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**Fair Work Commission: 4 yearly Review of modern awards**

**AM2014/196 & AM2014/197: CASUAL & PART TIME EMPLOYMENT**

**FINAL SUBMISSIONS**

**CHILDREN'S SERVICES AWARD 2010**

**EDUCATIONAL SERVICES (SCHOOLS) GENERAL STAFF AWARD  
2010**

**National Out of School Hours Services Association (NOSHSA)**

**8 AUGUST 2016**

## 1. INTRODUCTION

- 1.1 These submissions are filed by the National Out of School Hours Services Association (**NOSHSA**) in relation to proceedings AM2014/196 and AM2014/197 (**Proceedings**).
- 1.2 NOSHSA is an alliance of the peak outside school hours care (**OSHC**) associations in each State and Territory in Australia. NOSHSA represents over 3,500 OSHC services through the combined membership of these associations.
- 1.3 NOSHSA is committed to OSHC services, their children and the families who use the services.

## 2. BACKGROUND

- 2.1 By application dated 19 October 2015 (**ACTU Claims**) in the Proceedings, the Australian Council of Trade Unions (**ACTU**) sought to vary the *Children's Services Award 2010* and *Educational Services (Schools) General Staff Award 2010* (**Awards**).
- 2.2 The ACTU seek the following variations to the Awards by inserting:
  - (a) a casual conversion clause, where casual employees (other than irregular casual employees) have the right to elect to convert to permanent employment after 6 months (**Casual Conversion Claim**);
  - (b) a clause that requires part time and casual employees to be rostered for a minimum of 4 hours on any shift (albeit the minimum hours can be worked over a split shift in OSHC businesses using the *Children's Services Award 2010*) (**Minimum Engagement Claim**);
  - (c) a clause that states that employees hours cannot be reduced to avoid a provision of the above clauses (**Reduced Hours Claim**);
  - (d) a clause that requires additional hours be offered to existing staff before hiring new staff (**Engagement Restriction Claim**);
  - (e) a clause that requires a casual to be notified in writing, on commencement of their employment of the likely hours of work required per week (**Commencement Information Claim**).
- 2.3 The ACTU rely on the statement of Narelle Jenks dated 15 October 2015 in relation to the *Children's Services Award 2010*. We have been unable to identify any specific evidence in relation to the *Educational Services (Schools) General Staff Award 2010*.
- 2.4 The following evidence has been adduced by parties opposing the ACTU Claims in the Awards:
  - (a) Statement of Kylie-Anne Brannelly of NOSHSA dated 22 February 2016 (**Brannelly Statement**);
  - (b) Statement of Paul Alexander Mondo dated 24 February 2016 (**Mondo Statement**).

## 3. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

- 3.1 The relevant legislative framework has been extensively outlined in the various submissions of the Australian Chamber in these Proceedings.
- 3.2 For the purpose of these submissions it is relevant to note:

- (a) Section 156(5) of the *Fair Work Act 2009* (Cth) (**FW Act**) requires the Full Bench to review the Awards “*in [their]... own right*”.
- (b) In conducting such review the Full Bench is required to consider whether:
  - (i) the ACTU has advanced a case (as contemplated by the Preliminary Issues Decision), including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation<sup>1</sup>, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;
  - (ii) any such exercise of discretion is consistent with s 134 of the FW Act; and
  - (iii) the proposed changes would be consistent with s 138 of the FW Act.

#### **4. HAS THE ACTU ADVANCED A SUFFICIENT EVIDENTIARY CASE?**

##### ***Children’s Services Award 2010***

- 4.1 Ms Jenks’ statement does not provide a sufficient basis to support the ACTU Claims in respect of the *Children’s Services Award 2010*.
- 4.2 Her evidence provides little weight to the argument that casual employees in the childcare industry have unfavourable, short hours of work that should be extended in favour for permanency. In fact, Ms Jenks acknowledged under cross-examination that she entered the childcare industry because, “*the hours suited [her] more, because finding childcare on the weekend was too difficult.*”<sup>2</sup>
- 4.3 Ms Jenks’ statement and her evidence under cross-examination provide no support for the Casual Conversion Claim and appears to be solely focussed on the issue of shift length.
- 4.4 Ms Jenks’ preference to work longer shifts needs however to be assessed in the context of the conditions of the childcare industry as identified by the Mondo Statement and Brannelly Statement.
- 4.5 These statements identify:
  - (a) the requirements of legislative ratios and qualifications in both industries;<sup>3</sup>
  - (b) the difficulties in rostering in accordance with the requirements of 5.5(a) in both industries;<sup>4</sup>
  - (c) the unique hours of operation of an OSHC, being before and after school for 2-3 hours at a time.<sup>5</sup>
- 4.6 These industry characteristics render the Minimum Engagement Claim entirely unworkable given that an increase in the minimum engagement conditions under the award from 2 to 4 hours would:
  - (i) be inconsistent with the hours of operation of the service which generally operates for 2-3 hours at a time either before or after school;<sup>6</sup>

<sup>1</sup> *Preliminary Issues Decision* at [23] and [60].

<sup>2</sup> PN7473

<sup>3</sup> See Statement of Brannelly at [29]-[45], See Statement of Mondo [33] - [42]

<sup>4</sup> See Statement of Brannelly at [17]-[20], See Statement of Mondo [70]

<sup>5</sup> See Statement of Brannelly at [25]-[28]

- (ii) contradict the Federal Government Childcare Benefit or the Childcare Rebate which only funds 2 - 3.5 hours of care depending on whether the care is before or after school;<sup>7</sup>
- (iii) have the effect of causing OSHC service providers operating under different industrial instruments to increase the cost of providing care due to increased staff wages for those businesses using the *Children's Services Award 2010*.<sup>8</sup>

4.7 In relation to the Casual Conversion Claim, the Brannelly Statement provides evidence that converting casuals to permanent employment is inconsistent with the way OSHC businesses operate and roster. She provides the example of "reverse rostering" where employees provide their availability to the OSHC centres who subsequently prepare rosters to fit in with employee's university timetables and out of work activities.<sup>9</sup>

4.8 The statements also provide evidence resisting the Engagement Restriction Claim<sup>10</sup>, Commencement Information Claim<sup>11</sup> and the Reduced Hours Claim<sup>12</sup> advanced by the ACTU.

4.9 For the above reasons, the ACTU Claim should fail in respect of the *Children's Services Award 2010*.

#### ***Educational Services (Schools) General Staff Award 2010***

4.10 NOSHSA considers that no evidentiary case has been made for the ACTU Claims in respect of the *Educational Services (Schools) General Staff Award 2010*. For that reason alone, the ACTU Claims should fail.

4.11 Notwithstanding this position, the evidentiary case advanced by employer parties outlined above is equally applicable to OSHC centres operating as part of independent or private schools.

### **5. CONCLUSION**

5.1 It is apparent that the claims made in these Proceedings by the ACTU:

- (a) are not supported by probative evidence properly directed toward demonstrating the facts supporting the proposed variation<sup>13</sup> in respect of the Award, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;
- (b) are not consistent with the modern awards objective as outlined in s 134 of the FW Act; and
- (c) are not terms that the Full Bench is permitted to include, or required to include, only to the extent necessary to achieve the modern awards objective within the scope of s 138 of the FW Act.

5.2 For all the above reasons, NOSHSA submit that the ACTU Claims should be dismissed.

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<sup>6</sup> See Statement of Brannelly at [41]-[51], [1]-[7] page 7

<sup>7</sup> See Statement of Brannelly at [12]-[16], page 8

<sup>8</sup> See Statement of Brannelly at [8]-[9], page 7

<sup>9</sup> See Statement of Brannelly at [17], page 8

<sup>10</sup> See Statement of Brannelly at [24] - [28], page 10

<sup>11</sup> See Statement of Brannelly at [1] - [3], page 10

<sup>12</sup> See Statement of Brannelly at [4], page 11

<sup>13</sup> *Preliminary Issues Decision* at [23] and [60].