



Fair Work Commission: 4 yearly review of modern awards

**SUBMISSIONS IN REPLY TO SUBSTANTIVE CHANGES TO THE
AWARD**

FUNERAL INDUSTRY AWARD 2010

AM2014/269

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

24 JULY 2017

1. BACKGROUND

- 1.1 These reply submissions are made in response to the claims by the Australian Workers Union (AWU) in relation to Items 10, 17 and 18 (**Items**)¹ of 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 issued 19 May 2017, ABI and NSWBC were directed to file submissions in reply to the following substantive changes to the Award being sought by the AWU in respect of:
- (a) **Item 10:** Uniform Allowance (clause 16.3(c))²
 - (b) **Item 17:** Minimum Engagements on Weekends (Clauses 20.1(a)(i) and (b))
 - (c) **Item 18:** Minimum Engagements on Public Holidays (Clause 24).
- 1.3 Items 10, 17 and 18 originally arose from questions asked by the Fair Work Ombudsman in respect of clarification of the current operation of each of the clauses referred to in the Items. During the conference on 29 March 2017, the AWU expressed interest in pursuing the subject matter of the Items as claims in the proceedings and confirmed this intent in correspondence to the Fair Work Commission dated 10 April 2017.

2. REPLY SUBMISSIONS

- 2.1 At the outset it is apparent that the AWU's claims should be dealt with as proposals to make substantive changes to the Award and as such they should be supported by merit based arguments and probative evidence. We note the AWU's position that it considers its claims are 'relatively minor' and technical in nature but we do not agree with this assertion³.
- 2.2 The claims go to the variation of the minimum entitlements this Award provides to employees. It cannot be said that such variations are 'self evident' as contemplated by the *Preliminary Jurisdictional Issues Decision*⁴. Accordingly, the AWU's decision to pursue these Items as claims is one which imposes on the AWU the requirement to file evidence and materials in support of their arguments and provide persuasive legal reasoning for the granting of their claims⁵.
- 2.3 We note that the AWU has chosen not to file evidence or supporting materials in support of its claims and that United Voice, whilst supportive of the AWU's submissions, has yet to file any submissions or supporting materials in support of the substantive changes to the Award being sought by the AWU.
- 2.4 We note that the submissions of the AWU do not satisfy the requirements identified for substantive award changes by the *Preliminary Jurisdictional Issues Decision* and we submit that the Fair Work Commission should not be moved to grant these applications. We make some more specific submissions in relation to their claims as follows.

¹ Roushan Walsh's (AWU) correspondence to his Honour President Ross' chambers, dated 10 April 2017.

² Clause references are made with respect to the Funeral Industry Award 2010 Exposure Draft published 31 March 2017.

³ AWU Submissions dated 3 July 2017, paragraph 14.

⁴ [2014] FWCFB 1788

⁵ *Four Yearly Review of Modern Awards - Preliminary Jurisdictional Decision* [2014] FWCFB 1788.

3. ITEM 10

- 3.1 The expansion of an existing entitlement, such as the uniform allowance, is a substantive change to the Award and not merely a technical or drafting issue as submitted by the AWU. The Award has operated for the last seven years to only provide the uniform allowance entitlement to full-time employees.
- 3.2 The expansion of this entitlement to part-time and casual employees represents a significant shift in the eligibility for the entitlement and a cost to employers in the industry that will particularly impact on smaller operators who have relied on the clause's clear and existing construction to date.
- 3.3 The AWU refers to the *Funeral Industry Award 2003* as a basis to amend the Award and yet that pre-modern award does not have a uniform allowance at all. The *Funeral Industry Award 2003* provided an allowance only for the loss of clothing specifically destroyed by fire in the workplace change room⁶ or the provision of protective clothing. Furthermore, the focus on a single pre-modern award as guidance for amending the Award some seven years later is not persuasive.
- 3.4 The AWU has not made out a case to provide the allowance to casual and part-time employees in the industry.

4. ITEMS 17

- 4.1 The AWU's argument that there is an inconsistency between the minimum engagements prescribed by the part-time and casual clauses and the minimum engagements prescribed by weekend work clauses is without merit.
- 4.2 The following minimum engagements are prescribed by the Award:
- (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 20.1(a) provides for a minimum engagement of two hours for work performed on a Saturday by any employee (where the work being performed is **not** in relation to a funeral, in which case the engagement is once again four hours); and
 - (d) Clause 20.1(b) provides for a minimum engagement of two hours for work performed on a Sunday (regardless of the type of work performed e.g. in relation to a funeral or not).
- 4.3 It is clear that the intention of clauses 20.1(a) and (b) is to provide a more specific minimum engagement for all types of employees employed under this Award when employees perform work on either a Saturday or Sunday. The operation of clause 20.1 does not create an inconsistency as the AWU alleges and this clause operates to replace the minimum engagements specified by clauses 10.5 and 11.3. Clause 20.1(a)(ii) also supports this interpretation in that it provides for a more beneficial minimum engagement for funeral work on a Saturday.

⁶ Clause 18A.5 of the Funeral Industry Award 2003 (Victoria).

- 4.4 Moreover any suggestion that this is a matter which is only ‘technical in nature’ is incorrect. The application being asserted by the AWU would have a significant and widespread effect on the industry and is a substantive application.
- 4.5 The change to the Award being asserted by the AWU would be a significant cost to the industry as it would impose a requirement to provide an additional:
- (a) 1 hour of work or pay to a part-time employee when engaged to work on a Saturday;
 - (b) 1 hour of work or pay to a part-time employee when engaged to work on a Sunday;
 - (c) 2 hours of work or pay to a casual employee when engaged to work on a Saturday; and
 - (d) 2 hours of work or pay to a casual employee when engaged to work on a Sunday.
- 4.6 No evidence or supporting materials have been put on by the AWU to support their claim and to demonstrate why the change they have proposed to clause 20.1(d) is necessary for the Award to meet the modern awards objective. The Award already prescribes a minimum engagement being the engagements set out in clauses 20.1(a)(i) and (b) and further amendment to the Award would be a burden to the industry and unnecessary for the Award to meet the modern awards objective.
- 4.7 In an industry where weekend work is required because of the nature of the work being performed, if the changes being sought by the AWU to the Award are granted, then the industry would be put to a significant and unnecessary increase in cost for weekend work which would unfortunately be passed on to customers.

Luis Izzo
Director

Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7640
luis.izzo@ablawyers.com.au

Zoe McQuillan
Lawyer

Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7537
zoe.mcquillan@ablawyers.com.au

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

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