



*Fair Work Act 2009*

FAIR WORK COMMISSION

**IN THE MATTER OF:**                    **4 Yearly Review of Modern Awards – Group 4 Awards**  
**Broadcasting and Recorded Entertainment Award 2010**  
**AM2014/259**

## **Submission of Birch Carroll and Coyle Limited and other cinema industry employers**

January 2017

Norton Rose Fulbright Australia  
ABN 32 720 868 049  
Level 15, RACV Tower  
485 Bourke Street  
MELBOURNE VIC 3000  
AUSTRALIA

Tel +61 3 8686 6000  
Fax +61 3 8686 6505  
GPO Box 4592, Melbourne VIC 3001  
DX 445 Melbourne  
nortonrosefulbright.com

**Contact:** Michael Serong

**Direct line:** +61 8686 6978

**Email:** [michael.serong@nortonrosefulbright.com](mailto:michael.serong@nortonrosefulbright.com)

**4 Yearly Review of Modern Awards – Group 4 Awards**  
**Submission of Birch Carroll Coyle Limited and Other Cinema Industry Employers**

**Introduction**

- 1 This submission is made on behalf of:
  - (1) Birch Carroll and Coyle Limited
  - (2) The Hoyts Corporation Pty Limited
  - (3) The Greater Union Organisation Pty Ltd
  - (4) Village Cinemas Limitedand Independent Cinemas Association of Australia and its employer members.
- 2 The employers named at paragraph 1 (the Employers) together comprise the overwhelming majority of employers in the cinema exhibition industry and employ virtually all the employees in the cinema exhibition industry.
- 3 This submission is made to the Full Bench in respect of the Broadcasting and Recorded Entertainment Award 2010 (BRE Award). The Commission's review of the BRE Award is matter AM 2014/259 and that matter is in sub-group 4D. The Employers have made submissions in that proceeding in relation to a number of issues affecting cinemas covered by the BRE Award.
- 4 This submission is made in response to the Amended Directions dated 21 December 2016 which requests the filing of submissions on technical and drafting issues by Wednesday, 18 January 2017.
- 5 The Employers have also participated in proceedings before the Casual and Part Time Employment Full Bench (AM2014/197) by filing Submissions dated 22 March 2016 and 4 August 2016. The Employers have not sought any change to the BRE Award in proceedings before the Casual and Part Time Employment Full Bench.

**Summary**

- 6 The words proposed in the Exposure Draft are not simply a drafting issue.
- 7 The Employers note that the Exposure Draft proposes a significant and substantive change to the current provisions for calculation of the rate of pay for casual employees in cinemas. The Employers submit that the Exposure Draft be amended to maintain the true effect of the current provisions in the BRE Award.
- 8 The Employers also note that the Exposure Draft proposes significant and substantial changes to the calculation of payments for annual leave, personal/carer's leave and redundancy. The Employers submit that the Exposure Draft be amended to maintain the true effect of the current provisions in the BRE Award.

**Submission – Casual rates**

- 9 Relevant provisions of the BRE Award are:

- 10.6 *Clauses 10.2 to 10.5 do not apply to employees in cinemas (these are full time, part time and casual employment provisions)*
- 14.12 *All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday payments.*
- 54.4(b) *A casual employee must be paid at the relevant minimum hourly wage plus a loading of 25%. Such loading is paid instead of all paid leave including annual leave, personal/carers leave and public holidays not worked whether prescribed in this award or the NES.*
- 10 Casual rates and penalties are generally calculated on the ordinary time rate of pay unless the award specifically provides otherwise. Casual employees are not excluded from any of the penalties in the BRE Award. Therefore a casual employee is entitled to his or her casual loading calculated on the relevant minimum hourly wage (i.e. the base rate of pay).
- 11 Relevant provisions of the Exposure Draft are:
- 2 **All purposes** means the payment will be included in the rate of pay of an employee who is entitled to the allowance or loading, when calculating any penalties or loadings or payment while they are on annual leave (see clause 34.2(a)).
- Loaded minimum hourly rate** applies to cinema employees only and means the relevant minimum hourly rate for entertainment employees in clause 13.3, plus the cinema loading prescribed in clause 13.4.
- Minimum hourly rate** means the hourly rate for an employee's classification specified in clause 13 – Classifications and minimum wages.
- Ordinary hourly rate** means the minimum hourly rate for an employee's classification as specified in clause 13 – Classifications and minimum wages plus any all-purpose allowance or loading to which an employee is entitled.
- 13.4 *All employees in cinemas will receive an 8% loading for all hours worked. This averaging component is payable instead of Sunday penalty payments and as compensation for reduced public holiday penalties. This loading is payable for all purposes.*
- 57.4(b) *A casual employee must be paid at the relevant loaded minimum hourly wage plus a casual loading of 25%. The casual loading is paid instead of all paid leave including annual leave, personal/carer's leave and public holidays not worked whether prescribed in this award or the NES.*
- 12 The provision requiring that the casual loading be paid on the "loaded minimum hourly wage" (presumably this should be "loaded minimum hourly rate" as defined) is clearly a fundamental change from the effect of the current award. It requires the payment of a loading on a loading.

#### Submission – Annual leave, personal/carer's leave, redundancy and the National Employment Standards

- 13 The relevant provisions of the BRE Award are:
- 13.1 Redundancy pay is provided for in the NES;

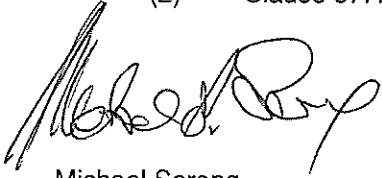
- 23.1 Annual leave is provided for in the NES; and
- 24 Personal/carer's leave and compassionate leave are provided for in the NES.
- 14 Under the *Fair Work Act 2009* (Cth):
- Section 90(1) Payment for annual leave is at the employee's base rate of pay
- Section 99 Payment for personal/carer's leave is at the employee's base rate of pay.
- Section 119(2) Payment for redundancy is at the employee's base rate of pay
- Section 16(1) "Base rate of pay" is the rate of pay for ordinary hours of work but not including any of:
- (a) incentive – based payments and bonuses;
  - (b) loadings;
  - (c) monetary allowances;
  - (d) overtime or penalty rates;
  - (e) any other separately identifiable amounts.
- 15 Relevant provisions of the Exposure Draft are:
- 2 All purposes (see paragraph 11)
- Loaded minimum hourly rate (see paragraph 11)
- 13.4 The 8% loading is payable for all purposes
- 16 The specific purpose of the 8% loading is clearly stated in the BRE Award, i.e. "*instead of Sunday penalty payments and as compensation for reduced public holiday penalties*". The provisions which require that the 8% loading be paid for "all purposes" (therefore including on annual leave, personal/carer's leave and redundancy pay) are fundamental changes from the effect of the current award provisions and require payments in addition to those required by the BRE Award and the NES.

#### **Change sought to Exposure Draft**

- 17 The Employers submit that the words proposed in the Exposure Draft are not simply a drafting issue. The words proposed would effect a fundamental and substantive change in the award provisions for employees in cinemas who are covered by the BRE Award for:
- (1) The calculation of casual rates of pay; and
  - (2) Payments for annual leave, personal/carer's leave and redundancy.
- 18 The Employers propose that, in order to retain the effect of the relevant provisions of the BRE Award:
- (1) Clause 13.4 of the Exposure Draft be amended by deleting:  

*This loading is payable for all purposes.*

(2) Clause 57.4(b) be amended by deleting the word "loaded".

A handwritten signature in black ink, appearing to read "Michael Serong". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Serong".

Michael Serong  
Consultant  
Norton Rose Fulbright Australia

18 January 2017

