009* ('the Act').

15. Clause 28.8 sets out the minimum payments for employees who are recalled to duty for cleaning purposes. Overtime payments apply, with a minimum payment of 2 hours.

16. In contrast, clause 24.6 sets out the minimum payments for employees who are directed by their employer to return to work to perform non-cleaning tasks such as administrative duties or for disciplinary or counselling interviews. Unlike in clause 28.8, overtime does not *always* apply but overtime will apply where an employee has worked over their maximum weekly or maximum daily hours.

17. Clause 24.6 was inserted into the Cleaning Award as a result of the Decision dated 21 October 2013[2] and the subsequent Determination[3] made on the same date as part of proceedings in the Modern Award Review 2012. The Decision reflected a consent position between the parties.

18. The application for a clause for call backs for non-cleaning purposes was made by United Voice on 6 March 2012 ('the Application').

19. Current clause 24.6 of the Cleaning Award is in similar terms, though not the exact terms, as proposed in the draft determination (Attachment A) of the Application. Notably, the words currently in dispute *'despite anything else to the contrary elsewhere in this award'* appear in the draft determination.

20. In paragraph 4 of the grounds of the Application (Attachment B), United Voice submitted that: *'The Modern award makes no provision for minimum payments for employees called back to work, outside of normal rostered hours. United Voice believes this was an unintended oversight in the Award-making process.'*

21. Clause 24.6 was proposed and inserted in an attempt to address the lack of minimum payments for employees who were called back to work for non-cleaning purposes, given that there were no minimum payment or minimum engagement period in the Cleaning Award for employees when the call back was not for cleaning.

22. The clause was intended to confer a benefit on employees, not to remove any entitlement to overtime. In this context, the words *'despite anything else to the contrary elsewhere in this award'* should be read as differentiating the provisions for call back for non-cleaning purposes from the provisions for call back for cleaning purposes in clause 28.8.

23. Further, clause 24.6 applies where an employee is *directed* by an employer to return to work for non-cleaning purposes. An interpretation that this clause overrides the overtime provisions in clause 28 would be inconsistent with s 62 of the Act regarding maximum weekly hours of work.

[2] [2013] FWC 8141
[3] PR543432

24. The purpose of s62 of the Act is to ensure that in most situations an employee[4] works no more than 38 ordinary hours a week and any additional hours will generally be paid at some premium as overtime. The section also provides a mechanism to assess whether any direction to work additional hours is reasonable.

25. Clause 28 of the Cleaning Award states that *'An employer may require an employee to work reasonable overtime at overtime rates. An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable…'*

26. Clause 28 provides that reasonable overtime will be paid at overtime rates and that an employee can refuse to work overtime if the additional hours are unreasonable. This is in reflection of the National Employment Standards ('NES') in relation to maximum weekly hours in section 62 of the Act.

27. If, as AiG argue, clause 24.6 overrides any other award provision that might apply in the relevant circumstances, then employees could be directed to work additional hours without the payment of overtime, and without the ability to refuse to work such additional hours. This would be inconsistent with the NES and such an interpretation should be rejected.

28. The wording in clause 23.6 of the Exposure Draft accurately reflects the current obligations in the Cleaning Award and should be retained.

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[4] The section is not limited to permanent employees and applies to casual employment. Part-time employees' ordinary hours will be the number of weekly hours less than 38 as agreed.