

FAIR WORK COMMISSION

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Outline of submissions on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd in support of the 'Level 9 Application' in respect of the Rail Industry Award 2010

6 December 2016

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**Submissions in support of the 'Level 9 Application' in respect of the Rail Industry Award 2010 ('Award')**

- 1.1 These submissions are made in accordance with the directions of Senior Deputy President Hamberger on 15 November 2016.
- 1.2 Aurizon, the Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Applicants**) jointly filed an application on 13 November 2015 to amend the definition of the Level 9 Clerical, Administrative and Professional (**CAP**) classification in the Award (**Level 9 Application**).
- 1.3 The Level 9 CAP definition currently in the Award contains the following brief description of the tasks and functions that are performed by an employee at this level:

**Level 9**

The employee will provide guidance and direction to staff supervising others. The employee will have high level specialised skills.

- 1.4 The amended definition proposed by the Applicants provides greater guidance to employers and employees as to which employees within the organisation fall within the definition.
- 1.5 The Applicants propose to amend the classification provisions of the award to delete the definition at Level 9 of the CAP classifications and replace it with the definition set out below:

**Level 9**

Employees at this level will have the skill levels of a Level 8 employee and:

- Provide guidance and direction to staff supervising others
- Have high level specialised skills
- May contribute to policy development
- May develop training materials and directs training activities
- Are involved in short-term planning and make independent operational decisions
- Example: Managing a suburban station, payroll team leader, infrastructure team leader

Excludes persons with functional responsibility for a regional, organisational or functional area eg. group of stations, work teams. Example: Payroll Manager, Depot Manager

- 1.6 This amendment incorporates the existing requirements and adds additional indicia and examples.
- 1.7 The RTBU has submitted that the first line of the proposed Level 9 CAP definition should be amended as follows:

"Employees at this level will have the skill levels of a Level 8 employee **and engage in a combination of all or some of the duties below...**"

- 1.8 The RTBU has not in its submissions otherwise opposed the proposed Level 9 CAP definition. The ASU have not made submissions in response to the Applicants' proposed Level 9 CAP definition.

#### **RTBU's proposed variation**

- 1.9 The Applicant does not agree with the RTBU's proposed wording for the reasons set out below.
- 1.10 Firstly, the RTBU's proposed wording is not necessary. The same meaning can be implied from the wording proposed by the Applicants. The words "May develop" and "May contribute..." in the Level 9 CAP descriptors proposed by the Applicant indicate that these attributes need not be held by a particular employee to be classified at Level 9.
- 1.11 Secondly, no other classification level in the Award expressly requires the employee to "engage in a combination of all or some of the duties ...". The indicia text identifies what "may", "would", or "often" be required as well as what is required. The amendment is consistent with this drafting approach.
- 1.12 Thirdly, although some classification levels are more prescriptive than others, (see for example Level 4 CAP which provides that "Whilst not a prerequisite, a principle feature of this level is..."), generally speaking, reading the classification structure as a whole would suggest that at each level it is not necessary that an employee possess all of the skills or engages in all of the functions listed.
- 1.13 Finally, the cases interpreting CAP classifications demonstrate that when determining the question of whether or not an individual falls within a particular CAP classification, the Fair Work Commission (**Commission**) will not perform a line-by-analysis requiring each and every criteria in the classification descriptions to be met. Rather, the Commission will consider the surrounding circumstances of an individual's role, and the operation of the Award in the particular industry in which it applies, in determining whether or not an employee is award covered, and in what classification he/she fits.
- 1.14 In *Oliver v Queensland Rail Limited T/A Queensland Rail* [2013] FWC 2583, the Commission determined that the Senior Legal Counsel, Property and Projects, Legal and Governance, Legal, was not covered by the CAP classifications in the Award, and was therefore, not Award covered. The Commission followed the **principal purpose test** outlined by a Full Bench of the Australian Industrial Relations Commission in *Carpenter v Corona Manufacturing* in determining whether or not the Award applied to Ms Oliver. In that case, the Full Bench stated:

An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal

purpose for which the employee is employed. In this case, such an examination demonstrates that the principal purpose for which the appellant was employed was that of a manager.

- 1.15 The Commission therefore found that due to the following factors, Ms Oliver's principal purpose was management, and not technical and/or legal, and therefore Ms Oliver was not Award covered:
- (a) The accountability requirements attaching to Ms Oliver's role were that of a senior manager;
  - (b) the performance of strategic management functions which she was recruited for, even though she necessarily had technical legal skills; and
  - (c) the fact Ms Oliver was not just liaising with senior managers; she was one herself.
- 1.16 Adopting the principal purpose test in matters of this kind necessarily results in the Commission examining each element of the classification level contended to apply before coming to a decision of the principal purpose of an individual's role, and whether or not that principal purpose aligns with the classification definition set out in the relevant Award. In such a context, the Respondent submits that the qualifying words sought to be included in the proposed Level 9 CAP definition are peripheral and unnecessary. The reality of Award interpretation, as demonstrated by the principal purpose approach taken in cases such as *Oliver*, is such that the Commission does in fact consider whether or not all or some of the elements of a classification are met.

## Conclusion

- 1.17 The Applicants submits that due to the fact the principal purpose test is applied in cases where Award application is in dispute, and the unnecessary nature of the RTBU's proposed wording, the Level 9 CAP definition as otherwise proposed should be inserted into the Award.



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