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The Associate
Commissioner Cirkovic
Fair Work Commission
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East Sydney, NSW 2011.

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Dear Associate

***Aboriginal Community Controlled Health Services Award* 2010**

We note the conference on 28 March 2017 for the *Aboriginal Community Controlled Health Services Award* 2010 ('the Award').

In relation to item 11 of the document titled *Revised Summary of Submissions –Technical and Drafting*, republished 27 March 2017, United Voice withdraws its claim concerning this matter.

In relation to item S5 in the document titled *Summary of Proposed Substantive Variations*, dated 14 March 2017, we note the following.

The Health Service Union in its outline of variations filed on 2 March 2015 sought that the casual loading is paid '*in addition to other shift loadings, weekend and public holiday rates.*' The claim is not mentioned in its additional submission and draft determination filed on 30 September 2016 but maintained in the Commission's summary of substantive claims.

The 4 yearly review is a review and not an *inter partes* proceeding and review of the Award's treatment of the casual loading should take place.

In the recent decision of 23 February 2017, *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 ('the Decision'), the Commission made repeated reference to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading. At paragraph 333 of the Decision, the Commission noted that the Productivity Commission in its Final Report observed:

> *In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.*

The Productivity Commission described a '*default approach*' where:

> *... the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.*[1]

At paragragh 337 of the Decision, the Commission indicated a preference for the default approach as:

> *... the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer's leave, notice of termination and redundancy benefits.*

The Commission further observed that the default approach is consistent with consideration 134(1) (g) of the modern award objective which requires that modern awards are '*simple, easy to understand, stable and* [provide a] *sustainable system for Australia that avoids unnecessary overlap of modern awards'*.[2] This consideration most clearly identifies consistency in the treatment of terms and conditions across all modern awards as *prima facie* an element of the modern award objective.

While the Commission did not make any specific reference to consideration 134(1) (da) (iii) which deals with the need to provide additional remuneration for employees working unsocial hours, United Voice contends that the insertion of this consideration into the modern award objective in January 2013 also provides support for the casual loading being an additional amount paid when any penalty or loading applies to work at an unsocial time. Subsuming the casual loading into other penalties and loadings also means that a casual employee is not compensated for disutility determined to apply for the hours worked.

The Commission in the Decision applied its stated preference for the default approach generally whenever it reduced or altered rates in relation to the modern awards the subject to the review. Examples of specific applications of this approach are found in the general consideration of weekend penalty rates for casuals;[3] in the Commission's proposed reductions in the Sunday rate in the Hospitality Award, [4] in the Commission's proposed reductions in the public holiday rate in the Hospitality Award, Restaurants Award, Retail Award, Fast Food Award and Pharmacy Award (it was not applied to the Clubs Awards as the rates in this award were not altered);[5] in effect in the proposed reductions in the Saturday and Sunday rate for casuals under the Fast Food Award;[6] in the Commission's proposed reductions in the Sunday rate in the Retail Award;[7] and for the proposed reductions in the Sunday rate in the Pharmacy Award.[8] The principle can be said to be one of general application within the modern award system unless there is some cogent industry or sector specific reason for it not to apply. The reliance on consideration 134(1) (g) of the modern award objective as justification for its adoption is significant.

More generally, the 25% loading for casuals has the status as standard. The components of the 25%

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1 The Decision, paragragh [335].
2 As above, [338].
3 As above, [333] to [338].
4 As above, [888] to [898].
5 As above, [1962] to [1979]
6 As above, [1403] to [1406]
7 As above, [1715].
8 As above [1878] to [1884]

loading were last subject to thorough merits review in the so called Metals case in 1998.[9] On 12 September 2008, a Full Bench headed by the then President Justice Giudice, noted in the context of settling the exposure drafts to several priority modern awards [2009] AIRCFB 717 [paragraph 20] '*[W]e have adopted a general standard of 25 per cent for the casual loading in the drafts.*'

On 19 December 2008, the same Full Bench expanded on its earlier comment concerning the appropriateness of the 25% loading noting [2008] AIRCFB 1000 [paragraph 49]:

> *In 2000 a Full Bench of this Commission considered the level of the casual loading in the Metal, Engineering and Associated Industries Award 1998 (the Metal industry award). The Bench increased the casual loading in the award to 25 per cent. The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry. It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard*

In award modernisation, the Award was a stage 4 award (AM 2008/64) and the 25% casual loading within the Award is reflective of the standard that the Commission sought to apply at the time.

As the recent decision of the Commission in the Penalty Rates Review has provided significant clarity concerning the preferred position in relation to the disaggregation of the casual loadings from penalties and loadings generally, United Voice urges the Commission to ensure that the Award is consistent with current preferred practice in relation to the treatment of the casual loading.

A review of loadings and penalties within the Award should take place.

We make some general comments concerning such a review below.

References here are to the most current exposure draft of the Award.

The interrelationships between the Award's overtime provisions, shift loadings and penalty rates are complex.

Casual employees are eligible to be paid overtime for work outside the ordinary hours of work (see: clauses 13.3 and 19.1), be shift worker and be paid shift loadings for Saturday and Sunday work (clause 20) and a penalty rate for public holiday work (clause 24).

The Award provides for a penalty rate for public holiday work by casual employees which is an additional 50% for such work (clause 24.4) and which is well below what a permanent employee is paid. Clause 24.3(b) should be deleted.

In relation to shift work, the Award provides that shift penalties for casual employees are calculated upon the employee's '*minimum hourly rate, prior to the addition of the 25% casual loading*' (clause 20.5). The Award's shift work provisions appear compliant with the Commission's preferred position provided that casual employees rostered on weekends and outside the span of hours generally are shift workers. This appears the case.

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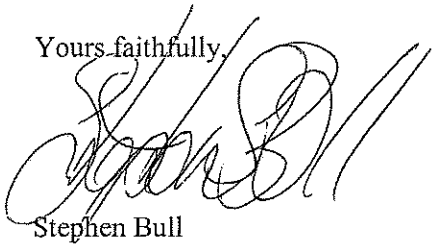
[9] *Metal, Engineering and Associated Industries Award, 1998 – Part I* (Odn C No. 02567 Of 1984), Print T4991

There does appear to be an issue with the treatment of non-shift casual employees' entitlement to overtime.

To ensure, the Award is consistent with the default position expressed by the Commission in the recent penalty rates decision requires an amendment to clause 11 to the following effect '*the casual loading is paid in addition to any overtime payments, loadings or penalty rates applicable to the employee's hours of work.*' Such an amendment would likely affect only the overtime rate paid to non-shift casual employees working outside the span of hours and clarify the treatment of casual employees on public holidays if the above deletion is made.

For these reasons the claim of the Health Services Union that the casual loading under the Award should be paid in addition to any loading or penalty rate is consistent with the Commission's current stated preferred position in relation to the manner in which the casual loading should be treated and would not in fact appear to significantly alter the safety net for casual employees currently provided by the Award.

Yours faithfully,



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