

**IN THE FAIR WORK COMMISSION**

**2014 Award Review**

(AM2014/248)

**Community and Public Sector Union (CPSU) (PSU Group)**

**Submissions regarding casual loading in the *Telecommunications Services Award***

**28 July 2016**

1. These submissions are made pursuant to Commissioner Roe's Report to the Full Bench of 21 July 2016 regarding the Exposure Draft of the *Telecommunications Services Award* [AM000041].
2. The CPSU represents members covered this award and provides the following response to the matters raised by the Australian Industry Group (Ai Group) in their submissions of 14 April 2016 regarding casual loadings and 'ordinary hourly rate'.

**Contentions of the Ai Group**

3. In their 14 April 2016 submissions, the Ai Group at paragraphs 454 and 455 say the Exposure Draft of the *Telecommunications Industry Award* at 6.4(b) should not refer to the expression 'ordinary hourly rate'. They say that provision should instead refer to the minimum hourly rate as expressed in the current award. In their 8 May 2016 Submissions in reply, Ai Group at paragraph 351 said they believed the change in the exposure draft was a substantive change and opposed it on that basis.
4. The current *Telecommunications Services Award* provides:

**11.3 Casual employment**

**(a)** An employer may engage employees on a casual basis in which case employment may be terminated by an hour's notice given either by the employer or the employee, or by the payment or forfeiture of an hour's wage as the case may be.

**(b)** A casual employee is one engaged and paid as such, and for working ordinary time will be paid per hour 1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 25%.

5. The Revised Exposure Draft of 27 April 106 provides:

**6.4 Casual employees**

Casual employment provisions may be affected by AM2014/197

**(a)** A casual employee is an employee who is engaged and paid as a casual employee.

**(b) Casual loading**

For each ordinary hour worked, a casual employee must be paid:

- (i) the ordinary hourly rate; and
- (ii) a loading of 25% of the ordinary hourly rate,
- (iii) for the classification in which they are employed

6. The chief difference in the *Telecommunications Services Award* between the minimum rate of pay and the 'ordinary rate of pay' is the later definition would include all purpose allowances, of which there is one under the current award, being 17.2(a) leading hand allowance.
7. At item 2.5 and paragraphs 32-56 of their 14 April 2016 submissions, the Ai Group explain their view regarding this issue in broader terms. They say that where the current award provides for the payment of casual rates upon minimum wages and not upon ordinary hourly rates and would cause additional costs.
8. The Ai Group make this submission despite the Fair Work Commission Full Bench decision in *4 yearly review of modern awards [2015] FWCFB 6656* (the September 2015 Decision) saying the general approach that would be adopted toward Exposure Drafts was that the 25% casual loading would be expressed to be calculated based on the 'ordinary hourly rate' and would thereby include all purpose allowances.
9. The Ai Group advance their submission on the basis it is not inconsistent with this decision because the Fair Work Commission Full Bench allowed reconsideration of the issue on an award by award basis. They refer to paragraph 109 of the *September 2015 Decision* which said:

[109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.
10. On this basis the Ai Group say the *Telecommunications Services Award* currently provides for the payment of the casual loading upon the minimum rate not the ordinary rate and the reference to 'ordinary hourly rate' should not be included in the Exposure Draft.

## The CPSU position

11. The CPSU's response to the Ai Group submission is two-fold. Firstly, as a matter of construction, the current award provides for the casual loading to be paid upon the wages including allowances. Secondly that the Ai Group have mis-applied paragraph [109] of the *September 2015 Decision*.
12. Clause 11.3(b) of the *Telecommunications Services Award* refers to the 'weekly wage' upon which the casual loading is paid. The clause says an employee receives "1/38th of the weekly wage prescribed by this award for the work which the employee performs." It does not refer to the 'minimum weekly wage' as put by the Ai Group. As a matter of construction therefore the CPSU says the casual loading would be paid upon the ordinary weekly wages and include any all purpose allowance.
13. It is the CPSU's submission that the Ai Group have mis-construed paragraph [109] of the *September 2015 Decision*. That paragraph said an award by award consideration would be permitted where parties could identify allowances that should not retain their all purpose basis because how that may result in an increased level of pay for casual employees. This paragraph does not appear to be an invitation to the Ai Group to re-argue its position in the *September 2015 Decision* again for each award.
14. Ai Group do not appear to be saying the current award clause 17.2(a) leading hand allowance should not be considered an all purpose allowance and should instead be paid on some other basis. No such case has been put by the AiG. Rather, their submissions say it was not the intention of the current award to pay a casual loading on anything other than the minimum wage rate. This is not a construction of the *Telecommunications Services Award* provision the CPSU accepts. It is precisely this submission which was rejected in the decision in the *September 2015 Decision*.
15. The CPSU refers to the *September 2015 Decision*, which in turn referred to the earlier decision in *4 yearly review of modern awards [2015] FWCFB 6656* (the July 2015 Decision), which provided:

**[85]** However in respect of the calculation of the casual loading vis-a-vis all purpose allowances, the Commission went on to say in the *July 2015 decision*:

[69] Some employer parties (e.g. Ai Group pp.12–13 re Cotton Ginning Award 2010 and more generally, pp.17–18) have submitted that where the current modern award states that the loading is calculated on "1/38th of the weekly award wage" or "1/38th of the minimum weekly rate", the casual loading should not be calculated based on the ordinary hourly rate that is they do not consider the all purpose allowance should be added to the minimum rate before the 25% is calculated. They submit that the casual

loading is 25% of the minimum rate and added to the minimum hourly rate, then the all purpose allowance is added after that.

[70] In our view it is desirable that there be a consistent rule relating to the calculation of a casual loading which should apply across all awards. Our provisional view is that the position of certain employer parties outlined above at paragraph [69] is the preferred option that should be adopted across all awards. That is, the casual loading will not be calculated based on the ordinary hourly rate. The casual loading will be calculated as 25% of the minimum rate, with any all purpose allowance being added after that.'

16. The conclusion of the *September 2015 Decision* was the preliminary view of the *July 2015 Decision* would not be followed, and relevantly said:

[102] We accept the submission that the provisional decision is inconsistent with the general approach adopted in the *2008 decision*, namely that the casual loading should be applied to the ordinary time rate. Although what constituted the ordinary time rate was not the subject of express consideration in the *2008 decision*, we consider it to be well understood that an allowance which is described as all purpose in nature is one that necessarily forms part of the ordinary time rate. That being the case, any departure from that approach proposed by the provisional decision must be justified by cogent reasons.

17. The CPSU says it is clear a casual loading provision similar to that contained in the *Telecommunications Services Award* as considered in the *September 2015 Decision*. As outlined above, clause 11.3(b) of the *Telecommunications Services Award* refers to the 'weekly wage' which can be contrasted to the award discussed in the *July 2015 Decision* which referred to the 'minimum wage'.

18. The conclusion of the *September 2015 Decision* was the adoption of the casual loading on the 'ordinary hourly rate' not the minimum hourly rate. The Ai Group advance no cogent reasons why this approach should not be followed in the *Telecommunications Services Award*.

19. On that basis the CPSU says the Full Bench should not further consider this application by the Ai Group as it attempts to re-agitate issues already determined.

**CPSU – SYDNEY**

**28 July 2016**