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**Sent:** Thursday, 29 June 2017 2:48 PM

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

The Associate

Commissioner Cirkovic

Please find attached some correspondence and a draft determination. The correspondence is a slightly amended version of our correspondence of 4 April 2017 and uses the current award. The draft determination is new and also is seeking to vary the current award. We have been supplying draft determinations for this review which deal with the current award.

This material is in aid of what is item S5 in the most recent summary of proposed substantive variations and principally a claim made by the Heath Services Union. We have provided a copy of this material to the HSU and they have indicated that it is consistent with the object of their claim and able to adopt it.

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29 June 2017

The Associate  
Commissioner Cirkovic  
Fair Work Commission  
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Dear Associate

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

We note our correspondence of 4 April 2017 concerning the *Aboriginal Community Controlled Health Services Award 2010* ('the Award') and its treatment of the casual loading. While it wasn't entirely clear the references to the Award in that correspondence were references to the then exposure draft of the award.

We up-date our submission here with reference to the Award and also attach draft determinations.

This submission is in supported of the claim of the Health Services Union which is item S5 in the document titled *Summary of Proposed Substantive Variations*, dated 24 May 2017, we note the following. For completeness we repeat some of what we have earlier said.

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 broad sentiment of this claim has significant merit.

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.<sup>1</sup>*

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.*

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*'.<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.

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;<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.

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

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

<sup>2</sup> The Decision, [338].

<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]

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.’

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 this 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.

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 21.1 and 24.2). The Award does not appear to differentiate between different categories of employees in relation to ordinary hours and overtime as it refers generically to ‘employees’ in the clauses dealing with ordinary hours, span of hours, overtime and penalty rates. Casual employees are clearly able to be shift workers under this award.

The penalty rate for public holiday work provides casual employees with an additional 50% ‘instead of the casual loading’ for such work (clause 10.4(d)) which is well below what a permanent employee would expect to be paid for the same work. The Award does not have a clear penalty rate clause for public holiday work but it appears that for a non-shift permanent employee work on a public holiday this work would be paid as overtime (clause 24). For a shift worker (but for clause 10.4(d) of the Award) the Award’s current provisions would appear to capture casual employers. It would appear that a permanent employee will earn at least 150% and 200% (after 2 hours work) for any work on a public holiday. A casual employee will only ever earn 150%. The casual rate should mirror the rate paid to other employees with the addition of the 25% loading.

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

Clause 10.4(d) should be deleted.

In relation to shift work, the Award as noted 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 25.5). The Award's shift work provisions appear compliant with the Commission's preferred position provided that casual employees who work on weekends are always shift workers. This appears the case.

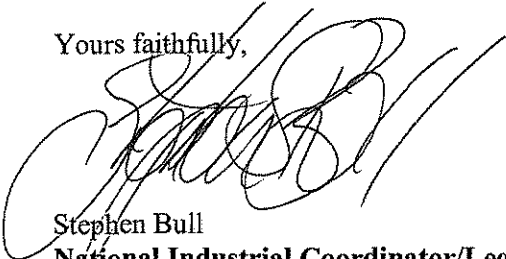
To clarify, that the Award is consistent with the default position expressed by the Commission in the recent penalty rates decision would require an amendment to clause 10 to the following effect should be made '*the casual loading is paid in addition to any overtime payment, loadings or penalty rate applicable to the employee's hours of work.*' Such an amendment would likely affect only the rate paid to casual employees working outside the span of hours on weekdays and clarify the treatment of casual employees on public holidays.

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.

While work at unsocial times may not be a current feature of work under the Award, with the greater professionalisation and sophistication of Aboriginal Medical Services which appears a trend that will continue, some services may develop patterns of work that mimic hospitals. These variations will ensure that the Awards does not contain provisions that will lead to distortions in the excess use of casual labour on weekends and public holidays.

We attach draft determinations.

Yours faithfully,



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## **DRAFT DETERMINATION**

*Fair Work Act 2009*

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

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

(MA0000115)

### **REVIEW OF MODERN AWARDS**

(AM2014/250)

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 *Aboriginal Community Controlled Health Services Award 2010* be varied as follows.

[2] Delete current clause 10.4(d)

[3] Insert new subclause 10.4(d) as follows:

*‘(d) The casual loading is paid in addition to any overtime payment, loadings or penalty rate applicable to the employee’s hours of work.*

The determination shall operate on and from XX YYY 2017.

PRESIDENT

