
Fair Work Commission: 4 yearly review of modern awards

SUBMISSIONS IN REPLY TO REVISED EXPOSURE DRAFT

FUNERAL INDUSTRY AWARD 2010

AM2014/269

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

20 APRIL 2017

1. BACKGROUND

- 1.1 These reply submissions relate to the revised Exposure Draft of the *Funeral Industry Award 2010* (the **Award**) published on 31 March 2017.
- 1.2 Pursuant to the Amended Directions of President Ross dated 31 March 2017, interested parties were directed to file submissions on the remaining technical and drafting issues identified in the Exposure Draft relating to:
- (a) **Item 5:** whether the wording ‘*on any or all days*’ and ‘*inclusive*’ in clause 13.2(a) should be retained in the Exposure Draft.
 - (b) **Item 12:** whether the words ‘*applicable rate*’ in clause 18.6 means the shift rate (including the shift loading in clause 18.5) or the minimum hourly rate in relation to the calculation of overtime for a shift worker.
 - (c) **Items 15 and 16:** there appears to be dispute between the parties regarding the interpretation and construction of the following clauses and how they interact with the minimum engagements prescribed for employees at clauses 10.5 and 11.3:
 - (i) **clause 19.1(b):** regarding the minimum engagement for shift workers performing overtime; and
 - (ii) **clauses 19.4(a) and (b):** regarding the minimum engagement for employees performing removal work.
- 1.3 ABI and NSWBC appreciate the opportunity to provide the following further reply submissions in relation to this revised Exposure Draft.

2. ITEM 5

- 2.1 ABI and NSWBC note that the intention in making the new clause 13.2(a) was not to remove the benefit of directing an employee to work a roster that included ordinary hours of work on any or all days Monday to Friday. On that basis we do not press our objection to the new clause 13.2(a) as it appears in the revised Exposure Draft.

3. ITEM 12

- 3.1 Paying overtime on a shift loaded rate as opposed to the minimum hourly rate of pay would be a significant departure from the current state of the Award which, in our view, provides for payment of overtime rates on the employee’s ‘applicable rate’ being the rate described at clause 15.
- 3.2 We submit that there is nothing in the Award, as currently drafted, that would give rise to a position where an employee would also receive shift loadings when working overtime.
- 3.3 To put it simply, when employees perform overtime they are not also entitled to shift loadings because when they are performing overtime they are no longer performing shift work within the meaning of the Award. The wording at the commencement of clause 18.6, in our view, makes this position clear:

“All time worked in excess of, or outside the ordinary working hours in clause 18.2, or on a shift other than a rostered shift...”

3.4 Overtime only applies once a shift working employee is working outside of their ordinary hours:

- (a) in the case of clause 18.6(a) being hours outside of their ordinary maximum hours being 38 over a four weekly cycle or performing work on an un-rostered shift; or
- (b) in the case of 18.6(b) performing work that was not anticipated in relief of another employee's absence from work.

We submit that when employees are working the above hours they are no longer performing work within the meaning of an afternoon shift as defined in clause 18.1(a) and (b) and 18.2 because those clauses only contemplate ordinary hours of work.

3.5 If the Fair Work Commission is minded to make this Award clause clearer in relation to payment of overtime on a shift working employee's minimum hourly rate, then we respectfully submit that our suggested wording in our submissions dated 22 February 2017 should be adopted, which is reproduced here for convenience, being:

"applicable minimum hourly rate"

3.6 This would mean that clause 18.6 would read as follows:

"Overtime for Shift Workers

(a) All time worked in excess of, or outside the ordinary working hours in clause 18.2, or on a shift other than a rostered shift, will be paid at 150% of the applicable minimum hourly rate for the first three hours and 200% thereafter.

(b) When less than 7 hours 36 minutes' notice has been given to the employer by a relief employee that they will be absent from work, and the employee whom the relief employee should relieve is not relieved and is required to continue to work on the employee's rostered day off, the unrelieved employee will be paid 200% of the applicable minimum hourly rate." (Our changes are underlined)

3.7 Our suggested amendment would also ensure that this clause is consistent with other clauses in the Award which deal with or are relevant to shift work loadings, including:

- (a) clause 18.5(a) which refers to the a shift loading of the 'minimum hourly rate';
- (b) clause 18.5(b) which refers to non-continuing afternoon shifts being paid on the 'minimum hourly rate'; and
- (c) clause 11.2 which refers to the rate of pay that a casual employee receives being the 'minimum hourly rate' for the appropriate classification and a loading of 25% being payable on the 'minimum hourly rate'.

3.8 The meaning of 'applicable', in our view, is that it is a reference to circumstances where for example a casual shift worker performs overtime (although we do not consider that the casual loading in this award is 'all purpose'). From that perspective the word 'applicable' does have work to do within the specific context of this Award in that an casual employee would receive overtime calculated on their minimum hourly rate and then also receive the applicable casual loading calculated on the minimum hourly rate.

3.9 We submit that United Voice’s view in their submissions dated 19 April 2017 that the clause from the federal pre-modern award (*Funeral Industry Award 2003*) operated to provide overtime for a shift worker on their shift loaded rate is not correct. That pre-modern award also contained a reference at clause 9.6.5 that stated:

“9.6.5 The rates prescribed in 6.2 are in substitution for, and not cumulative on, the shift premiums prescribed in 9.5 of this Schedule.” (sic)

3.10 We submit there is a typographical error in that clause and that the reference to clause 6.2 in 9.6.5 is intended to be 9.6.2 which refers to the overtime provision. The operation of 9.6.5 is that the overtime rates were in substitution for the shift loadings and not cumulative on a shift loaded rate. In addition the reference referred to by United Voice only related to the work of funeral directors in Schedule A of that pre-modern award and there is a broader scope of work performed in the funeral industry including embalming and coffin making.

3.11 We submit that our proposed amendment seeks to meet the requirements of the modern award objective so as to make the Award easier to understand and is consistent with the current operation of the Award.

4. ITEMS 15 AND 16

4.1 It is our view that the following clauses operate to provide minimum engagements in the following scenarios:

- (a) Clause 10.5 provides for a minimum engagement of three hours for part-time employees;
- (b) Clause 11.3 provides for a minimum engagement of four hours for casual employees;
- (c) Clause 19.1 (b) provides for a minimum engagement of one hour’s pay when an employee (regardless of whether they are full-time, part-time or casual) is recalled to work before 7am or after 7pm; or
- (d) Clause 19.4 (a) and (b) provides for a minimum engagement of two hours where the employee is called on to perform removal work (regardless of whether the employee is full-time, part-time or casual).

4.2 We submit that the above clauses are clear and that there is no interaction between them. For instance an employee who is a casual will ordinarily have a four hour engagement but when they perform removal work their minimum engagement will be two hours. In this way we submit those clauses 19.1(b) and 19.4(a) and (b) relate to more specific instances than the general minimum engagements provided for in clauses 10.5 and 11.3 and will override those provisions when applicable.

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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

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