QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for general ruling

Queensland Council of Unions AND Crown and Others (No. B1346 of 1999)

The Australian Workers' Union of Employees, Queensland AND Crown and Others (No. B1351 of 1999)

The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers AND Crown and Others (No. B377 of 2000)

COMMISSIONERS BECHLY, SWAN AND BROWN 3 April 2001

Loading – Casual Loading – Application for General Ruling – Application for Increase – Arbitrated Matter – Inspections – Evidence – Casual Loading Progressively Increased by General Ruling to 23%.

DECISION

There are three applications before the Full Bench of the Commission. B1346/99 and B1351/99 seek a General Ruling to increase casual loading. These applications are made by the Queensland Council of Unions (QCU) and The Australian Workers' Union of Employees, Queensland (AWU). B377/00, an application made by The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers, seeks to amend the *Café, Restaurant and Catering Award – State (Excluding South-East Queensland*) by reducing the casual loading from 50% to 19% to reflect the casual loading rate applicable in the *Hospitality Industry – Restaurant, Catering and Allied Establishments Award – South Eastern Division.*

The joint submissions of QCU and AWU request that:–

> "This Commission declares by way of a General Ruling that those Awards and Industrial Agreements which prescribe loading for casual employees expressed as a percentage of less than 28.5 per centum shall be varied so as to increase such percentage loading to 28.5 per centum as from (the specific date).".

The applications made by QCU and AWU were opposed, by way of counter claim, by the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) and Livingstones (Australia). Other named respondents, opposed the claim. The Queensland Government supported the claim to the extent of a 1% increase.

Historical Perspective of Casual Loading within the Queensland Jurisdiction according to the QCU/AWU submissions

In an application made by the AWU during 1952 to the Industrial Court of Queensland, for increases in casual allowances (37 QGIG 602, September 1952) the Court stated:–

> "Obviously these rates were originally fixed at a higher figure than the ordinary rates applying to the types of employment governed by them to enable the casual worker to earn an additional sum during a limited period of employment as compensation for the lack of regular employment. It is difficult, however, to ascertain to what extent the casual loading, as it were, was intended to compensate this type of employee".

Further, in *Bag-Making Award – South-Eastern Division* (37 QGIG 752 of November 1952) the Industrial Court, in considering an application to delete the "Male Adult" casual rate and insert a general 12 ½% loading, stated:–

> "In a recent judgement dealing with, *inter alia*, casual rates under the Harbour Boards Award – State, the Court suggested that matters to be considered in arriving at proper rates for casual workers were (a) type of work, (b) incidence of casualness and (c) the degree of work to be performed to be considered a casual. Of these three matters, I think by far the most important is the incidence of casual work. In my view the lesser amount of employment for casual workers there is available in any particular calling, the greater the casual rate should be, and vice versa. Of course, there must be a limit placed on the rates, as the fixation of such a rate as would enable a casual worker to earn more than a regular worker must be guarded against. In the earlier days of arbitration when rates of this description were being fixed, such present-day conditions as annual leave, payment for statutory holidays not worked and sick leave were either in their infancy or were not contemplated. I think in these days such matters should be considered in fixing casual rates as otherwise there is the danger that the casual worker will be inadvertently subjected to a degree of industrial injustices. The chief difficulty is to determine to what extent such matters should be considered. I think it is reasonable and in accordance with modern trends of industrial relations that a good deal of weight should be given to the proposition that a casual rate should include some amount to compensate a casual worker for the loss of annual leave and payment for statutory holidays. It is assumed that daily and hourly rates in Awards do contain a loading in respect of these matters, but there is no evidence to show what is the amount of such loading. The question as to whether the casual rate should include a loading in respect of sick leave presents greater difficulty. Payment for sick leave is not necessarily automatic. Any particular worker may

> not draw sick leave payment in years of service and, *prima facie*, to load the casual rate with an amount in this respect may be regarded as putting the casual worker in a better position than a worker who is in regular employment. On the other hand it seems to be a reasonable assumption, corroborated to some extent by positive statements made frequently in Court in the past and not denied, that employers' costs include an amount based upon hypothetical sick leave payments. On the whole, I can see no injustice in loading the casual rate on this occasion.".

A number of applications were heard by the Commission after this period seeking to reduce the then existing casual loading. Those cases were unsuccessful. In 1964, a claim was lodged by the AWU to vary the "policy" of the Commission in relation to casual loading. The increase sought was an extra 2½% loading, thereby establishing an overall casual rate of 15%. On that occasion, an attempt was made to identify the criteria which should be considered in determining an appropriate casual loading. The criteria suggested were annual leave, public holidays, lost time and sick leave.

After this adjustment, casual leave loading increased to 19% and then, in a number of cases, to 20% as a consequence of a series of decisions by the Commission.

Within the Queensland jurisdiction, there are a number of Awards which contain a casual loading rate higher than the standard 19%. These include:–

Retail Industry Interim Award – State	22%
Accommodation Industry (Other Than Hotels) Award – South-Eastern	25%
Division and Boarding House Employees Award – State (Excluding South-East Queensland)	
Club Etc. Employees' Award – South East Queensland	25%
Club Employees' Award – State (Excluding South-East Queensland)	50%
Clothing Trades Award (both Awards)	33 & 1/3%
Building Construction Industry Award – State	20%

Overview of the QCU and AWU claim

As the last substantial review by this Tribunal of casual loading occurred some twenty-five years ago, both organisations believed that, with the marked growth in casualisation within the workforce, a more contemporary perspective was required.

Statistics provided showed that, on a national basis, approximately one-quarter of the workforce was employed on a casual basis, and, within Queensland, the figure was approximately one-third. Casualisation of the workforce was growing at a rate faster than that of the full-time workforce.

The nature of casual employment had changed significantly over the years. Various categories of casuals had emerged – ie "permanent casual", "part-time casual", "casual casual" etc. It was claimed, notwithstanding this, that:–

> "there is a significant degree of commonality manifest in the disadvantages of casual employment. Common features include: precarious employment, irregular and insecure hours, income insecurity, asymmetrical obligations between employer/employee, and social disadvantage.".

It was claimed that the "commonality" of conditions in the non-casual labour force included:–

> "benefits [which] range from entitlements such as annual leave, through to benefits such as sick leave, bereavement leave and Award provisions providing minimum rest periods between shifts. Non-casual benefits also include matters falling outside of express entitlements such as greater job security, greater inclusion into the workplace, better balancing of work and family life, reduced stress and easier financial planning.".

More specifically, those changes have included:–

> "Job protection (Termination, Change and Redundancy)
> Improved access to Superannuation
> Paid RDO's
> Parental Leave
> Family Leave
> Carer's Leave
> Award-Based classification structures
> Improved access to structured training
> Paid Training Leave
> Unfair Dismissal Protection
> Public Holidays Test Case".

It was acknowledged that whilst casual employees had received varying degrees of recognition *vis a vis* the above criteria, the disamenities associated with casual employment remained substantial.

In determining to seek an extra 9.5% casual loading increase, these applicants stated:–

> "This application does not seek to increase casual loading on account of each and every disamenity associated with casual employment.
>
> The application to bring the minimum 19% loading up to a minimum of 28.5% (9.5% increase) accounts for a number of factors:
>
> - Foregone leave loading (1.5%)
> - Foregone bereavement leave (1%)
> - Foregone minimum one weeks notice (2%)
> - Barriers to training, reclassification and career progression (5%)".

The applicants elaborated upon the above in the following manner:–

> "Foregone Leave Loading (1.5%)
>
> A minimum standard of 17.5% applied across Awards of the Commission. Non-casual employees receive this entitlement as part of their holiday pay. In Case No. B207/73 (85 QGIG 1232), casual loading was increased, however, the Commission stated 'In determining the amount of such increase, we have not, because of lack of information, included the annual leave loading of 17.5% in our basis of assessment.' ".

In light of that comment, the applicants state:–

> "Casuals are not compensated for foregone leave loading. 4 weeks of leave loading at 17.5% equates to an additional .7 of a week annual leave. .7 of one week divided by 52 weeks (total weeks in a year) equates to 1.4% rounded up to 1.5%. The amount of additional loading required to compensate casual employees for foregone leave loading = 1.5%.".
>
> Foregone Bereavement Leave
>
> Two days Bereavement Leave is common in Awards of this Commission. The *Industrial Relations Act 1999*, Chapter 2, Division 3, s. 40 provides for Bereavement Leave for employees but specifically states at s.40(1) that "This section does not apply to casual employees or pieceworkers . . .".
>
> In support of their claim, these applicants state:–
>
> > "The current minimum quantum of casual loading does not include a component attributable to foregone bereavement leave. The current minimum quantum of casual loading does not include a component attributable to the disadvantages and asymmetrical obligations suffered by casual employees who are bereaved. Bereavement leave operates similarly to sick leave. Sick leave is currently contemplated by casual loading. Bereavement leave should be dealt with in a similar fashion. An additional amount of 1% should be included in the quantum of casual loading to account for a minimum of 2 days foregone bereavement leave. This calculation is based on a minimum of two days (bereavement leave) divided by 260 days (total working days in any one year) equating to 0.8% rounded up to 1%.".
>
> Foregone Minimum One Weeks Notice (2%)
>
> One week's notice on cessation of employment (or payment in lieu) is common to Awards of this Commission. The non-casual workforce is entitled to this payment (graded upwards dependant upon the period of time worked). More beneficial provisions are contained within a number of agreements approved by this Commission. Casual employees are not compensated in terms of minimum notice on termination.
>
> These applicants state:–
>
> > "An additional amount of 2% should be included in the minimum quantum of casual loading to compensate casual employees for the absence of a minimum standard of one week's notice on termination. The calculation is based upon one week minimum notice on termination of employment/divided by 52 weeks (total weeks in one year) equating to 1.9% rounded up to 2%.".

Barriers to Training, Reclassification and Career Progression (5%)

Currently, the Policy of the Training Recognition Council is that casual employees are excluded from participating in apprenticeships and traineeships. Through the introduction of the Structural Efficiency Principle, non-casual employees have Award based entitlements to higher classification and career paths.

These applicants state that:–

> "An additional amount of 5% should be included in the minimum quantum of casual loading, to compensate casual employees for the disadvantages associated with barriers to training, re-classification and career progression. The 5% is based upon a benchmark differential between Award based classifications (a common differential between Award based classifications is 5%). The minimum quantum of 5% is based upon a presumption that casual employees will be held back from at least one re-classification progression, during their employment.".

Whilst the applicants rely upon the four criteria aforementioned upon which to mount their claim, they state:–

> "If the Commission is not moved to grant the full quantum specified by the applicants on each and every one of the four criteria, specified in the application, then the applicants request that the QIRC consider the broader context of the application and increase the loading by taking into account some of the broader issues, such as:
>
> - Social disamenities
> - Job insecurity
> - Whether Queensland casual employment levels are too high and should be discouraged
> - Barriers to 'permanent jobs'
> - Longer periods of 'lost time', underemployment and unemployment
> - Asymmetrical obligations between employers and employees
> - Lower wages of casual employees
> - Indirect discrimination experienced by female casual employees
> - Diminished protection against unfair dismissal
> - Reduced entitlements to Parental Leave
> - Reduced entitlements to Family Leave".

Relative to the *Industrial Relations Act 1999*, the applicants rely upon:–

> **"Principal object of this Act**
> S.3 The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by–
>
> (a) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers;
> (b) providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness;
> (c) preventing and eliminating discrimination in employment, and ensuring equal remuneration for men and women;
> (e) promoting the effective and efficient operation of enterprises and industries;
> (f) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community;
> (i) promoting and facilitating the regulation of employment by Awards and agreements;
> (j) meeting the needs of emerging labour markets and work patterns;
> (m) assisting in giving effect to Australia's international obligations in relation to labour standards.
>
> ILO Convention 100 – Equal Remuneration, 1951.
> ILO Convention 111 – Discrimination (Employment and Occupation), 1958.
> ILO Convention 122 – Employment Policy, 1964.
> ILO Convention 156 – Workers with Family Responsibilities, 1981.
> ILO Convention 158 – Termination of Employment, 1982.".

Overview of The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers' Claim

The claim of this organisation is as follows:–

> "Upon application, the minimum casual loading that can be inserted into the *Café Restaurant and Catering Award State (Excluding South-East Queensland)* by the Commission shall be 19%.
> The casual loading shall not be compounded in calculating penalty payments.

The following minimum casual loading shall be paid:
19% for all ordinary hours worked;
69% where the rate of pay is prescribed as time and a-half;
119% where the rate of pay is prescribed as double time; and
169% where the rate of pay is prescribed as double time and a-half.".

This organisation sought the standardisation of casual rates of pay throughout their relevant Awards within Queensland. It was stated that "The casual loading is not an amount to boost the wage rate. The casual loading is an amount that is to compensate a casual employee for not receiving benefits that a weekly/part-time employee would receive. The figure of 19% or greater "is an arbitrary figure fixed by the Commission to afford relief to those who do not otherwise benefit" (Commissioner Pont – Matter No. B601/1975).

The general thrust of this organisation's submission was that "The Commission has accepted by the inclusion of such provisions within Awards, that the casual loading was never intended to be compounded on top of "penalties".

Overview of Livingstones of Australia Claim

Livingstones of Australia seek to have the casual loading applicable within Queensland Awards reduced from 19% to 17%.

The submissions of the applicants were considered from a number of perspectives. Those included, amongst other things:–

"Many casual employees work hours approximating those of full-time weekly employees and suffer no lost time yet are still paid a component of the casual loading for lost time".
A significant number of employees work on any day of the week including public holidays and are paid penalty rates for work performed on a public holiday as would be full-time employees. Accordingly, the issue of not getting paid for public holidays not worked is irrelevant (see evidence of Mr Graeme Curnow – TAB Queensland, Mr Andrew Young, Bismark and Mr D Scotts, Executive Officer of QNIA).
That casual employees are employed for a variety of reasons "as dictated by the operational needs of their business/industry".
That the long-standing perception of casual employment as being sporadic and uncertain has, in many instances "been overtaken by casual employment on a regular and systematic basis spanning a number of years".
That casual employment may be "extremely stable, have secure hours, have attractive hourly rates of pay, allow for family time and be extremely attractive to certain employees".
That, because there are many different forms of casual employment, "an Award by Award analysis of an appropriate casual loading would be desirable".
That the claimed "disamenities" suffered by casuals were "overstated" and "a gross generalisation".

The claim was that there had been, over the last twenty-five years, improvements in the conditions attributable to casual employees. These included:–

a greater incidence and hence availability of casual work;
improved access to superannuation;
protection from unfair dismissal provided the employee is not a short-term casual as defined in the Regulations;
access to Maternity Leave for long-term casuals as defined in the Act;
long Service Leave;
access to Award-based classification structures; and
the Introduction of a 38 hour week in many State Awards and a resultant increase in the casual hourly rate.

For some employees:–
redundancy benefits;
workplace consultation via consultative committees;
formalised access to training;
access to career progression; and
active involvement in EBA negotiations (the last mentioned benefits were particularly attributable to TABQ employees).

Overview of QCCI's Claim

The QCCI has instituted a counter-proposal to have the casual loading applicable within Queensland Awards reduced from 19% to 16%. The particulars of the claim are:–

"Upon application, the minimum casual loading that can be inserted into Awards by the Commission shall be 16 %.
The casual loading shall not be compounded in calculating penalty payments.

For example, the following minimum casual loadings shall be paid:
16% for all ordinary hours worked;
66% where the rate of pay is prescribed as time and a-half;
116% where the rate of pay is prescribed as double time; and
166% where the rate of pay is prescribed as double time and a-half.".

This organisation favoured the granting of a Statement of Policy over the making of a General Ruling regarding casual rates of pay. In this context, "the making of a Statement of Policy as sought, will allow unions to make applications to vary Awards to increase the casual loading. It also will allow employers to make applications to vary Awards seeking to reduce the casual loading to a rate of no less than 16%.". Of concern was the prospect that, were the application to be granted in the manner so sought by the applicants, then a casual employee could be placed in a more advantageous position than a weekly or part-time employee.

Further elaborating upon its counter-proposal, QCCI stated:–

> "In determining the minimum casual rate, we are proposing a rate of 16%. The engagement or incidence of casual employment across industries is now totally different in the majority of cases, compared to the last time the casual rate was reviewed in 1973. The emergence of the use of casual employment and new industries which have developed since 1973 that depend significantly on casual employment have altered the industrial landscape for casual employees. Casual employees in many industries play an important part in providing a necessary service to the public. This trend of engaging casual employees now and in the future will continue to increase and they will be employed on any day of the week including public holidays.".

Reference was made to the situation where a casual was employed on a public holiday and the consequent disadvantageous affects experienced by employers being required to compound the already existing penalty by the casual loading.

Overview of Queensland Government's Claim

The Queensland Government's claim was that the casual loading should be increased by an amount of 1%. The Government held the view that "a more satisfactory response to the Unions' claim is to grant a moderate increase in the casual loading (ie 1% to compensate casual employees for non-entitlement to annual leave loading) and that the Award review process be used to address casualisation and the remaining components of the unions' application.".

The Government produced documentation identifying the varied range of casual loading rates applicable within certified agreements from New South Wales, South Australia, Western Australia, Queensland and the federal jurisdiction. This documentation showed the following:–

> "52.5 percent provide for a 20 percent loading;
> 18.6 percent provide for a loading less than 19 percent;
> 17.1 percent provide for a loading between 21 and 25 percent;
> 7.2 percent provide for a loading of 19%;
> 2.7 percent provide for a loading of more than 30 percent (only 4 agreements are from Queensland); and
> 2 percent provide for a loading between 26 and 30 percent.".

Further, it was stated that:–

> "Of all the Queensland agreements reviewed by ACIRRT that specify a casual loading, the most common loading is 19 percent (53.4 percent of agreements) followed by 20 percent (24). In total, 92 of the Queensland agreements reviewed provide a loading greater than 19 percent and 3 provide a loading of less than 19 percent.".

The Government's submissions sought to highlight the following:–

> The nature of casual employment.
> "Casual employment is heterogeneous in nature, that is casual employees are commonly categorised as either true casuals or permanent/long term casuals; and
> There is a lack of commonality in the various definitions of 'casual employee', thus clouding the issue of what constitutes casual employment".
> Heterogeneous nature of casual employment
> Lack of commonality in definition of casual employee
> Increase in casual employment
> "Over the last decade casual work has grown at almost 10 times the pace of other more secure jobs. ABS figures show that from August 1989 to August 1999 the number of casual employees Australia-wide increased by around 49% from 1,298,000 to 1,931,700. By contrast, the number of other employees increased by a more modest 3.3

percent from 5,199,400 to 5,372,500 during the period. Between 1989-99 over 78% of the new jobs created were casual".

Industries with high levels of casualisation

Casual employment by gender and status

"According to unpublished ABS data females comprise 55.6% of all casual employees in Queensland at August 1999…In addition, about 87% of the State's 231,093 female casual employees are employed as part-time workers".

Casual employment by age

Casual employment by size of work location

Casual earnings

Duration of casual jobs.

Below represents a summary of the Government's submissions:–

"In summary, labour market data relevant to casual employment indicates that:–

- over the last decade casual work has grown almost 10 times the pace of other more secure employment. From August 1989 to August 1999 the number of casual employees Australia wide increased by around 29 percent;
- in Queensland, casual employment comprises 31.2 percent of total employment, compared to 26.4 percent for Australia;
- Queensland industries with high levels of casualisation include: agriculture, forestry and fishing; retail trade; accommodation, cafes and restaurants; cultural and recreational services; and property and business services;
- 55.6 percent of casual employees in Queensland are females, of which about 87 percent are employed as part-time workers. The number of males employed as casuals is increasing;
- 20.9 percent of Queensland casuals are employees aged 15-19 years old, with 77 percent enrolled in school or elsewhere. For older age groups the percentage enrolled in study declines significantly;
- 44 percent of Queensland casuals are employed in workplaces with less than 10 employees. Such firms also undertake the lowest proportion of training;
- despite the casual loading, casual earnings are lower than those of permanent employees, particularly in lower skilled occupations. Reasons for these inconsistencies are unclear and have not been the subject of academic research; and
- in Queensland, around 60 percent of casuals are employed for more than 1 year by the same employer.".

With regard to the QCU/AWU claim that the casual loading rate should be increased to facilitate lack of training and career progression for casual employees, the Government stated that the approach suggested "is unlikely to address the inherent problems associated with limited career opportunities, while it is also considered counterintuitive to extend financial compensation in the absence of normal productivity improvements expected to flow from training and skills development. It is therefore submitted that the issue of training and career promotion can be best addressed through the Award review process and in particular, the requirement under section 126 (h) (iii) that, whenever possible, Awards provide support for training".

The cost impact of implementing the QCU/AWU claim would be approximately $277.4M per annum which would equate to an 0.57% increase to Queensland's gross wages bill and an extra $22.9M and 0.36% per annum to the public sector.

The Government's proposal of a 1% increase in the casual loading would provide a more modest outcome for the economy equating to approximately $22.0M per annum and 0.05% to Queensland's gross wages bill and $2.4M per annum and 0.04% to the public sector wages bill. The Government states:–

"This modest increase is sustainable in the current economic climate and will impose a minimal cost impost on employers".

The Government opposed the counter-claims made by QCCI and Livingstones Australia as they believed "they fall well short of community standards and risks exacerbating the problem of casualisation". With regard to the QCU/AWU claim that bereavement leave, notice of termination and lack of access to training and career progression should be considered when evaluating the casual loading, the Government stated that the last two mentioned matters would be better dealt with by way of Award restructuring.

Respondents opposed to the Claim

Other named respondents opposed the claim. Whilst we have fully considered all submissions, it is not our intention to detail the submissions of those parties. The major points in contention between the parties have generally been canvassed in the abovementioned summaries and, where particular evidence relates to other respondents, then that evidence will be detailed.

Witness Evidence

We do not see the need to recite all of the evidence from the various parties and organisations in this matter. Many parties reiterated the evidence of other witnesses. We propose, however, to cite the major points raised by the various parties in support of their respective claims.

Professor Peter Brosnan (Foundation Professor of Industrial Relations and Dean of the Faculty of Commerce and Management at Griffith University) gave evidence on behalf of the QCU and stated that, at present, he was "engaged in a study of casual employment of youths in the retail trade".

From his research, Professor Brosnan stated that Queensland had the highest level of casualisation within Australian States. Inherent within casual employment were the problems of insecurity of employment and the "uniquely Australian concept of a permanent casual". When comparisons were made with similar types of employment in European countries, it was found that a number of countries imposed restrictions upon casual employment. In New Zealand, for example, it was stated that casual employees were legally entitled to holiday pay, sick leave, carer's leave and bereavement leave. According to this witness, out of studies conducted, there was evidence that a major concern of many casuals was that there were limited job advancement opportunities.

To further the submission that casuals were not receiving training in their positions, Professor Brosnan relied upon an Australian Bureau of Statistics' Employer Training Expenditure Survey and an analysis conducted by Michael Alexander (an author of the publication Changes at Work) showing that casual workers were 1.55 times less likely to receive training than permanent employees and that pay rates generally were lower for casual workers.

Ms Meg Smith (Director and co-owner of Labour Market Alternatives Pty Ltd – a company which undertakes research within industrial relations) is a Lecturer in the School of Employment Relations and Work at the University of Western Sydney and gave evidence on behalf of QCU. In 1998/99, Labour Market Alternatives prepared a report for the Evatt Foundation examining the profile of casual employment in New South Wales. This report was titled *Choice and Coercion: Women's Experience of Casual Work.*

That report highlighted the following:–

> "In August 1998 casual employment comprised 26.9 per cent of all employment – in 1984 the commensurate figure was 15.8 per cent (ABS, Cat. No. 6310.0). While casualisation is growing for both men and women, and most recently at a faster growth rate for men, the detailed pattern of casual employment indicates a gendered phenomenon. Thus, it is women who are disproportionately represented in casual employment, particularly part-time casual employment. Close to one in three (32 per cent) of employed women and more than one in four (22.5 per cent) employed men are employed on a casual basis. Women comprise 54.1 per cent of all casuals (full-time and part-time) (ABS, Cat. No. 6310.0 August 1998)".

Casual labour was usually found in small businesses and industry sectors which primarily included accommodation, cafes and restaurants, agriculture, forestry, fishing and retail trade. The generally accepted definition of casual work which included concepts of short-term employment, irregular and uncertain work and separate contracts of employment now only encompassed some areas of casual work. Statistics show that high percentages of casual employees have been engaged by the same employer for more than twelve months.

Further evidence from this witness showed that whilst theoretically, casual employees were able to refuse an offer of work, in fact, "they felt that future employment would be jeopardised by such a rejection". The disamenities previously cited in the general submissions of both the QCU and AWU were reiterated in the evidence of this witness.

Ms Smith stated, in overviewing casual provisions contained within a sample range of federal and state Awards, that there were often great disparities evident in those industrial instruments when attempting to define casual employment. It was stated that "The setting of the loading has not historically universally rested on a precise costing of its components. The foregone conditions, such as annual leave, sick leave, bereavement leave, that are more easily costed are a conservative subset of conditions on which to base the assessment of the level of the loading, given the scale of the disamenities of casual employment, most prominently employment insecurity evident in the empirical data gathered through the project.".

Various witnesses within the nursing profession gave evidence to the effect that casual shifts could often be cancelled at short notice, that bereavement leave was unavailable, that employees felt vulnerable if they chose to refuse casual work on occasions, that there was a lack of training for casual employees within the hospital environment, that personal loans from financial institutions were almost impossible to obtain because of the nature of casual employment, amongst other reasons.

Evidence from various Union officials highlighted, amongst other things, the following:–

- casual employees were unwilling to raise concerns with their employers for fear of being treated unfairly in terms of future casual work;
- casual employees were often telephoned by the employer just before they were to commence work and told that there would be no requirement for them to work on that occasion;
- that upon reaching certain age groups (ie 18, 19, 20 or 21) casuals have not been rostered on for any more work or have had their hours severely reduced;
- concern was expressed at the lack of family leave provisions for casual employees;
- that there is a marked lack of training for casual employees with a large concentration of casual employees in the lower classification levels; and
- that under some industrial instruments, casuals can have their rosters altered unilaterally and that there may be no minimum period of engagement clause.

In response to the abovementioned claims, various employer witnesses gave evidence. Also senior nursing administrators gave evidence, the effect of which is as follows:–

- casual nursing needs fluctuate depending upon the time of the year;
- it is often difficult to obtain an appropriate number of casual employees;
- not all casual employees are totally reliable in terms of their availability for work;
- there would be a significant monetary increase for hospitals were the casual loading to increase in the manner so sought;
- casual employees are mainly engaged to –

  match peaks in patient acuity/hospital occupancy;
  replace unpredicted sick leave;
  relieve permanent staff for annual leave; and
  fill positions which are unable to be filled with permanent staff;

- according to these employers, many casual employees choose to remain so because –

  they are able to work when it suits them;
  casual work fits in with family life;
  they are unable to work a full shift but are able to complete, e.g. a four hour shift;
  some employees prefer to work on day shifts;
  some employees prefer to work from Monday to Friday only;
  some casual employees seek not to work on public holidays or school holidays;
  some employees seek specific employment to save for something special;
  many casual employees work in other jobs but wish to either earn extra money through casual employment or simply to ensure retention of specific skills;
  some casual employees prefer the variety of work as a casual employee;
  some casual employees work as it suits them; and
  many casual employees have been offered, over time, permanent work but have refused the offer.

- training was offered to casual nursing employees if it was sought;
- there was a national shortage of nursing staff wanting permanent employment;
- some hospitals attempted to minimise the use of casual labour because of –

  "lack of continuity of care with the use of casuals;
  decrease in commitment to customer service with the use of casuals;
  increase in costs per hour with the use of casuals; and
  casuals unavailable when required.";

- in some instances, there exists an incremental payment for casual employees once a certain number of hours have been worked.

Within the child-care industry, evidence was given that because of the extended opening hours of child-care centres, casual employees were required to cover those extra hours. Within this industry, evidence was given that training was available to casual employees.

Evidence from employers conducting business within the restaurant and catering industry showed that many employees were casual employees. Employees were engaged in this manner because of the nature of the industry. A common perspective was that if the casual loading increase was granted, then this would have a precarious affect upon the industry which would reflect itself with increased prices and a possible decrease in the hours these establishments were open to the public.

Evidence from employers within the hotel industry highlighted the following:–

- that casual employment was prevalent within the industry;
- usually employment was either full-time or casual, but not generally part-time;
- staff turnover was considerable;
- many casual employees do not see their employment within this industry as a long-term career prospect;
- in many instances, casual employees who wish to stay within the industry can progress "through the ranks" into more senior positions;
- where casual employees make up the majority of employees, their bargaining power through enterprise bargaining is real and significant;
- the casual nature of employment is "mutually beneficial" to both employer and employee; and
- there has been a concerted effort within this industry by employers to ensure that appropriate training is available to casual employees.

Evidence was given by the Manufacturing Manager of Buderim Ginger Limited. This evidence showed that peak seasons exist whereby the employment of casuals is necessary. There exists a training matrix and system embodied within the certified agreement which relates to the accumulation of skills. From this flows both a vertical and horizontal system of training. Casual employees acquire skills and permanent staff are totally drawn from the casual staff.

Within the TAB Queensland Limited (TABQ), some 101 casuals are engaged at various branches. 435 casual employees are engaged in telephone betting and 29 casuals are engaged in the Control Centre. 94 of TABQ's casual employees are aged 25 years or younger. Staffing arrangements are dependant upon "the weather, condition of racetracks, the standard of horse racing, state based carnivals and the impact of communication technology". From the employer's perspective, casual employees are attracted to this industry for the following reasons, amongst other things:–

- the desire for flexibility *vis a vis* other demands in their life;
- students gain from this type of work as it fits in with their study commitments; and
- working parents with school aged children find this type of work attractive.

Through enterprise bargaining outcomes with this employer, greater flexibility has been provided for employees. These include the ability to be "unavailable" for work on six Saturdays of the year if they so choose "Operators can specify which days mid-week they are available for extra shifts and unrestricted operators are permitted to initiate four (4) swaps per month within the roster. In special circumstances, operators are permitted unlimited shift swaps upon written application. Special rostering arrangements are available for staff returning from parental needs and we accommodate the needs of employees with carers' responsibilities for family members.".

Training is provided "on the job" within TABQ. 63 employees who started their career with TABQ as casuals, have progressed to TABQ's administrative structure.

There was evidence adduced from a number of employers who, whilst in different industry groupings, experienced similar situations with casual employees. This usually related to work within industries where seasonal demands were predominant. The essence of the evidence is similar and does not require repeated comment in this decision. These industries include, for example, the nursery industry and the fruit and vegetable growing industry.

Conclusion

In the course of hearing this matter, a wide range of parties have given evidence upon the issue of casual loading. All of this evidence has been appropriately considered by the Full Bench.

In the case of some employer witnesses, the matters raised by the Union applicants to support their claim for a casual loading of 28.5% (on pages 3 and 4 of this decision) have been directly addressed by employers as it pertains to their own businesses. For example, training, reclassification and career progression for casual employees does occur within some previously cited organisations (see evidence of TABQ). In many other instances, however, this is not the case.

What might be stated at the outset is this. We acknowledge that there exists those businesses where particular positive attention is paid to casual employees, primarily because of the nature of the business – i.e. businesses which rely almost solely upon casual employment and where the type of work involved requires some particular form of skill. In those instances, it is simply in the best interest of both the employer and the employee to adopt processes of flexibility, and the development of appropriate skill levels of employees because of the nature of the industry (e.g. the hospitality industry, TABQ). We also acknowledge that there are some industries within which casual employment is used in its more traditional sense, i.e. occasional use of short term and often sporadic casual employment. Somewhere in between those two scenarios lie most casual work situations.

Different Awards of this Commission define and limit the employment of casuals in different ways. We do not see it as our role in this decision to consider whether casual employment is appropriate or otherwise. Put simply, we accept that various forms of casual employment are utilised by certain employers for a range of reasons. We have been asked to consider an appropriate casual loading for those employees. We now do so.

Previously cited statistics show that the nature of casual work has changed significantly over the years. The traditionally accepted understanding of casual employment – i.e. work of limited duration, irregular in nature and where separate contracts of employment are entered into upon each work engagement, whilst remaining in existence in some instances, has been overtaken by the reality of contemporary casual work arrangements. A significant proportion of casual employees are now engaged for longer periods of employment (often for more than 12 months) and Legislation has been enacted both within the State and nationally to facilitate these changes.

The changing nature of work patterns for all employees has been evident since the last occasion upon which the question of casual loading was considered by a Full Bench of the Commission. In some instances, changes in working conditions which have occurred for full-time employees have been reflected, usually with modification, within changes affecting casual employees (ie dismissal laws, long service leave provisions, etc.).

In previous decisions of this Commission upon the question of casual loading, it has been clear that no precise formula has been utilised for the formulation of the rate. Whilst we accept that no precise formula exists for arriving at an appropriate casual loading, one need only refer to earlier decisions of this Commission to accept that a nexus of sorts exists between the criteria generally considered when fixing the casual loading and progression which has generally occurred in working conditions for other than casual employees. We see no reason as to why that general proposition should be disturbed in this decision and our decision is structured in similar vein.

As society and its needs change, so do the requirements and needs of employers and employees. Within this context of change, the nature of casual employment could be categorised in many ways. It is difficult to be precise as to which feature or features of casual employment are most pronounced, however certain factors became evident during the course of this hearing. For example, casual employment is utilised mostly by the female workforce, a large percentage of casual employees are employed in workplaces with less than 10 employees, and many casual employees are employed for more than 12 months with the one employer on a regular and systematic basis.

We accept generally the evidence of Union witnesses to the effect that many casual employees are often apprehensive about taking time off work for whatever reason for fear that they will not retain the casual hours they have enjoyed for some period of time. While we do accept that, in some circumstances, casual hire can lead to an offer of permanent engagement, we accept that generally the evidence of employee witnesses was that the prospect of career advancement for casual employees is in most cases negligible.

On these last two points specifically, we would state as follows:– In cases where casual labour is engaged in a "traditional" sense (previously described), it is understandable that the prospect of career advancement would be limited. To expect otherwise is simply contrary to the nature of the engagement. However, in other instances, and we believe these to be the majority of occasions, career advancement is also unlikely, save for those previously cited businesses reliant upon flexibility and a specific level of skill.

In the case of apprehension by many casual employees about taking time off work for various reasons, we accept the veracity of these claims and more so in those areas where the skill level required of employees is less pronounced. In these instances, it is easier for the employer to replace the casual employee. However, we do not discount the limited evidence given which indicates that in some instances particular consideration is given by employers to meeting the needs of some casual employees notwithstanding the nature of the position held.

In considering the various applications put before the Commission, we state that we are not prepared to consider a diminution in the casual loading rate of 19%. We see no justification for adopting this course. The strong evidence put before us warrants appropriate positive consideration and it would be contrary to the progression of industrial relations in this State to take a step so suggested in a General Ruling matter such as this. Nor are we prepared, on the material put to us, to alter the loading for casuals contained in the *Cafe, Restaurant and Catering Award – State (Excluding South-East Queensland)*. Those applications which seek to reduce the casual loading are rejected.

In reaching this decision and the final decision as to quantum of loading, we have taken into account that a variety of loadings have been deemed to be appropriate in a variety of Awards. No specific detail is before us as to why the particular loadings have been set. We accept that contained in the loadings are elements for annual leave, sick leave, public holidays and other paid entitlements accruing to permanent employees. As well, included in each of the allowances is an element relating to lost time in particular callings, referred to in the *Bag-Making Award – South-Eastern Division* aforementioned and in the decision of Court Members Dwyer and Harvey (37 QGIG 602), and other decisions of the Commission.

The lost time element obviously varies for different industries and industry sectors and quite often differs from employer to employer within the one industry.

Whilst it is acknowledged that this element, along with other elements, has not been specifically quantified in past decisions, it is a relevant element which has not been addressed in any or sufficient detail in this case to assist those applicants who seek to reduce the loading which is now before us.

We also take into account that since the last time this allowance was set in 1974 there have been a number of advances in employment conditions prescribed by way of Policy determination or Award prescription of this Commission which are not available to casual employees. We cite, for example, the Termination, Change and Redundancy Policy of this Commission which excludes casual employees.

We also do not propose to accept the Government's application for a 1% increase in casual loading. We are mindful of the Government's economic estimates and costing of the claims of the Unions were they to be granted. In fact, that acknowledgment does form an appropriate part of our reasoning in reaching our decision. However, we believe the quantum proposed by the Government does not adequately address the clear changes which have occurred in the area of casual employment.

Given that we do not attempt to establish and utilise a precise formula for determining an appropriate casual loading, we propose to consider the Unions' applications in the following manner.

On the question of "Foregone Leave Loading", we would state that we believe this to be a component of the Unions' claim which should be accepted as claimed. It is a matter of fact that, across Awards in this Commission, a minimum standard of 17.5% leave loading applies to employees other than casuals. On the material before us, we can see no reason why this element of the claim should be rejected. It would seem to us that it naturally follows that since casual employees are compensated for the loss of annual leave, so too should they be for that other element of annual leave, leave loading. We note, from earlier decisions of this Commission, that it was clear on the question of payment of Leave Loading that this component was previously refused on the basis of "lack of information" around the question.

The matter of "Foregone Bereavement Leave" is more problematic for us. Bereavement Leave is common to Awards of this Commission. The frequency of its access to the non-casual workforce is unknown to us with any precision. We should not stumble over that point, however, as it has already been established within this jurisdiction that Bereavement Leave has been warranted. The argument is put to us that Bereavement Leave is similar to Sick Leave which is included for consideration in the casual loading. From the evidence before us, it is our view that this component should be included within the casual loading rate. Because of the relatively extended nature of casual employment in this current environment, it is more likely that casual employees would have the same need to access this type of leave as would non-casual employees.

For similarly based reasons as above, we would include within the loading an element for increased notice of termination provided in the Legislation for non-casual employees but take into account that inherent in the existing loading is a component which recognises that no notice of termination is given to casuals.

In considering how the benefits of bereavement leave and extended periods of notice should be provided to casual employees some thought was given to the provision of the actual benefit rather than a monetary allowance. In the case of extended notice periods, because of the increasing trend to employ casuals on a long term, if not permanent basis, some thought was given to the provision of the benefit to those casual employees.

The provision of the benefits in that fashion rather than as part of an overall allowance was considered impracticable through a General Ruling matter such as that which is now before us.

However, the parties should not be deterred, particularly when making Certified Agreements, from entering into arrangements to provide access to such benefits to casuals through an entitlement to the benefit rather than by way of an allowance.

The area which has caused us considerable concern in this application has been the submission entitled "Barriers to Training, Reclassification and Career Progression". The applicant Unions place considerable weight upon this area in order to arrive at their claim of a 28.5% casual loading. The reasons for this have already been cited.

We have already stated that we accept that training for casual employees does occur in a range of industries. However, in stating that, we are also aware of employer submissions which state that in certain industries (e.g. the service industries) different realities must be faced. In many instances in these industries, casual employees are employed in small businesses, which have little ability to cater for matters such as industry training. We accept, as a matter of common sense, that some degree of "in-house" training will always occur. The QCU/AWU, however, refer to a more structured process of training. The employer submissions that larger businesses have greater capacity to instigate appropriate training is seen by us to be the more realistic view.

Is this element of the claim a "disamenity" sufficient to enhance the Unions' claims for a 28.5% casual loading in the manner so sought? In terms of the quantum sought by the Unions, we do not think so. As a matter of public interest, we would state that access to appropriate training etc for casual employees would always be of benefit to the employee and the employer. The practicalities of delivering this training in some cases would simply not be a viable proposition for many employers. Clearly, the greater the skill required of the casual employee, then perhaps the greater the prospect of training by the employer. That, however, is only part of the debate. Employees usually require training in order to be able to progress. Often, however, there are limited opportunities for one to progress in many industries. The reality of this must underpin any submission in this vein. In many instances, for the type of job in question, training, other than for familiarisation with the respective workplace, is not necessary. Once that type of job is initially undertaken, the nature of it does not radically change or at least not sufficiently so as to require any structured training.

We therefore dismiss this component of the claim to the extent it was sought by the Unions. We do accept, though, an element of this claim should be considered in the formulation of the casual loading, but only to a limited degree. We say this because, whilst there is certain merit in the Unions' claim, it is not a component which should be considered out of proportion to the reality of the situation.

In considering all of the submissions made, we propose to vary the casual loading rate of pay by way of General Ruling of this Commission to a minimum amount of 23%. In doing so, we are aware of the fact that many industries within the State will not be directly affected by this decision as the casually loaded rates within those industries previously cited remain superior to the 23% hereby Awarded.

This decision recognises a changed attitude to casual employment, exhibited by both employers and employees, which has resulted in an increase in the level of casual employment. Some evidence of these changed attitudes can be put by way of example:

- consensual inclusion in Awards and Agreements giving preference to permanent employees where additional casual work in another occupational stream becomes available with the same employer;
- nursing staff accessing additional casual hours through Nursing Employment Agencies and sometimes being assigned to their full-time employer for such casual hours;
- expansion in use of casual work by many students undergoing secondary or tertiary education and others who have no desire to work permanently in the industry concerned but use the availability of casual hours in a variety of industries as a means to enter the alternative career chosen or to provide an acceptable income in addition to other family unit income; and
- a trend by employers to move towards "full-time" casual employment rather than permanent employment. This trend is not capable of quantification but we accept that is a growing practice which some employers perceive as an advantage in that it removes obligations as to accrual of a range of entitlements and freedom to adjust daily or weekly hours dependent upon work intake.

On the evidence drawn from a number of witnesses presented by the Unions and employer parties before us there is a belief that greater flexibility in permanent part-time provisions contained in Awards could lead to a reduction in the current level of casual employment with a transfer to permanent part-time employment and this would thus achieve a result sought in the Unions' application.

Whilst the terms of permanent part-time employment are not before this Full Bench, the parties may be well served to take into account this evidence in any subsequent consideration of permanent part-time employment conditions. A witness presented by the QCU, a Ms Claudette Kelly, gave evidence as to her experiences as a permanent, casual and part-time employee of an employer in the pathology industry and expressed her view as to her preference to work as a permanent part-time employee under the applicable Award (the Pathology (Private Practices) Award – State). That Award contains quite flexible permanent part-time employment arrangements which the parties negotiated as appropriate arrangements to promote the use of permanent part-time employment in the private pathology industry.

Similar facilitative provisions may assist in the reduction in use of casual employment in other industries.

In making this decision, we are mindful of the financial impost a decision of this nature will have upon a range of industries throughout this State. We have carefully considered Government and employer evidence and statistics as to the nature of this impact.

To this end, we determine to implement the decision in the following manner:–

- Where current Award entitlements for Casual Loading are 19% –

  – from the date of operation from this decision – 2%;
  – after six (6) months from the date of this decision – 1%; and
  – after twelve (12) months from the date of this decision – 1%.

- Where Award entitlements for Casual Loading are currently in excess of 19%, but less than 23% –

  – the staggered increases listed above will be applied in a manner that ensures that the Award does not fall below the Casual Loading rates as they will stand as the above increases come into effect with the passage of time. For example, an Award that currently provides for a Casual Loading of 20% would receive an initial increase of 1% from the date of this decision and the remainder of the increases in line with this decision AND Awards that currently provide a Casual Loading of 22% would increase by 1% at a date twelve months from the date of this decision.

- Awards with an entitlement in excess of 23% are not affected by this decision.

Savings Provision

No employee should be disadvantaged as a result of the General Ruling coming into effect.

Certified Agreements

The Full Bench in the Shift Allowance case No B1206 of 1999 stated:–

> "We are of the view that the Commission should acknowledge that parties enter into Certified Agreements to give some certainty of outcomes and that we should not impose an additional cost on such employers during the currency of a Certified Agreement.".

This Full Bench is of a similar view. Accordingly, this General Ruling will not impact on Certified Agreements prior to their nominated expiry date unless specific provision is included in the Certified Agreement that enables the Certified Agreement to be amended to take account of General Rulings.

Addendum

We are mindful of the fact that the Australian Industrial Relations Commission had handed down a decision in Print No T4991 with regard to casual employment. We do not propose to deal with outcomes of that case in this decision. If the parties in this matter (or any other body as the Legislation permits) wish to pursue a claim relating to the outcome of that Federal decision, then they are entitled to do so under separate application pursuant to the appropriate requirements of the *Industrial Relations Act 1999*.

We order accordingly.

Dated this second day of April, 2001.

R.E. BECHLY, Commissioner.

D.A. SWAN, Commissioner.

D.K. BROWN, Commissioner.

Appearances:–

Mr W. Turner for Agforce Queensland Industrial Union of Employers.

Mr P. Whitton for Queensland Master Builders Association, Industrial Organisation of Employers.

Ms K. DeLange for The Registered and Licensed Clubs Association of Queensland, Union of Employers.

Messrs M. Patti and G. Muir of Employer Services Pty Ltd on behalf of Australian Dental Association (Queensland Branch) Union of Employers; Royal Queensland Bowls Association; Childcare Industry Association of Queensland Inc.; Private Hospitals' Association of Queensland (Inc.) and Consulting Surveyors Queensland Industrial Organisation of Employers.

Mr P. Varendorff of Miles Witt Partnership for Australian Nursing Homes and Extended Care Association – Queensland Ltd and Queensland Meals on Wheels Services Association Incorporated.

Mr S. Ross for Queensland Nurses' Union of Employees.

Messrs C. Barrett, J. Martin and R. Robinson for Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Mr J. Lunn for The Queensland Public Sector Union of Employees.

Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.

Ms C. Salmon and Mr T. Shipston for the Crown.

Messrs S. Nance, M. Cuthbertson and G. Black and Ms C. Doyle for Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Messrs C. Mason and R. McPherson and Ms S. Haire for Australian Industry Group, Industrial Organisation of Employers (Queensland).

Mr D. Pratt for Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

Ms D. Brown and Mr R. Wotherspoon for National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.

Ms S. Richards for Queensland Hotels Association, Union of Employers.

Mr G.B. Siebenhausen and Ms R. Laun for Queensland Motel Employers Association, Industrial Organization of Employers.

Mr M. Rodgers of Livingstones (Australia) for Queensland Nursery Industry Association Industrial Union of Employers; T.A.B. Queensland; ABC Development Learning Centres Pty Ltd T/A ABC Child Care Centres; The Queensland Chamber of Fruit and Vegetable Industries Co-operative (Union of Employers) Limited; Brismark; the Australian Childcare Association and Queensland Private Childcare Centres Employers Organisation of Queensland Industrial Organisation of Employers.

Mr J. Spreckley for Queensland Council of Unions.

Messrs D. D'Arcy and B. Swan (prior to Full Bench being reconstituted) for The Australian Workers' Union of Employees, Queensland.

Ms T. Scrine for Furnishing Industry Association of Australia (Queensland) Limited Union of Employers.

Messrs I. Turner and M. Cuthbertson for Australian Mines and Metals Association (Inc.) Queensland Branch.

Ms S. Lindsay and Mr M. Smith for Retailers' Association of Queensland Limited, Union of Employers.

Mr J. Spriggs for Queensland Independent Education Union of Employees.

Mr R. Dempsey for Australian Building Services Association – Queensland Division, Industrial Organisation of Employers.

Released: 4 April 2001