

IN THE FAIR WORK COMMISSION

Matter No: AM2016/8

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

SUBMISSION

UNITED VOICE

1. This submission is made pursuant to the directions of the Commission made on 19 September 2017.
2. We note our submissions made on 13 October 2016, 8 November 2016 and 23 August 2017 and would ask that this submission be read with our earlier submissions. We do not wish to withdraw any of our earlier submissions but acknowledge that the Commission has expressed concluded views in relation some matter such as the payment of termination entitlements and we do not seek to traverse these findings except where the current directions invite further comment.
3. We support the recent submission made by the Australian Council of Trade Unions ('ACTU') but elaborate further on some of the concerns raised.

Provisional payment of wages and other amounts model term

4. We confirm our earlier submissions that monthly payment should not be considered an award based possibility for casual employment. We note the ACTU's adoption of our concerns in relation to casual employment generally.
5. We also agree with the ACTU's observations concerning a model term and that the payment of wages is an area where there should be an award by award review of current payment of wages provisions and the appropriateness of current terms and the application of any model term.
6. As noted in our submission made on 23 August 2017, three modern awards that United Voice is interested in allow for the monthly payment of wages. These are the *Restaurant Industry Award 2010*, the *Children's Services Award 2010* and the *Supported Employment Services Award 2010*. In each case, we would consider that monthly payment in some respect however modified is problematic with the nature of the work under these awards.

7. There have been a number of recent Federal Court decisions that have clarified the role of the Commission in this 4 yearly review.
8. As the Full Federal Court in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*¹ recently observed:

*It is of the essence to appreciate that a modern award is not an instrument the product of agreement, or conciliation and arbitration as representing all the terms and conditions of employment of identified employees. Rather, together with the National Employment Standards its purpose is to provide a fair and relevant minimum safety net of terms and conditions.*²

9. We reiterate our submission made on 23 August 2017, that if the monthly payment of wages is an outcome that an employer considers particularly advantageous, it is an outcome that is best achieved through a bargained industrial relations outcome.
10. Recently, the Full Federal Court in *Shop, Distributive and Allied Employees Association and another v The Australian Industry Groups and others* [2017] FCAFC 161 (‘the Federal Court Penalty Rates case’) observed in rejecting our submission (and that of our co-applicant) that a material change in circumstances was necessary before the Commission exercised its review function under section 156 of the Act and altered a modern award that:

33 The reference in s 134(1) (g) to the “need to ensure a simple, easy to understand, stable and sustainable modern award system” does not support the applicants. That is a matter which the FWC must take into account as part of the modern awards objective. It is thus a matter for the FWC to determine the weight to be given to the value of stability in the particular review it is conducting, along with the weight to be given to all other matters it must take into account, cognisant of its duty (which itself involves an evaluative assessment of potentially competing considerations) to ensure that modern awards, together with the National Employment Standards, provide the required fair and relevant minimum safety net. It is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC’s functions, such as stability, and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.

34 Further, there is no basis for imputing to Parliament an intent to give stability, a consideration that the FWC must take into account, priority over the FWC’s ultimate task of ensuring that “modern awards, together with the National

¹ [2017] FCAFC 123.

² As above at paragraph 18.

Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". The applicants' contention would constrain the capacity of the FWC to maintain an award's compliance with the modern awards objective. That could only be done if a material change of circumstance was first established. It should not be readily presumed that Parliament intended to impose constraints upon the achievement of an objective that it has mandated. A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.

11. We agree with the ACTU's broad statement that the Commission should not be attempting to fix something that isn't broken. The model term appears more broadly directed to general regulation of the payment of wages rather than consideration of what an appropriate safety-net term dealing with payment of wages should look like. This consideration reinforces the need for award by award consideration of payment of wages terms and also reconsideration of current terms within modern awards. The 3 modern awards where we ask the Commission to remove or modify monthly payment as a possibility are good examples where in this review it is proper for the Commission to properly consider the appropriateness of the current provisions within modern awards.
12. One matter which we raised in our earlier submission of 23 August 2017 briefly is that the model term does not deal with engaging employees on the basis of monthly payment.³ If this possibility is left open namely that employers can engage award reliant employees on the basis of monthly payment, this fundamentally undermines any attempt to limit or make monthly payment a more qualified payment option.
13. At the point of engagement, the employee has limited bargaining power and no real capacity to agree to a particular payment interval. There is also the concern that a newly engaged employee will have more potential issues in relation to indigency and a significant delay in the initial 'pay day' will impact on new employees to a greater extent.
14. Accordingly, there should be clear recognition in any model term that employees cannot be engaged initially on the basis of a monthly payment and that any change should take place after an initial period of employment. The statutory minimum employment period⁴ is an appropriate interval before an employer can seek to change an initial weekly or fortnightly pay period 'by agreement' to a monthly pay period. The addition of the word 'after conclusion of the minimum employment period' at the end of the first sentence in subclause 1(e) of the model term would achieve this objective. Having the minimum payment periods as

³ Submission of 23 August 2017 paragraph 45
⁴ Section 383, Fair Work Act 2009.

the period before which an employee can be changed to monthly payment would mean that there would be the real possibility that any decision made to move to monthly payment is as a result of a real agreement between the employer and the employee.

Payment on termination of employment model term

15. We rely on the submission of the ACTU and our earlier submissions made on 8 November 2016 and 13 October 2016. We note that the Commission has expressed a concluded view but as the Commission has invited further submissions we note the following brief additional comments.
16. In relation to the provisional payment on termination model term we query the utility of such a term. Particularly with longstanding employees where state and territory based long service leave entitlements and payments in lieu of notice will have to be paid, there will be limited possibility of the term creating a single pay day for termination entitlements. There is significant benefit in having a well signposted single cut-off point where an employer should pay to an employee what is owed. We maintain our position that prompt payment after termination should be the modern award standard.
17. In relation to termination entitlements, working out what precisely has been paid is often difficult and made more difficult when termination entitlements are made in a series of separate payments sometimes significantly after the end of the employment. In terms of providing a useful standard setting provision, the model term will have some difficulty doing this. Conscientious employers will be aware that they can legally make at least 2 payments in relation to many termination and those that pay in dribs and drabs will no doubt continue to do so as there is no clear provision mandating one payment at any particular time before or after the end of the employment relationship.

Accrual of payments

18. We do not wish to add to the submission of the ACTU on this matter.
19. We thank the Commission for the opportunity to make a further submission concerning this common issue.

United Voice

31 October 2017