IN THE FAIR WORK COMMISSION

Matter No: AM2014/269

Section 156 - Four Yearly Review of Modern Awards – Funeral Industry Award 2010

SUBMISSION

UNITED VOICE

1. This submission is made pursuant to the direction of the Commissioner Ross issued on 31 March 2017. This submission concerns items 12, 15 and 16 of the summary of technical and drafting submissions in the *Funeral Industry Award 2010* (‘*the Award’*).

2. We note that the AWU intends to pursue items 10, 17 and 18 as substantive claims. United Voice supports those claims.

3. All references are to the Exposure Draft unless otherwise stated.

Item 12 – Clause 18.6 Overtime for shiftworkers

4. The Commission asked the parties to confirm whether the ‘*applicable rate*’ referred to in clause 18.6 (Clause 22.6 of the current Award) refers to the shift rate or the minimum hourly rate.

5. The words ‘*applicable rate*’ means the rate of pay that the employee would have earned if they worked ordinary hours at the time they were working overtime. This necessarily includes the relevant shift rate, penalty rates and any all-purposes allowances.

6. The words of the clause do not support the contention that ‘*applicable rate’* means ‘*the minimum hourly rate of pay’*. The use of the words ‘*applicable rate’* suggests that the rate paid to the employee may vary from time to time or in different situations. An employee’s minimum rate of pay will not vary at all, while an employee’s shift rate (calculated from their ordinary rate of pay) will vary depending on the time of day and day of the week. If the clause truly referred to the minimum hourly rate of pay then the word ‘*applicable*’ would be otiose.

7. Further, it is unlikely that the Commission would have intended for the words ‘*applicable rate’* to mean the minimum hourly rate of pay. If that was the case, then the overtime provisions for shift workers would have expressly referred to the minimum rate of pay as is the case for day workers. Clause 19.1 (Clause 24.4 of the current Award) provides for overtime for employees other than shift workers. That clause provides that the employee’s ‘*ordinary rate’* is used to calculate overtime. This is a more beneficial entitlement than

calculating overtime rates on the minimum hourly rate of pay. It is unlikely that the Commission would have set the entitlement to overtime for shift-workers at a lesser rate than that for other workers.

8. This interpretation is supported by the history of the award. The Commission appears to have adopted the draft a proposed by the AWU.[1] The AWU draft award was based on the federal *Funeral Industry Award 2003* ('*Victorian Award*') which had application in Victoria. The AWU draft award included the first instance of clause 18.6. Clause 18.6 does not reflect the words of the Victorian Award clause provisions for overtime for shift-workers but reflects the substance of those provisions.

9. Clause 9.6 of Schedule A of the Victorian Award provided for overtime for funeral directors engaged as shiftworkers as follows:

> *Subject to 9.6.3 of this Schedule, shift workers for all time worked in excess of or outside the ordinary working hours of shift workers in 9.2 of this Schedule, or on a shift other than a rostered shift, will be paid at the rate of time and a half for the first three hours and double time thereafter.*

10. Ordinary pay was defined by clause 5.5 of the Victorian Award. Ordinary pay meant:

> *5.5.1 Ordinary pay means remuneration for an employee's normal weekly number of hours calculated at the ordinary time rate of pay, including overaward payments and the following allowances where applicable:*
>
> - ***shift work premiums according to roster or projected roster (including Saturday, Sunday or public holiday shifts);***
> - *industry allowance;*
> - *leading hand allowance;*
> - *excess fares allowance;*
> - *first aid allowance;*
> - *tool allowance;*
> - *qualification and service grants; and*
> - *where the employee is provided with board or lodging by the employer, includes the cash value of that board or lodging.* [Emphasis added]

11. Since a shift worker's ordinary pay would include their shift work premiums and allowances, overtime would be calculated using, amongst other things, the '*applicable*' shift work premium.

12. It appears that clause 18.6 of the Award has been drafted to incorporate the Victorian Award concept of '*ordinary pay'*, so that overtime is calculated with reference to the allowances and

[1] Submission of the AWU, 24 July 2009, clause 23.6.

penalties that would be earned by a shift worker. This explains the use of the words '*applicable rate*' for shiftworkers and the use of '*ordinary rate of pay*' to describe the entitlement for non-shiftworkers. Both words capture the meaning of 'ordinary pay' in the Victorian Award as it would have applied in practice to shiftworkers and non-shiftworkers.

13. At Award Modernisation, the AIRC decided not to include this definition in the Award.[2] The AIRC did not give reasons as to why it removed the definition of ordinary pay. However, given the wording of clause 18.6 it is unlikely that the AIRC intended that this should mean that shiftworkers overtime is calculated using the minimum hourly rate.

14. To ensure that there is no doubt about the operation of the clause, United Voice proposes to define '*applicable rate*' as follows:

> ***applicable rate*** *means the rate of pay that the employee would have earned if they worked ordinary hours at the time they were working overtime, including shift allowances and penalty rates.*

15. The appropriate location for this definition is at clause 18.6.

16. AFEI and ABI submit that the '*applicable rate'* referred to in clause 18.6 should be defined as '*the minimum hourly rate'*. This would be a substantive variation to the Award that would significantly reduce the remuneration of shiftworkers for working overtime.

Item 15 – Clause 19.1 (b) Payment for overtime – other than shift workers

17. The Commission asked the parties to confirm how clauses 19.1 (b) interacted with the minimum engagements for part-time and casual employees in clauses 10.5 and 11.3.

18. Clause 29.1 (b) provides for a one hour minimum engagement where an employee is recalled to work before 7.00 am or after 7.00 pm.

19. This minimum engagement is for the benefit of full-time employees who do not have a minimum engagement.

20. The minimum engagements for part-time and casual employees are longer than one hour. A part-time employee '*must be rostered for a minimum of three consecutive hours*' under clause 10.5. A casual employee is entitled under clause 11.3 to a minimum engagement of four hours '*each time the employee is required to attend work, including when engaged more than once*

[2] *Award Modernisation* [2009] AIRCFB 865, [78].

in any day'. There is nothing in the text of clause 19.1 (b) that would deny a part-time or casual employee the benefit of clauses 10.5 and 11.3.

21. Where a casual or part-time employee is recalled to work overtime, the minimum engagement applies.

Item 16 – Clause 19.4 Removals

22. The Commission asked the parties to confirm how 19.4(a) and 19.4(b) interacted with the minimum engagements for part-time and casual employees in clauses 10.5 and 11.3.

23. The 'minimum payment of two hours' for removals performed in accordance with clauses 19.4(a) and 19.4(b) are applicable to full-time employees only.

24. As noted above at paragraph 20, part-time and casual employees are entitled to minimum engagements longer than those provided for by 19.4(a) and 19.4(b). Where a part-time or casual employee performs a removal in accordance with clause 19.4 they will still be entitled to the minimum engagements in clauses 10.5 and 11.3.

UNITED VOICE
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