

HENRY DAVIS YORK

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Fair Work Commission
80 William St
East Sydney 2010

By email: amod@fwc.gov.au

4 yearly review of modern awards - Casual Employment and Part-time Employment (AM2014/196 and AN2014/197)

We act for Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd in relation to the 4 yearly review of the Rail Industry Award 2010 (**Rail Award**).

We object to the admission of the witness statement of Gary Talbot, National Organiser of the Rail Tram and Bus Union (**RTBU**), which appears to have been filed by the RTBU on 19 October 2015 as evidence.

In accordance with the Directions made by the Full Bench on 29 February 2016, we object to paragraphs 3 to 9 of Mr Talbot's witness statement on the following grounds:

1. Paragraphs 3, 4, 5 and 8 contain conclusions where there is no factual evidence to support such conclusions.
 - (a) In paragraph 3, Mr Talbot concludes that there is an "increasing level of casualisation in the rail infrastructure industry", "approximately a third of the infrastructure workforce is now made up of casual employees", and "this is the result of a proliferation of labour hire actively seeking a slice of the rail industry maintenance pie" without setting out the factual evidence on which such conclusions are based.
 - (b) In paragraph 4, Mr Talbot concludes that "in my experience, the increase in labour hire companies has created a lot of job insecurity", and "[this has] had a negative impact on the RTBU's member's wages and conditions and also made it very hard for workers who are employed casually to secure loans". Again, the witness statement does not contain any factual evidence on which such conclusions may be based.
 - (c) In paragraph 5, Mr Talbot concludes that "the increase in casual labour has also led to a need to clarify how the casual loading interacts with overtime and penalty rates". Mr Talbot also concludes that "penalties and overtime are paid in conjunction with the casual loading... *due to the fact* that the loading for casual employees forms part of their base rate of pay to make up for the precarious nature of casual work" (emphasis added). Again, the witness statement does not contain any factual evidence on which such conclusions may be based.

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- (d) In paragraph 8, Mr Talbot concludes that "in my experience the Building and Construction General On-Site Award 2010 can often be applied alongside the Rail Industry Award 2010 in the construction of rail infrastructure". The witness statement does not contain any factual evidence on which this conclusion about Mr Talbot's experience may be based. We also object to this evidence on the basis that it is misleading, see paragraph 3 below.
2. Paragraphs 5, 6, 7 and 8 and 9 contain submissions of Mr Talbot based on his purported interpretation, understanding and/or awareness.
- (a) In paragraph 5, Mr Talbot submits that "*my interpretation* of the casual loading clause in the Modern Award has always been that penalties and overtime are paid in conjunction with the casual loading for casual employees" (emphasis added).
- (b) In paragraph 6, Mr Talbot submits that "*my understanding* of this comes from negotiating a number of agreement genera and specific agreements..." (emphasis added).
- (c) In paragraph 7, Mr Talbot submits that "*I am also aware* of other national and state agreement which include similar provisions..." (emphasis added).
- (d) In paragraph 8, Mr Talbot submits "On the ground *I am also aware* that there is much crossover between the rail infrastructure and the construction industry" (emphasis added).
- (e) In paragraph 8, Mr Talbot submits "... I have drawn *my interpretation* of casual interaction with overtime and penalties from the Building and Construction General On-Site Award 2010.." (emphasis added).
- (f) In paragraph 9, Mr Talbot submits "It is *my understanding* that this is how it is applied across the rail industry... *As far as I am aware*...this is how companies with which I have negotiated agreements calculate overtime and penalties..." (emphasis added).
3. Evidence in paragraph 8 is misleading and therefore is unhelpful or irrelevant.
- (a) In paragraph 8, Mr Talbot concludes that "in my experience the Building and Construction General On-Site Award 2010 can often be applied alongside the Rail Industry Award 2010 in the construction of rail infrastructure". This evidence is misleading because the Building and Construction General On-Site Award 2010 cannot be applied alongside the Rail Industry Award 2010. The correct position is that one award or the other may cover an employee's employment, not both.

We note that in a recent decision of the Full Bench in relation to the 4 yearly review of modern awards and penalty rates, opinions expressed by the Productivity Commission as to the appropriateness of penalty rates in the Australian Workforce were treated as submissions, not evidence.¹ During the Modern Awards Review 2012, Fair Work Australia dismissed an application by the ASU to vary the Legal Services Award 2010 on the basis that there were not cogent reasons for departing from the previous Full Bench decision.

¹ [2016] FWCFB 965.

Senior Deputy President Kaufman observed that the witness statements filed by the ASU were not evidence, but, in reality, submissions of the deponents.² These statements by the Commission have equal application to the witness statement of Mr Talbot.

Yours faithfully
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² [2012] FWA 9551, paragraph 45.