

## IN THE FAIR WORK COMMISSION

Matter No: AM2016/8

Section 156 - Four yearly review of modern awards – Payment of wages

### SUBMISSION WAITING TIME

#### UNITED VOICE

#### INTRODUCTION

1. This submission seeks to clarify United Voice's position concerning various applications by Australian Business Lawyers ('ABL') on behalf of its clients to remove and replace the current late payment provisions in the
  - a. the *Cleaning Services Award 2010* ('*Cleaning Award*');
  - b. the *Hospitality Industry (General) Award 2010* ('*Hospitality Award*');
  - c. the *Registered and Licensed Clubs Award 2010* ('*Clubs Award*'); and
  - d. the *SES Award*. (collectively: 'the Awards')
2. On 19 July 2016, ABI filed a number of draft determination seeking the deletion of late payment of wages provisions in Awards ('the late payment penalty claims').
3. The Australian Hotels Association ('AHA') support's ABI's claims regarding the *Hospitality Award*.
4. United Voice has an interest in the Awards.
5. In our submission of 13 October 2013, United Voice noted that we do not support these changes to the Awards. We withdraw this opposition on the basis of the qualification noted below.
6. Our initial opposition to the proposed changes were motivated by concerns that there was no demonstrable problem that the late payment claims were directed towards and that removing late payments by electronic funds transfer (EFT) from their operation was problematic.
7. The current clauses in the Award make clear that employers must not delay the payment of wages in accordance with the agreed method of payment. The current penalty clauses all potentially cover payments made by EFT: clause 20.3 of the *Cleaning Award* includes payments by EFT, clause 26.4 of the *Hospitality Award* and clause 21.4 of the *Clubs Award* deal generally with wages and clause 18.6 of the *SES Award* deals with all payments under the clause.
8. We acknowledge that the current clauses are problematic as they do not clearly limit a waiting penalty to employee waiting at the workplace payments for wages to be paid in cash or cheque. The decision of the Full Bench in *Timber Industry Award 2010* [2015] FWCFB 2856 is noted.

9. We do not consider that the proposed amendments are problematic in terms of section 139 of the *Fair Work Act 2009* ('the Act') or inconsistent with the Full Bench's decision of 11 March 2015 concerning new clauses in the *Timber Industry Award 2010* [2015] FWCFB 1549.
10. United Voice has concerns that the proposed variations will unhelpfully suggest to a reader of the payment provisions of the Awards that the only penalty associated with the late payment of wages occurs when payment is by cash or cheque and the employee is present in the workplace waiting to be paid. The benefit of the current provisions is that they provide some general encouragement to pay wages as they have been agreed to be paid in a timely manner. We note that there was no submission or evidence that suggested employees were abusing these provisions and demanding waiting penalties inappropriately.
11. United Voices proposes that it would be appropriate for the Full Bench in this review to consider a declaratory provision in the Awards and other modern awards noting the significance of a failure to pay wages by the method and at the time agreed.
12. The Awards except the SES Award vary the general obligation created by section 323 of the Act to pay '*at least monthly*'. Subsection 323(3) notes:

*(3) Despite paragraph (1) (b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

13. Subsection 323(3) provides specifically that the contravention of a modern award's payment of wage provision is a civil remedy offence. The Parliament has not sought to rely solely on section 45 of the Act that notes generally '*a person must not contravene a term of a modern award.*'
14. Arrangements for the payment of wages under modern award will have some diversity. When the award provides a choice, this necessarily will involve the employer and the employee agreeing on a method. It is significant that the Parliament has made a specific civil penalty provision directed to the methods by which wages may be agreed to be paid under an award.
15. As the Parliament clearly intended the Act's civil remedy regime to apply in circumstances where there is a failure to comply with an agreed method of payment, it is appropriate that there should be a clear note after the payment clause indicating that there are serious consequences for non-compliance. A note as proposed would be doing no more than clarifying the position and ensuring that the Award reflects the importance that the Parliament has chosen to attach to the timely payment of wages in accordance with the method agreed between the employer and the employee. In most cases this will be payment by EFT on a particular day of the week.

16. We provide a draft note as follows:

*Note: subsection 323(3) of the Fair Work Act states if a modern award specifies a particular method by which the money must be paid, the employer must pay the money by this method and failure to do so is a civil contravention of the Fair Work Act.*

United Voice  
**19 October 2016**