From: Michael Robson [mailto:Michael.Robson@unitedvoice.org.au]
Sent: Monday, 13 March 2017 4:43 PM
To: Chambers - Cirkovic C
Cc: Nikkita Venville; ruchi.bhatt@aigroup.com.au
Subject: AM2014/263 - Children's Services Award

Dear Associate,

Please find attached United Voice's submission made pursuant to the directions issued on 7 February 2017.

Regards,

Michael Robson
National Industrial Officer
United Voice National Office

IN THE FAIR WORK COMMISSION

Matter No: AM2014/263

Section 156 - Four Yearly Review of Modern Awards – Children's Services Award

SUBMISSION

UNITED VOICE

1. This submission is made pursuant to the direction of Commissioner Cirkovic on 17 February 2017. This submission concerns technical and drafting matters in the exposure draft of the *Children's Services Award 2010* ('the Award').

2. All references in this submission are to the exposure draft, unless otherwise specified.

Item 2 – Definition of 'ordinary hourly rate' and of 'minimum hourly rate'

3. At the conference on 7 February 2017, United Voice undertook to hold discussions with AIG, with a view to resolving their dispute over the definition of *'minimum hourly rate*' and '*ordinary hourly rate'* in the exposure draft. United Voice and the Australian Industry Group (AIG) have come to the following agreements.

4. The Fair Work Commission's Award Modernisation Team has inserted a definition of 'ordinary hourly rate' into the current Exposure Draft of the Award. United Voice and AIG agree that the Exposure Draft does not reflect the decision of the Fair Work Commission in *Four yearly review of modern awards* [2015] FWCFB 4658 at paragraph 42.

5. United Voice and AIG propose that the current definition of '*ordinary hourly rate'* suggested by the Award Modernisation Team should be replaced with the following words:

> '***ordinary hourly rate*** *means the hourly rate for the employee's classification specified in clause 16, plus any allowances specified as being payable for all purposes*'.

6. United Voice and AIG also agree that a new definition of '*minimum hourly rate'* is necessary. We propose the following words:

> *'**Minimum hourly** rate means the minimum hourly rate applicable to an employees classification level and pay point as set out at clause 16'.*

7. Further, the definition of '*ordinary hourly rate*' at schedule B.1.1 should be deleted. This provision is unnecessary given that '*ordinary hourly rate'* is defined at clause 2 – definitions. The remaining paragraphs of the clause should be renumbered accordingly.

8. Finally, Schedule B.1.2 should be revised to clarify that the rates of pay set out in the tables of the schedule are calculated from the minimum hourly rate. The reader should be made aware that those tables do not include rates of pay calculated using an ordinary hourly rate that includes the all-purposes qualifications allowance. We propose that schedule B.1.2 should be varied as follows:

> *'The rates in the tables below are ~~based~~ calculated on the **minimum hourly rate of pay** ~~in accordance with clause 16.1~~ as set out at clause 16.1 only. ~~Consistent with B.1.1, all purpose allowances need to be added to the rates in the table where they are applicable.~~ Where an employee is entitled to be paid an allowance specified as being payable for all purposes, the employee will be entitled to a different amount.'*

Item 9 – Casual employment

9. AIG submits that casual rate should be calculated from the minimum hourly rate of pay and not the ordinary rate of pay. The AIG submit that calculating the casual rate using the ordinary rate of pay, which may include the all-purposes qualification allowance, is a substantial departure from the current award. This matter remains in dispute.

10. The only reason that AIG advances in support of its assertion is that the current award clause 10.5(a) does not refer to an employee's ordinary hourly rate of pay. AIG's reasoning is not supported by the text of the current Award. Indeed, AIG admits that it has only made generic submissions on this issue that relate to multiple awards.[1] Moreover, AIG's

[1] See Transcript, 7 February 2017, PN123.

submission contradicts previous decisions of Fair Work Commission Full Bench.

11. AIG is in fact proposing a substantive change to the Award that would cause some employees to lose a substantial part of their income. AIG should advance a merits case for its claim in the substantive portion of these proceedings if it wishes to pursue this claim.

12. The key case in this matter is the Full Bench decision of 13 July 2015 ('*July Decision*')[2]. The Full Bench considered the insertion of standardised definitions of '*ordinary rate of pay'* and '*all purposes'* allowance in the Group 1 exposure drafts.

13. In the *July Decision*, the Full Bench found that it was desirable to have a consistent rule regarding the calculation of the casual rate across all awards. Provisionally, the Commission decided that '*the casual loading will be calculated as 25% of the minimum rate, with any all purpose allowances being added after that*'.[3]

14. This decision was reconsidered by a later Full Bench after submissions from interested parties. In the decision of 30 September 2015 ('*the September Decision*'),[4] a Full Bench held that the approach in the July Decision regarding the calculation of the casual loading should not be adopted.[5]

15. The Full Bench found that adopting the provisional approach would cause '*not insignificant reductions in pay*' to some employees, and would add '*unnecessary complexity to some modern awards*'.[6] Adopting the provisional approach would needlessly vary modern awards, so that:

> *... allowances which are currently described as all purpose in nature would no longer operate on a truly all purpose basis, but would apply for certain purposes only. For the sake of clarity, that would then require those purposes to be clearly identified. As was pointed out in the*

[2] *Four yearly review of modern awards* [2015] FWCFB 4658,
[3] *July Decision*, [70].
[4] *Four yearly review of modern awards* [2015] FWCFB 6656.
[5] *September Decision*, [107]-[111].
[6] *September Decision*, [107]-[108].

> *submissions of the AWU, a requirement in the case of casual employees that the casual loading be calculated on the minimum hourly rate, but that other loadings and penalties be calculated on the ordinary hourly rate would add difficulty to the process of calculating the correct hourly rate. This difficulty will not be able to be overcome by the addition of detailed rate schedules specifying the casual hourly rates payable for each ordinary time, overtime, weekend work and shift work scenario because, particularly in those awards where there are different all purpose allowances applying to different categories of employees, it will become impracticable to produce comprehensive rate schedules coverings every possible scenario for every category of employee.*[7]

16. Consequently, the Full Bench decided that (at [110]):

> *The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as* ***25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances,*** *and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.* [emphasis added].

17. However, the Full Bench also decided it would '*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.*'[8]

18. Further, it is up to AIG to identify any allowance currently identified as being paid for '*all purposes'* and give reasons why that allowance should no longer be given that designation.

19. Clause 10.5(a) of the current Award provides:

> *A casual employee is an employee engaged as such and must be paid the hourly rate payable for a full-time employee for the relevant classification in clause 14—Minimum wages plus a casual loading of 25%*

[7] *September Decision*, [108].
[8] *September Decision*, [109].

20. Consistent with the *September Decision*, the exposure draft clause 11.1 is substantively identical to current clause 10.5(a) except for the insertion of the word '*ordinary*':

> *A casual employee is an employee engaged as such and must be paid the* ***ordinary*** *hourly rate payable for a full-time employee for the relevant classification in clause 16—Minimum wages plus a casual loading of 25%.*
> [emphasis added].

21. Given the *September* Decision, exposure draft clause 11.1 should not be varied in the manner proposed by AIG.

22. AIG has not submitted that any allowance identified as being paid for all purposes is not actually payable for all purposes.

23. Further, the inclusion of the word '*ordinary'* does not alter operation of the clause in any way. Clause 10.5(a) predates the decision to standardise the definition and use of the terms *'all purpose'* and '*ordinary hourly rate of pay'* across the modern award system.[9] The Award uses old-fashioned terminology to describe how loadings and penalties are calculated, which does not reflect the modern distinction between '*minimum hourly rate'* and '*ordinary hourly rate'*.

24. For instance, clause 23.5 – Weekend and public holiday work uses the terminology of '*time and a half*' and '*double time'* without reference to the rate which is being modified by the penalty. Similarly, clause 23.4 – Shiftwork simply provides a table with one column entitled '*% loading*'. It is left to the reader to guess that the percentage loading is applied to the applicable hourly rate of pay.

25. Only a strained reading of the current award would permit clause 10.5(a) to be interpreted so that the casual loading is calculated from the minimum hourly rate of pay but that weekend and shift penalties are calculated using the ordinary hourly rate of pay.

[9] *July Decision*, [35]-[47].

26. The only all-purposes allowance in the Award is the Qualifications Allowances provided by current clause 15.6 (exposure draft clause 17.2(b)):

> *A Director or Assistant Director who holds a Graduate Certificate in Childcare Management or equivalent will be paid an all-purpose allowance, calculated at 5% of the weekly rate for an Assistant Director (Children's Services Employee Level 5.4).*

27. Given the archaic nature of the language of the current Award, the only reasonable conclusion is that the use of the term '*all-purposes*' means that the allowance is genuinely paid for all purposes.

Item 18 – Adjustment of expense related allowances

28. Australian Business Industrial and the New South Wales Business Chamber ('ABI & NSWBC') submit that the words 'increased' should be replaced with the word 'adjusted'.

29. United Voice opposes ABI & NSWBC's submission. The exposure draft is consistent with current clause 15.8 which provides:

> *(a) At the time of any adjustment to the standard rate, each expense related allowance will be* ***increased*** *by the relevant adjustment factor. The relevant adjustment factor for this purpose is the percentage movement in the applicable index figure most recently published by the Australian Bureau of Statistics since the allowance was last adjusted.* [emphasis added].

UNITED VOICE
13 March 2017