

IN FAIR WORK COMMISSION

FWC Matter No: AM2016/4

Applicant: Community and Public Sector Union (“The CPSU”)

In the matter of an application to vary the coverage of a modern award during a review of modern awards –s 156

CPSU RESPONSE TO DRAFT DETERMINATION OF 27 SEPTEMBER 2017

Decision in [2017] FWCFB 3803

1. The CPSU notes the Fair Work Commission Full Bench decision on 27 September 2017 determining, *inter alia*, the CPSU’s application to vary the *Broadcasting and Recorded Entertainment Award 2010* (The Award).
2. Our application sought to vary that award to cover worked performed by CPSU members who are Captioners/Audio Describers and Subtitlers/Subtitling Editors. The work performed by these employees in this discrete area of the industry was not covered by the Award.
3. Arising from the Decision, a draft determination was issued on 27 September 2017 and interested parties granted a period of four weeks from the date of the decision to provide comments to the Commission regarding that draft determination. These submissions are made in response to that invitation.

Draft Determination

4. The CPSU has reviewed the draft determination and sought feedback from its members. The CPSU notes the minor changes made to that draft determination by the Commission. On review of the draft determination, the CPSU has three concerns, one being an omission of a classification, the second regarding a sub-heading to be included in Schedule B and the third being a potential ambiguity contained in a few of the provisions to be inserted.
5. Firstly, the draft determination omits the classification of Captioner/Audio Describer Shift Leader or Trainer from insertion into clause 14.2. This

classification was included in the CPSU's amended draft determination and the classification description is included in the draft determination at item [33] described as Captioner/Audio Describer Shift Supervisor or Trainer. The CPSU says the title for this classification should be included in the draft determination and should be inserted at 14.2(o) of the Award.

6. Secondly, item [33] of the draft determination inserts in the Award new classification descriptions. The heading for that insert is 'Captioner/Audio Describer'. However the classifications being inserted include Subtitler/Subtitling Editor. The heading in item [33] of the draft determination should thereby properly reflect the classification and say 'Captioners/Audio Describers and Subtitlers/Subtitling Editors'.
7. Thirdly, the CPSU is concerned a potential ambiguity exists in items [14], [15] and [16] of the draft determination which uses a reference to employees classified as Captioner/Audio Describers and Subtitlers/Subtitling Editors'. Item [14] of the draft determination provides for the newly inserted classifications to be covered by the provisions of Part 6 of the Award as follows:

“Part 6 applies to those employees classified as Captioners/Audio Describers and Subtitlers/Subtitling editors contained in Schedule B.”
8. The purpose of this note was to ensure Part 6 applied to all the work performed by Captioner/Audio Describers and Subtitlers/Subtitling editors, in all the newly included the classifications in Schedule B1.23 of: Trainee Captioner/Audio Describer, Trainee Subtitler/Subtitling Editor, Captioner/Audio Describer, Multi-skilled Captioner/Audio Describer, Advanced Multi-skilled Captioner/Audio Describer, Captioner/Audio Describer Shift Leader or Trainer Subtitler/Subtitling Editor. An appropriate award safety net of award coverage for this type of work was the object of the CPSU's application.
9. The potential for ambiguity that arises in item [14] is that item [6] of the draft determination inserts a classification of Captioner/Audio Describer at 14.2(h) and Subtitler/Subtitling Editor at 14.2(o) by virtue of item [9]. One possible interpretation of how [14] has been expressed is that Part 6 would only apply to these classifications at 14.2(h) and 14.2(o) and not all the new classification included in the award for that type of work.

10. Such an interpretation is not the intended consequence of the CPSU’s application and the words used at item [14]. However, the CPSU would be concerned not to allow for ambiguity in which parts of the Award applied to these employees. It should not be possible to construe item [14] of the draft determination to say that Part 6 would apply narrowly to just to a single classification. That Part 6 should apply to all the classifications for that type of work.
11. This concern about possible ambiguity leads the CPSU to recommend an alteration to the draft determination at [14] as follows (shown with mark-up):

“Part 6 applies to those employees ~~classified performing work as Captioners/Audio Describers and Subtitlers/Subtitling editors~~ in the classifications contained in Schedule B.”

12. The CPSU says a proposed alteration should be sufficient to clearly state that Part 6 applies to the work described in Schedule B to the Award, which also would encompass all the newly included classifications at B1.23 for the type of work subject to the CPSU's application.
13. The CPSU says a similar potential ambiguity arises in items [15] and [16] of the draft determination, clauses which deal with the paid break after two hours and the afternoon shift penalty. The CPSU suggests an alteration to [15] and [16] to include a reference to all the newly included classifications for that work contained in Schedule B1.23 as follows (shown in mark up):

15. By inserting a new clause 28.6 as follows:

28.6 No employee performing work as ~~a~~-Captioners/Audio Describers and Subtitlers/Subtitling Editors in the classifications for that work contained in Schedule B1.23 shall will be required to work on a visual display terminal for more than two hours without a break. Each employee is entitled to a ten minute break in respect of each such two hour period worked. (This time shall count as time worked).

16. By inserting a new clause 30.9 as follows:

30.9 Employees' performing work as ~~a~~-Captioners/Audio Describers and Subtitlers/Subtitling Editors in the classifications for that work contained in Schedule B1.23 will receive a penalty for all work on a shift commencing

after 12.00 pm (noon) and before 6.00 pm and of at least seven hours duration of 17%.

The CPSU says the reference to the classifications contained at Schedule 1.23 should denote those provisions apply to all the classifications of employees performing that type of work and is not just limited narrowly to the classifications at clause 14.2(h) or 14.2(o).

14. On the basis of the above comments the CPSU otherwise supports the making of the draft determination in the terms issued by the Fair Work Commission on 27 September 2017.

CPSU Sydney

25 October 2017