

*Fair Work Act 2009*

FAIR WORK COMMISSION

**IN THE MATTER OF: 4 Yearly Review of Modern Awards – Group 4 Awards**  
**Broadcasting, Recorded Entertainment and Cinemas Award 2010**  
**AM2018/17**

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

26 April 2019

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**4 Yearly Review of Modern Awards – Group 4 Awards**  
**Broadcasting, Recorded Entertainment and Cinemas Award 2010**  
**AM2018/17**

**Submissions 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 This submission is made in response to a Direction of Vice President Hatcher in these proceedings on 11 February 2019.
- 3 The employers named at paragraph 1 (the **Employers**) together comprise the overwhelming majority of employers in the cinema exhibition industry and employ a very large majority of the employees in the cinema exhibition industry.
- 4 This submission is made to the Full Bench in respect of the Broadcasting, Recorded Entertainment and Cinemas Award 2010 (**BREC Award**). The Commission's review of the BREC 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 BREC Award.
- 5 This submission is made in response to the Full Bench Decision dated 21 March 2018 [2018] FWCFB 1548 where it is stated:

*[247] The previous Full Bench did not indicate whether the 8% allowance was cumulative or compounding, but the intention does not appear to have been to create an all-purpose allowance*

*[248] ... we think there is merit in seeking further clarification about how the 8% loading is calculated.*
- 6 This is a reference to clause 13.4 of the Exposure Draft of the BREC Award republished on 23 March 2018 (the **Exposure Draft**) where it is stated:

*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.*
- 7 As required by the Full Bench Decision of 21 March 2018 at [242] the Employers provided submissions dated 17 April 2018.

8 In the Full Bench decision of 7 August 2018 [2018] FWCFB 4175 at [147] it is stated:

*To be clear, we had no intention of changing the 8% loading as part of the technical and drafting process; we sought only to clarify the mechanism for calculation.*

9 The matter referred to in paragraph 5 has been referred to this Full Bench (AM2018/17) and is listed for Hearing on 15 and 16 August 2019.

### Summary

10 The words of clause 14.12 of the BREC Award and clause 13.4 of the Exposure Draft are clear. It is agreed, and confirmed by the Full Bench, that the 8% component is not an all purpose allowance. In 2008 a Full Bench stated the general rule that both penalties and the casual loading are to be calculated on the ordinary time rate. The Full Bench also decided, in effect that, if an award does not state that an allowance is all purpose or that the allowance forms part of the ordinary hourly rate, then the rate including the 8% component should not be used to calculate entitlements. The words of clause 14.12 (and 13.4 of the Exposure Draft) make it perfectly clear that the 8% component is for work performed and is to compensate for two clearly stated entitlements which are only available for work actually performed and is in lieu of penalties otherwise payable if work is performed on a Sunday or a public holiday.

### Submission – The current BREC Award

11 The current BREC Award at clause 14.12 states:

*All employees in cinemas will receive an 8% penalty averaging component instead of Sunday penalty payments and reduced public holiday penalties.*

12 In the Full Bench Decision of 21 March 2018 (paragraph 5 above) it is stated at [247]:

*The previous Full Bench did not indicate whether the 8% allowance was payable for all purposes, nor did it indicate whether the allowance was cumulative or compounding, but the intention does not appear to have been to create an all purpose allowance. Interested parties have agreed to the deletion of the words “This loading is payable for all purposes” appearing in clause 13.4 of the exposure draft and to delete the definition in clause 2 of the exposure draft. We will adopt the parties’ agreed position.*

13 The President in his Statement of 13 February 2019 (AM2014/1), under “casual loadings” notes:

[60] *In the July 2015 decision the Full Bench expressed the view that it is desirable that there be a consistent rule for the calculation of casual loading which should apply across all awards. The bench’s provisional view was that a casual loading will be calculated at 25% of the minimum rate (not the ordinary hourly rate), with any all purpose allowance being added after that.*

[61] *This issue was revisited in the September 2015 decision, following further submissions from interested parties. The Full Bench then concluded that:*

- *for a number of awards containing allowances that are all purpose in nature or stated to form part of the ordinary hourly rate, adoption of the provisional view would result in a reduction in hourly rates of pay for casual employees;*

- *the provisional view was inconsistent with the general approach of the Australian Industrial Relations Commission (AIRC) Full Bench Award Modernisation Decision of 19 December 2008 that the casual loading should be applied to the ordinary rate rather than the minimum rate; and*
- *adoption of the provisional view was not justified where there was no evidence of practical difficulty in the operation of current award provisions which are inconsistent with the Award Modernisation Decision.*

[62] *The Full Bench determined that the general approach to casual loading will remain as in the exposure drafts, with casual loading expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and as 25% of the minimum hourly rate in awards which do not contain any such allowances.*

[63] *The Full Bench noted the concern underlying the provisional view, namely, whether it was appropriate for certain allowances currently expressed as all purpose to be paid at an increased level for casual employees by application of the casual loading. The preferable approach to this issue was 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.*

14 In the Full Bench Decision of 13 November 2018 [2018] FWCFB 6852 (AM2014/250 and others), it is stated:

[21] *MEAA also filed a further detailed submission on 21 September 2018 regarding whether the 8% allowance is an allowance for all purposes. Birch Carroll and Coyle Limited, Hoyts Corporation Pty Limited, Greater Union Organisation Pty Limited, Village Cinemas Limited and the Independent Cinemas Association of Australia all filed a submission on 21 September 2018 noting that in relation to the 8% loading issue, the starting point should be the status quo and noting that if a party seeks a change to a longstanding and substantive award provision the party needs to bring a merit case.*

[22] *These issues will be dealt with by the separately constituted Full Bench in AM2018/17.*

[23] *There are no other outstanding issues for this Full Bench to determine in relation to the Broadcasting Award.*

#### **Submission – Award Modernisation Decision of 19 December 2008**

15 In the Award Modernisation Decision of 19 December 2008 [2008] AIRCFB 1000, in matter AM2008/1-12, the Full Bench stated, at [50]:

*Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.*

16 Whether an employee received the casual loading calculated on the minimum or basic rate of pay or on that rate loaded by the 8% penalty averaging component depends on the wording of the BREC Award. There is no indication in the BREC Award that the casual loading should be calculated on the minimum/base rate increased by the penalty averaging component. Indeed the 8% penalty averaging component is carefully expressed to only compensate for Sunday payments and reduced public holiday

payments. Therefore a casual employee is entitled to have both the casual loading and the 8% component each calculated on the base rate of pay.

#### **Submission – nature or description of 8% component**

17 As noted at paragraph 13, the Full Bench Decision of September 2015 [2015] FWCFB 6656 it was decided, in effect, that if an allowance was all purpose in nature or if it was stated to form part of the ordinary hourly rate then the rate, including that allowance, would be used for calculating the entitlement. In the case of the BREC Award the 8% component:

- Is not “all purpose” (paragraph 12 above);
- Is not stated anywhere in the BREC Award to form part of the ordinary hourly rate.

#### **Submission – the words are clear**

18 It is submitted that there is no ambiguity in clause 14.12 of the BREC Award. The words are clear. The 8% component is to average, for work performed at any time on any day of the week, penalties or higher penalties which might otherwise be attracted by work on Sundays and public holidays. The penalties for work on Sundays and higher penalties for work on public holidays are addressed and replaced by the clear words of clause 14.12:

*...instead of Sunday penalties and reduced public holiday penalties.*

19 The component was not intended as a wage increase. It was and is intended to average out penalties otherwise foregone for work on specific days by providing the component for work actually performed on all days. It would completely pervert the intention of the penalty averaging provision if it were to apply to a range of other entitlements for which no work is performed such as:

- Annual leave;
- Personal leave;
- Long service leave;
- Payment in lieu of notice;
- Redundancy pay.

#### **MEAA submission of 20 September 2018**

20 In response to the statements in various paragraphs of the MEAA submission of 20 September 2018:

4-7 MEAA implies that the 8% component is an “all purpose” allowance and therefore forms part of the “ordinary hourly rate”. A Full Bench (see paragraph 9 above) has decided that the 8% is not an all purpose allowance.

8 MEAA states that an award must be read in its context, whether historical or textual, and states that the “minimum rate per week” is the base rate plus the penalty averaging component. However no basis is put for asserting that the “minimum rate” is an all purpose rate.

14-16 MEAA submits that Live Performance Australia (LPA) described the 8% component as part of the minimum rate and so payable for all purposes. However MEAA also notes the statement of Mr D Hamilton of LPA on Transcript of 16 June 2017 (AM2014/259) that the 8% component:

*“was never put into the award as an allowance. It was our submission in 2009 that it was part of the minimum rate.”*

21 MEAA also notes that the joint submission of the major cinema employers and LPA dated 17 April 2018 stated, at paragraph 25:

*The Employers submit that the 8% penalty averaging component is part of properly made minimum rates.*

However neither Employers nor LPA stated that the “minimum rates” were all purpose minimum rates. Rather the 8% component was introduced to average out penalties among all employees over all days of the week while actually working and “minimum rates” meant minimum rates while actually working.

#### **MEAA submission filed on 26 February 2019**

22 In response to statements in various paragraphs of the MEAA submission filed on 26 February 2019:

3-4 Clause 14.12 of the BREC Award (and the substantial restatement of it at clause 13.4 of the Exposure Draft) have existed in the BREC Award since 30 December 2009 and the 8% “penalty averaging” component in the predecessor industry award, the *Entertainment and Broadcasting Industry – Cinema Award – 1998* for many years before that. During this time the major employers have not considered there to be any ambiguity as evidenced by the fact that all major cinema exhibition employers consider that the calculation should be made on a cumulative and not a compounding basis. The Employers submit that the Decision of the Full Bench in the 4 Yearly Review of the Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 applies, that is:

*where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*

should apply.

5-8 It is clear from the evidence that those Employers, who employ a very significant proportion of all employees in the cinema exhibition industry do calculate, and have for a number of years have calculated, the 8% penalty averaging component and the casual loading on a cumulative basis. This approach is supported by the Full Bench Decision of 21 March 2018 (paragraph 6 above) that the 8% penalty averaging component is not an all purpose allowance and the definition, at section 16 of the *Fair Work Act 2009* (Cth) of “base rate of pay” being the rate for ordinary hours work but not including loadings, allowances, penalty rates and other items.

9-16 Should the Commission decide to act as sought by the MEAA submission, then it is submitted that the Commission should have

regard to the current interpretation and practice of the Employers of the majority of employees in the cinema exhibition industry and, if it sees an ambiguity, preserve the current majority interpretation and practice in respect of clause 14.12 of the BREC Award and clearly state that the calculation of the 8% component and the calculation of the casual loading are to be made on a cumulative basis, i.e. each calculated on the base rate of pay as defined in section 16 of the *Fair Work Act 2009*.

## Conclusion

- 23 As required by s.206 of the FW Act, the major employers named at paragraph 1 have for a number of years used the minimum rates prescribed from time to time in the BREC Award plus the 8% penalty averaging component. These are the employers of a very large majority of employees in the cinema industry. These employers have interpreted the relevant provisions of the BREC Award in the manner described by the Full Bench at paragraph 15, including by taking advice which had regard to that Full Bench Decision, i.e. that the calculation is to be made on a cumulative basis. It is respectfully submitted that the BREC Award already provides that the 8% penalty averaging component and the casual loading may each be calculated separately, based on the award minimum rate. If the Commission considers that this is not sufficiently clearly expressed in the BREC Award, then it is respectfully submitted that the BREC Award might be amended to more clearly express this long standing and well founded interpretation.

Michael Serong  
Consultant  
Norton Rose Fulbright Australia

26 April 2019

Fair Work Act 2009  
FAIR WORK COMMISSION

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## STATUTORY DECLARATION OF JODI PATON

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# STATUTORY DECLARATION

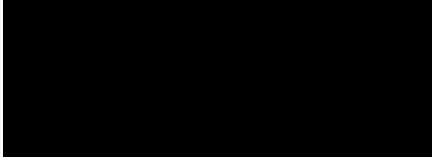
## Statutory Declarations Act 1959

I, Jodi Paton of [REDACTED] New South Wales 2000 make the following declaration under the **Statutory Declarations Act 1959**:

1. I am Director – People, Performance and Culture of Hoyts Corporation Limited (**Hoyts**). I am authorised by Hoyts to make this declaration on its behalf.
2. After due enquiry, I declare that, to the best of my knowledge, information and belief:
  - a) Hoyts has a pool of approximately 2611 employees whose minimum wage is fixed by the Broadcasting, Recorded Entertainment and Cinemas Award 2010 (**BREC Award**).
  - b) Hoyts has a pool of approximately 105 persons available for casual engagements.
  - c) Hoyts has, since at least 2012, set minimum wages for these employees as required by section 206 of the *Fair Work Act 2009* (Cth).
  - d) The wage rate for these casual employees is set having regard to the relevant rates in the BREC Award 2010, including the 8% penalty averaging component provided for in clause 14.12 of the Award.
  - e) The minimum wage rate paid to a casual employee is calculated as the award minimum rate plus 8% of the award minimum rate plus the casual loading calculated on the award minimum rate, i.e. on a cumulative basis.

**I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.**

Declared by Jodi Paton



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)



Jodi Paton

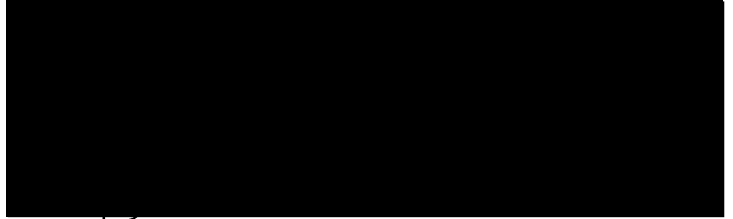
Before me:

Name:

Address:

Qualification:

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Signature

**Note 1:** A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years – see section 11 of the *Statutory Declarations Act 1959*.

**Note 2:** Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* – see section 5A of the *Statutory Declarations Act 1959*.

Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF:

4 Yearly Review of Modern awards – Group 4 Awards

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AM2018/17

## STATEMENT OF KERRY WESTWOOD

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*Fair Work Act 2009 (Cth)*  
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**IN THE MATTER OF:**

**4 yearly review of modern awards – group 4 awards**  
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**STATEMENT OF KERRY WESTWOOD**

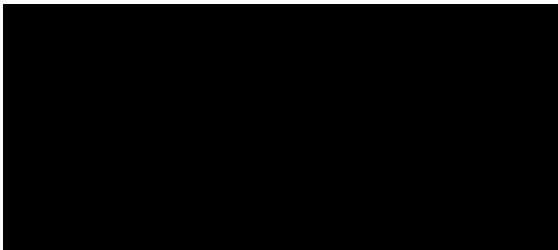
I, Kerry Westwood of [REDACTED] NSW 2450 say as follows:

**Background**

- 1 I am responsible for People & Culture in the Event Group of Companies of which Birch Carroll & Coyle Limited (**BCC**) is a subsidiary. I am authorised by Event Hospitality & Entertainment Limited to make this declaration on its behalf.
- 2 After due enquiry, I declare that, to the best of my knowledge, information and belief:
  - (a) BCC has a pool of approximately 1080 persons available for casual engagements and in a typical week BCC employees between 500 and 1000 people on casual engagements.
  - (b) BCC has, for many years, set minimum wages for these employs as required by section 206 of the *Fair Work Act 2009 (Cth)*.
  - (c) The wage rate for these casual employees is set having regard to the relevant rates in the *Broadcasting, Recorded Entertainment and Cinemas*

*Award 2010*, including the 8% penalty averaging component provided for in clause 14.12 of the Award.

- (d) The minimum wage rate paid to a casual employee is calculated as the award minimum rate plus 8% of the award minimum rate plus the casual loading calculated on the award minimum rate, i.e. on a cumulative basis.



.....  
Signed by Kerry Westwood

Dated: 24<sup>th</sup> April 2019

Fair Work Act 2009

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## STATEMENT OF KERRY WESTWOOD

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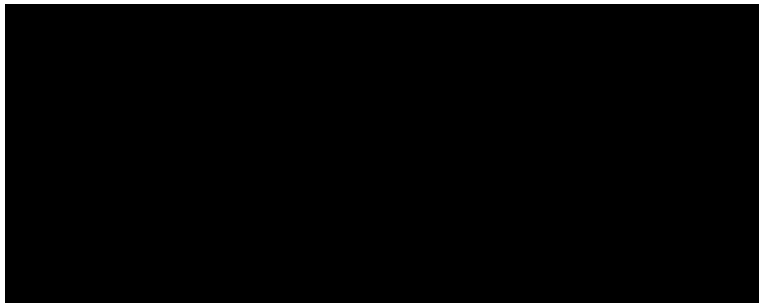
**STATEMENT OF KERRY WESTWOOD**

I, Kerry Westwood of [REDACTED] NSW 2450 say as follows:

**Background**

- 1 I am responsible for People & Culture in the Event Group of Companies of which The Greater Union Organisation Pty Ltd (**Greater Union**) is a subsidiary. I am authorised by Event Hospitality & Entertainment Limited to make this declaration on its behalf.
- 2 After due enquiry, I declare that, to the best of my knowledge, information and belief:
  - (a) Greater Union has a pool of approximately 1444 persons available for casual engagements and in a typical week Greater Union employees between 600 and 1200 people on casual engagements.
  - (b) Greater Union has, for many years, set minimum wages for these employees as required by section 206 of the *Fair Work Act 2009 (Cth)*.

- (c) The wage rate for these casual employees is set having regard to the relevant rates in the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*, including the 8% penalty averaging component provided for in clause 14.12 of the Award.
  
- (d) The minimum wage rate paid to a casual employee is calculated as the award minimum rate plus 8% of the award minimum rate plus the casual loading calculated on the award minimum rate, i.e. on a cumulative basis.



Signed by Kerry Westwood

Dated: 24<sup>th</sup> April 2019



Fair Work Act 2009

FAIR WORK COMMISSION

IN THE MATTER OF:

4 Yearly Review of Modern awards – Group 4 Awards

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AM2018/17

## STATEMENT OF SIMONE RUST

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IN THE MATTER OF:  
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Broadcasting, Recorded Entertainment and Cinemas Award 2010  
(AM2018/2017)

STATEMENT OF SIMONE RUST

I, Simone Rust of 1/500 Chapel Street, South Yarra VIC 3141 say as follows:

**Background**

- 1 I am the Human Resources Business Partner of Village Cinemas Australia Pty Ltd (**Village**). I am authorised by Village to make this declaration on its behalf.
- 2 After due enquiry, I declare that, to the best of my knowledge, information and belief:
  - (a) Village has approximately 1258 employees including casuals, whose minimum wages fixed by the *Broadcasting, Recorded Entertainment and Cinemas Award 2010 (BREC Award)*.
  - (b) Village has a pool of approximately 961 persons available for casual engagement.
  - (c) Village has, for many years, set minimum wages for these employees as required by section 206 of the *Fair Work Act 2009 (Cth)*.

- (d) The wage rate for these casual employees is set having regard to the relevant rates in the BREC Award, including the 8% penalty averaging component provided for in clause 14.12 of the Award.
- (e) The minimum wage rate paid to a casual employee is calculated as the award minimum rate plus 8% of the award minimum rate plus the casual loading calculated on the award minimum rate, i.e. on a cumulative basis.

  
.....  
Signed by Simone Rust

Dated: 2 May 2019.