



25 November 2016

Without prejudice

By email: AWright@psa.asn.au

Anthony Wright
Industrial Advocate
Public Service Association of NSW
160 Clarence Street, Sydney NSW 2000

Dear Mr Wright

**Roads and Maritime Services and Public Service Association (PSA)
IRC Matter No. 2016/00248778**

We refer to your letter dated 11 November 2016 and to your emails dated 17 November 2016.

Offers to date

On 8 November 2016 Roads and Maritime Services made a without prejudice offer to settle the aspect of this dispute that relates to the meal breaks taken by Enforcement Operations Inspectors (EOIs) during an afternoon or night shift. That offer was subject to certain terms including a release by the PSA from any claim for back pay.

On 11 November 2016 the PSA wrote to Roads and Maritime and stated Roads and Maritime's offer was "*broadly acceptable based on the limited consultation undertaken*" except for the release relating to back pay.

The PSA made a counter-offer to settle the meal break aspect of the dispute in exchange for an ex gratia payment to affected members, representing back pay of shift loading on the unpaid meal break taken by EOIs during an afternoon or night shift for the life of the *Roads and Maritime Services Consolidated Salaried Award 2014 (2014 Award)*.

References to the 2016 Award

In your emails dated 17 November 2016 you question why Roads and Maritime has referred to the *Roads and Maritime Services Consolidated Salaried Award 2016 (2016 Award)* given your assertion that the dispute is limited to the 2014 Award.

As you have noted, the relevant clause under the 2014 Award (clause 22.2(a)(iii)) is identical to the relevant clause under the 2016 Award (clause 22.2(a)(v)).

Accordingly, Roads and Maritime's position is that any settlement in respect of a dispute over the interpretation of the relevant clause in the 2014 Award must also include a settlement in respect of

Roads and Maritime Services

the relevant clause in the 2016 Award. That is because a determination of the entitlement under the 2014 Award will necessarily effect a determination of the entitlement under the 2016 Award, and vice versa.

For the avoidance of doubt, where Roads and Maritime uses the capitalised term **Back Pay** in this letter, it refers to a payment representing back pay of shift loading on the unpaid meal break taken by EOIs during an afternoon or night shift under the 2014 Award and the 2016 Award.

The PSA's calculation

The PSA's counter-offer in its letter dated 11 November 2016 is calculated on 50% of what a hypothetical EOI would have been paid if they:

1. held the maximum grade (USS Grade 6/3);
2. worked the Mt White roster without variation;
3. took an unpaid meal break during every afternoon or night shift for the life of the 2014 Award; and
4. were paid a shift loading in respect of each of those unpaid meal breaks.

The PSA arrived at the figure of \$1,340 per EOI based on this calculation.

Issues with the PSA's calculation

With respect, we do not consider the PSA's calculation can be used as the basis for determining the amount of Back Pay. This is because:

1. As the PSA has identified, the amount of Back Pay will vary greatly for each EOI depending on the shifts and locations worked.
2. Any payment of Back Pay must be calculated on the basis of the actual shifts worked by each individual EOI - it cannot be calculated on the basis of a hypothetical EOI.
3. The PSA's calculation appears to assume the shift loading on the unpaid meal break would be paid for every afternoon or night shift worked by an EOI. This assumes an EOI takes an unpaid meal break during every afternoon or night shift. In reality, some EOIs work a crib break instead of taking an unpaid meal break.
4. The Back Pay calculation cannot include afternoon or night shifts worked by an EOI where the EOI took a crib break instead of an unpaid meal break.

Roads and Maritime's calculation

Roads and Maritime has now reviewed 250,460 shifts worked by EOIs for the period from 1 July 2014 to 14 November 2016 (inclusive) to estimate the cost of paying a shift loading on unpaid meal breaks taken during afternoon and night shifts for that period.

Roads and Maritime:

1. Identified the number of afternoon and night shifts worked on a weekday and a weekend during the relevant period (see **Attachment 1, Table A**).

2. Identified the number of those shifts during which a crib break was worked (see **Attachment 1, Table B**).
3. Identified the number of those shifts during which an unpaid meal break was taken. This was done by subtracting the number of crib shifts from the total number of shifts (see **Attachment 1, Table C**).
4. Calculated the estimated cost to Roads and Maritime if it agreed to pay EOIs a shift loading for their unpaid meal break taken during afternoon and night shifts (see **Attachment 1, Table D**).
5. Determined that the total estimated cost of Back Pay for the period from 1 July 2014 to 14 November 2016 (inclusive) is \$95,331.

Please note this estimate is based on payment at:

- a) the highest grade in the EOI position (USS Grade 6/3); and
- b) rates of pay under the 2016 Agreement applicable from 1 July 2016.

Accordingly, the actual amount of Back Pay for the period will be \$95,331, less adjustments for:

- a) EOIs who held the position at a lower grade; and
- b) the lower rates of pay applicable prior to 1 July 2016.

Based on the analysis above, the maximum amount of Back Pay will be approximately \$3,344.95 per month (\$95,331 / 28.5 months, being the number of months in the period from 1 July 2014 to 14 November 2016), or \$40,139 per year.

Without prejudice offer

Roads and Maritime repeats its position that EOIs are not entitled to the payment of a shift loading on an unpaid meal break under either the 2014 Award or the 2016 Award, and any such payment will need to be reconciled with the current funding for the Branch.

However, Roads and Maritime recognises that this dispute is longstanding and ongoing and wishes to resolve it in a way that prevents additional costs being incurred by the parties in pursuing and defending the claim.

Roads and Maritime also wishes to resolve the dispute in a way that reduces the need to rearrange EOIs' shift patterns or shorten shifts, which may result in some EOIs losing their entitlement to the additional 5 days of annual leave under clause 25.5(a)(iii) of the 2016 Award.

On that basis, Roads and Maritime makes the following offer:

1. Going forward, Roads and Maritime will pay EOIs a shift loading for the unpaid meal break taken during an afternoon or night shift (including the caveat that it will be adjusted for lower grades).
2. In addition, Roads and Maritime will pay each individual EOI the shift loading for each unpaid meal break they took during an afternoon or night shift for the **12 month period** prior to the date the PSA signs a Deed of Release.

3. The payments described above will be subject to the parties signing a Deed of Release that includes the following terms:
- a) Non-admission of liability.
 - b) The payments will be calculated and paid to each individual EOI (PSA members and non-PSA members) based on the actual unpaid meal breaks taken during an afternoon or night shift.
 - c) Release by the PSA from all claims in relation to the meal break taken by EOIs during an afternoon or night shift under the 2014 Award and the 2016 Award (including any further claim for Back Pay);and
 - d) Roads and Maritime will agree to include a clause in the next Award that gives effect to the payment of a shift loading on an unpaid meal break during an afternoon or night shift, and the PSA will support the inclusion of that clause by other Unions party to the Award.

As outlined above, the estimated cost of this offer to Roads and Maritime will be:

- 1. \$40,139 for the 12 months of back pay (less the adjustment for those employees who worked in a lower grade, and for the lower rate of pay applicable prior to 1 July 2016); and
- 2. \$40,139 per year going forward based on historical data (less the adjustment for those EOIs who work in a lower grade).

This offer will remain open until **5pm on Thursday, 8 December 2016** at which time the offer is withdrawn.

If the PSA accepts this offer Roads and Maritime will commence the process of determining the amount payable to each individual EOI on the above basis.

Yours sincerely



Paul McKaysmith
A/ Principal Manager
Human Resources & Industrial Relations

Attachment One

Table A Afternoon and night shifts worked by EOIs 1 July 2014 to 14 November 2016		
	Afternoon shift	Night shift
Monday- Friday	9,573	17,826
Saturday	162	518
Sunday	530	785

Table B Crib shifts worked by EOIs 1 July 2014 to 14 November 2016		
	Afternoon shift	Night shift
Monday- Friday	1,977	7,072
Saturday	142	226
Sunday	235	475

Table C Shifts when an unpaid meal break was taken by EOIs 1 July 2014 to 14 November 2016		
	Afternoon shift	Night shift
Monday- Friday	7,596	10,754
Saturday	20	292
Sunday	295	310

Table D Estimated cost of shift loading on unpaid meal breaks taken by EOIs 1 July 2014 to 14 November 2016 ¹		
	Afternoon shift	Night shift
Monday- Friday	\$3.59 per shift x 7,596 shifts = \$27,270	\$4.30 per shift x 10,754 shifts = \$46,242
Saturday	\$14.34 per shift x 20 shifts = \$286	\$14.34 x 292 shifts = \$4,187.28
Sunday	\$28.67 per shift x 295 shifts = \$8,457.65	\$28.67 per shift x 310 shifts = \$8,887.70

¹ Based on the following shift loadings for the 38 minute unpaid meal break taken during an afternoon or night shift:

- a) \$3.59 per afternoon shift on a weekday;
- b) \$4.30 per night shift on a weekday;
- c) \$14.34 per afternoon or night shift on a Saturday; and
- d) \$28.67 per afternoon or night shift on a Sunday.

Please note these amounts are based on the highest grade within the EOI position (USS Grade 6/3) AND rates of pay applicable since 1 July 2016. They will be adjusted based on the grade of each particular EOI and the applicable rate of pay at the time the afternoon/night shift was worked.