

## IN THE FAIR WORK COMMISSION

Matter No: AM2014/89

### Section 156 - Four Yearly Review of Modern Awards —*Security Services Industry Award 2010*

#### SUBMISSION OF UNITED VOICE

1. This submission is made in aid of the award stage review of the Security Service Industry Award 2010 ('the Award').
1. The 4 yearly review is a review and not an *inter partes* proceeding. Recently, the Full Federal Court in *Shop, Distributive and Allied Employees Association and another v The Australian Industry Groups and others* [2017] FCAFC 161 ('the Federal Court Penalty Rates case') observed at paragraph 38:

*The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2) (a). In that context "review" takes its ordinary and natural meaning of "survey, inspect, re-examine or look back upon". Consequential upon a review the FWC may exercise the powers in s 156(2) (b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2) (a).*

2. The review of the Award is not complete. In light of recent relevant authoritative decisions made in this 4 yearly review concerning general principles to be applied, review of the Award's treatment of the casual loading should take place prior to the completion of the review.
3. 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.*

4. 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.<sup>1</sup>*

5. At paragraph 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.*

6. The Commission further observed that the default approach is consistent with consideration of the modern award objective in s.134 (1) (g) of the *Fair Work Act 2009* (‘the Act’) 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*’.<sup>2</sup> 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.
7. 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

---

<sup>1</sup> The Decision, paragraph [335].

<sup>2</sup> As above, [338].

the general consideration of weekend penalty rates for casuals;<sup>3</sup> in the Commission's proposed reductions in the Sunday rate in the Hospitality Award,<sup>4</sup> 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);<sup>5</sup> in effect in the proposed reductions in the Saturday and Sunday rate for casuals under the Fast Food Award;<sup>6</sup> in the Commission's proposed reductions in the Sunday rate in the Retail Award;<sup>7</sup> and for the proposed reductions in the Sunday rate in the Pharmacy Award.<sup>8</sup> 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.

8. While the Commission did not make any specific reference to consideration 134(1) (da) (i) which deals with the need to provide additional remuneration for employees working overtime, United Voice contends that the insertion of this consideration into the modern award objective in January 2013 provides support for the casual loading being an additional amount paid when any overtime rates apply to work in excess of ordinary hours. Subsuming the casual loading into overtime rates also means that a casual employee is not adequately compensated for disutility determined to apply for the hours worked.
9. In the decision of 5 July 2017, *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, the Commission observed in paragraph 549 that:

*Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need*

---

<sup>3</sup> As above, [333] to [338].

<sup>4</sup> As above, [888] to [898].

<sup>5</sup> As above, [1962] to [1979].

<sup>6</sup> As above, [1403] to [1406].

<sup>7</sup> As above, [1715].

<sup>8</sup> As above [1878] to [1884].

*not cause significant additional cost burdens for employers. That is relevant to the consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.*

10. We refer to the submission of Kim Lawless to the review of this Award in AM2014/89, dated 24 August 2017, which states:

*I addressed a question to the FWO regarding Security Services Award MA000016 and have received advice that Casual loading doesn't apply to overtime rates on weekends. So in my case I work for 10.5 hours on Saturday, earning \$36.98/hr for the first 10 hours, then it DROPS to \$31.70/hour for the next 2 hours! So I am penalised for working more than 10 hours in a shift.*

11. More generally, the 25% loading for casuals has the status as a standard. The components of the 25% loading were last subject to thorough merits review in the so called Metals case in 1998.<sup>9</sup> 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.’

12. 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*

13. In award modernisation, the Award was a stage 1 award (AM 2008/11) and the 25% casual loading within the Award is reflective of the standard that the Commission sought to apply at the time.

---

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

14. 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.
15. A review of loadings and overtime rates within the Award should take place.
16. We make some general comments concerning such a review below.
17. References here are to the most current exposure draft of the Award, dated 8 September 2017.
18. The interrelationships between the Award's overtime provisions, shift loadings and penalty rates are complex. The entitlement of casual employees to overtime is ambiguous and requires clarification.
19. The provisions of the Award in which the casual loading should be disaggregated from overtime rates are as follows:
  - Clause 11.2 Casual loading
  - Clause 21.2 Payment of Overtime
  - Clause 21.3 Overtime Rates
  - Schedule B –Summary of Hourly Rates of Pay
20. A draft determination outlining the changes sought to the current exposure draft of the Award is attached to this submission.

United Voice

**24 October 2017**

## DRAFT DETERMINATION

*Fair Work Act 2009*

Part 2-3, Div 4 – 4 yearly review of modern awards

### Security Services Award 2010

## REVIEW OF MODERN AWARDS

(AM2014/89)

ROSS, PRESIDENT                      SYDNEY, XX YYY 2017

*Review of modern awards to be conducted.*

[1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Security Services Industry Award 2010* be varied as follows.

[2] Delete current 11.2(b) and insert the following:

*11.2(b) The casual loading is paid in addition to **any overtime rates** and any penalty rates for shift, weekend or public holiday work payable to full-time employees.*

[3] By inserting a new clause 21.2(c) as follows:

*21.2(c) An employer must pay a casual employee at the overtime rate for any time worked:*

- (i) in excess of 38 hours per week;*
- (ii) where a roster applies, in excess of 38 hours per week averaged over the roster cycle provided the roster does not exceed 8 weeks; or*
- (iii) which exceeds 10 hours per day or within a shift.*

[4] Delete current clause 21.3(a) and inserting the following:

*(a) The overtime rate is:*

- (i) for a full-time or part-time employee, the relevant percentage specified in column 2 of Table 5—Overtime rates (depending on when the overtime was worked as*

specified in column 1) of the minimum hourly rate of the employee under Table 4— Minimum rates for full-time employees; or

(ii) for a casual employee, the relevant percentage specified in column 3 of Table 5—Overtime rates (depending on when the overtime was worked as specified in column 1) of the minimum hourly rate of the employee under Table 4— Minimum rates for full-time employees.

Table 5—Overtime rates

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>
<i>For overtime worked on</i>	<i>Overtime rate (% of minimum hourly rate)</i>	<i>Overtime rate (% of minimum hourly rate)</i>
	<i>Full-time and part-time employees</i>	<i>Casual employees (includes casual loading)</i>
<i>Monday to Saturday— first 2 hours</i>	<i>150%</i>	<i>175%</i>
<i>Monday to Saturday— after 2 hours</i>	<i>200%</i>	<i>225%</i>
<i>Sunday— all day</i>	<i>200%</i>	<i>225%</i>
<i>Public holiday— all day</i>	<i>250%</i>	<i>275%</i>

*NOTE: Schedule B—Summary of Hourly Rates of Pay sets out the hourly overtime rate for all employee classifications according to when overtime is worked.*

[5] Insert a new table B.4 in Schedule B –Summary of Hourly Rates of Pay as follows:

*B.4 Casual employees—overtime rates*

	Monday to Saturday – first 2 hours	Monday to Saturday – after 2 hours	Sunday – all day	Public holiday – all day
% of minimum hourly rate				

	175%	225%	225%	275%
Security Officer Level 1	\$35.95	\$46.22	\$46.22	\$56.49
Security Officer Level 2	\$36.98	\$47.54	\$47.54	\$58.11
Security Officer Level 3	\$37.61	\$48.35	\$48.35	\$59.10
Security Officer Level 4	\$38.24	\$49.16	\$49.16	\$60.09
Security Officer Level 5	\$39.48	\$50.76	\$50.76	\$62.04

The determination shall operate on and from XX YYY 2017.

PRESIDENT