IN THE FAIR WORK COMMISSION

Matter No: AM2016/15

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

SUBMISSION OF UNITED VOICE

3 December 2018

1. This submission is responsive to the Statement[1] of the Full Bench of the Fair Work Commission dated 16 November 2018 ('Statement') concerning the plain language re-drafting of reasonable overtime clauses.

2. United Voice has an interest in the *Cleaning Services Award 2010* ('Cleaning Award') and the *Hospitality Industry (General) Award 2010* ('Hospitality Award').

3. On 16 November 2018, the Commission issued draft determinations for the Cleaning Award and the Hospitality Award that exclude casuals from provisions concerning reasonable overtime.

4. On 29 October 2018, the Full Bench in a decision[2] ('the Decision') noted:

> ***[23]*** *We would observe that the extension of the reasonable overtime term to casuals requires further consideration. It appears that the matter was not the subject of any real debate in the Part-time and Casuals proceedings and that the variations made by that Full Bench were simply consequent upon the decision to provide that casuals were to be paid overtime rates in certain circumstances. It seems to us that this issue is one of some complexity. The capacity for an employer to require a causal to work reasonable overtime seems inimicable to the nature of casual employment. There is also a question about whether s.62 applies to casual employees. These issues can be further explored in the settlement of the variation determinations in respect of the relevant awards.*

<u>The current status</u>

5. Casual employees under the Cleaning Award are entitled to overtime payments (clauses 12.5(a) and 24.2(a)) as are casual employees under the Hospitality Award (clause 13.4).

[1] [2018] FWCFB 5749
[2] [2018] FWCFB 6680

6. The reasonable overtime provisions in the Cleaning Award (clause 28.1) and the Hospitality Award (clause 33.1) do not exclude casual employees.

Section 62 of the *Fair Work Act 2009*

7. The question of whether s 62 of the *Fair Work Act 2009* ('the Act') applies to casual employees is raised in paragraph [23] of the Decision.

8. Section 62 of the Act does apply to casual employees as it deals with '*an employee*'.

9. There is no exclusion of casual employees in s 62. This section can be contrasted with other sections of the National Employment Standards ('the NES') that explicitly exclude casual employees such as s 86 (in regards to annual leave) and s 95 (in regards to paid personal/carer's leave).

10. In addition, in s 62 (1)(b) provision is made specifically for '*employees who are not full time employees*'. The term '*employees who are not full time employees*' rather than '*part-time employees*' is used and should be read to include both part-time and casual employees.

11. The entitlement of casuals to overtime under the Hospitality Award arose out of the Commission's review of overtime for casual employees in relation to a number of modern awards that took place in the Part-time and Casual proceedings of this 4-yearly review. In the principal decision[3] of this common issue, the Full Bench noted at [674]:

> *Section 62 of the FW Act gives casual employees the right to refuse to work hours in excess of 38 per week where the request or requirement is unreasonable, but that is the same right as for full-time and part-time employees under the 3 awards who have an entitlement to overtime penalty rates. It might have been submitted that because, in determining whether additional hours are reasonable or unreasonable, s.62(3)(d) requires account to be taken of "whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours" that casual employees not in receipt of overtime penalty rates have wider scope to contend that a request to work overtime is unreasonable, but we doubt whether this has any practical benefit in actuality.*

12. Casual employees are entitled to the protection of not being requested or required to work more than the lessor of 38 hours per week or their ordinary hours of work in a week unless

[3] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541.

those additional hours are reasonable. Casual employees are also entitled to the protection of s62 (2) in refusing to work additional hours if those hours are unreasonable.

The draft determinations

13. We agree that there is a legitimate question about the nature of casual employment and whether an employer *should* be able to require a casual employee to work overtime.[4] This is a question which raises broader issues about casual employment and may require further consideration in the appropriate context.

14. However, in the context of the plain language re-drafting process, the key matter that arises in framing the draft determinations is the application of s 62 of the Act to casual employees and the content of the current awards.

15. The draft determinations for the Cleaning Award and the Hospitality Award should not exclude casual employees from the reasonable overtime provisions, given that:

    (a) s 62 of the Act applies to casual employees;

    (b) the reasonable overtime provisions in part reflect s 62 and;

    (c) clause 28.1 of the current Cleaning Award and clause 33.1 of the current Hospitality Award do not exclude casual employees.

16. The draft determinations for the Cleaning Award should be amended to delete the words *'other than a casual'* from clause 28.1 (a) and the draft determination for the Hospitality Award should be amended to delete the words '*other than a casual*' from clause 33.1.

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[4] There is also a broader issue about whether award clauses enabling an employer to *require* any employee to work overtime accord with the NES, as noted in our submission dated 16 October 2018. Our position is that the NES provides a more beneficial entitlement than the relevant award clauses.