



Fair Work Commission: 4 yearly review of modern awards

SUBMISSIONS IN REPLY TO SUBSTANTIVE MATTERS

FUNERAL INDUSTRY AWARD 2010

AM2018/23

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

- 1.1 On 16 November 2018, the Fair Work Commission (“**Commission**”) published directions for parties to file any written submissions, witness statements and any other documentary evidence in opposition to the substantive claims which arose regarding the 4 yearly review of the *Funeral Industry Award 2010* (“**Funeral Award**”).
- 1.2 This submission is made on behalf of Australian Business Industrial (“**ABI**”) and the New South Wales Business Chamber Ltd (“**NSWBC**”) in accordance with those directions. ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009*.
- 1.3 ABI and NSWBC appreciate the opportunity to provide this submission.
- 1.4 ABI and NSWBC ascertain that there are three outstanding claims raised by the Australian Workers’ Union and United Voice. These relate to:
- (a) Minimum Engagement period for Part-time and Casual Employees;
 - (b) Minimum Payment for Public Holidays; and
 - (c) Uniform Allowance.
- 1.5 Regarding direction “C.” of the aforementioned directions dated 16 November 2018, we have reviewed the material and confirm that we do not intend to call any witnesses or submit any other documentary evidence at this stage. Therefore, ABI and NSWBC are content for these matters to be determined “on the papers” if the Commission determines such a course to be appropriate.

2. MINIMUM ENGAGEMENTS FOR PART-TIME AND CASUAL EMPLOYEES

March 2018 Decision

- 2.1 On 21 March 2018, the Commission gave a provisional view (**March Decision**)¹ regarding the two outstanding issues in the Funeral Award, being:
- (a) firstly, the recall and removal provisions and minimum periods of engagement for part-time and casual employees; and
 - (b) secondly, penalty rates for work on a Saturday or Sunday and minimum periods of engagements.
- 2.2 Regarding the first issue, the Full Bench provisionally held that where a part-time employee is recalled to work overtime, the employee is to be paid the minimum of one hour’s pay at the applicable overtime or penalty rate at clause 19.1(b) of the exposure draft.
- 2.3 The Background Paper published by the Commission on 16 August 2018 clarified that the March Decision as follows:
- “[12] In the March 2018 decision the Full Bench provisionally held that where a part-time employee is recalled to work overtime, the employee is to be paid the

¹ [2018] FWCFB 1548.

minimum of one hour's pay at the applicable overtime or penalty rate at clause 19.1(b) of the exposure draft.

...

[13] In relation to recalls for casual employees, the Full Bench held that the casual minimum engagement provisions are different to part-time employees. Specifically, clause 11.3 of the exposure draft provides that casual employees 'must be paid for a minimum of four hours' work each time the employee is required to attend work, including when engaged more than once in any day.

[14] In line with their provisional view about recalls, the Full Bench said: 'the minimum engagement of part-time employees for rostered work in clause 10.5 does not apply to removals work performed outside the ordinary hours of work. It is our provisional view that part time employees would receive a minimum payment of 2 hours if they were called to perform removal work.'⁴

[15] In line with their provisional view about recalls, the Full Bench held that the casual minimum engagement period in clause 11.3 applies where a casual employee is required to undertake removals as per clause 19.4.5"

2.4 The parties were invited to file further submissions.

August 2018 Decision

2.5 After receiving further submissions in accordance with the invitation referred to above, the Full Bench expressed the view in a further Decision in August 2018² (**August Decision**) that its provisional view from the March Decision was incorrect in relation to the application of minimum engagement for part-time employees. The Full Bench stated that the AWU submissions had merit in relation to minimum engagement periods for both part-time and casual employees.

2.6 The Full Bench observed:

"[290] Upon reflection, it appears that our provisional view set out in the March 2018 decision is incorrect and the AWU submission has merit. We agree that the specific minimum engagement provisions relating to part-time and casual employees (clauses 10.5 and 11.3) are applied for these types of employees instead of the minimum engagement provisions set out at clauses 19.4 and 20.1."

2.7 This substantive issue was referred to this Full Bench as a substantive item.

Relevant Clauses

2.8 The relevant clauses are set out below:

"10.4 Part-time employment

...

(d) An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

² [2018] FWCFB 4175.

...

10.5 Casual employee

(c) On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours' work, including when engaged more than once in any day. This minimum payment is made whether the casual employee is required to work the full four hours or not.

...

24.2 Payment for overtime—other than shiftworkers

(a) For work performed outside the hours fixed as the times for beginning and ending work in clause 21.2, an employee will be paid at the rate of 150% of their ordinary rate for the first three hours worked and 200% of their ordinary rate thereafter.

(b) Where an employee is recalled to work before 7.00 am or after 7.00 pm for other than arranged overtime, the employee will be paid a minimum of one hour's pay at the appropriate rate of overtime on each occasion the employee is recalled to work overtime.

...

24.4 Removals

(a) Where an employee is called to undertake removals between the hours of 7.00 pm and midnight and work is completed at or prior to midnight, the employee will be paid 150% of their ordinary rate for the first three hours of work and 200% of their ordinary rate thereafter with a minimum payment of two hours at the appropriate rate.

(b) Where an employee is called to undertake a removal, any portion of which occurs between the hours of midnight and 7.00 am, the employee will be paid 200% of their ordinary rate with a minimum payment of two hours.

...

24.1 Work on Saturday, Sunday or public holidays

With the exception of removals, payment for work performed on a Saturday, Sunday or public holiday (or day substituted for a public holiday) will be as follows:

(a) Saturday

(i) For work performed on a Saturday, employees will be paid at the rate of 150% of their ordinary rate for the first three hours worked, and 200% of their ordinary rate thereafter, with a minimum of two hours' pay.

(ii) Where an employee is actually engaged in the carrying out of a funeral on a Saturday, the employee will receive a minimum of four hours' pay at the following rates:

- if the work is completed in three hours or less, the total minimum payment will be paid at 150% of their ordinary rate; and/or

- if the work exceeds three hours, all additional time will be paid at 200% of their ordinary rate.

(b) Sunday

All work performed on a Sunday will be paid at 200% of their ordinary rate, with a minimum payment of two hours' pay."

AWU Submissions

- 2.9 The AWU submission addresses minimum engagement periods for casual employees and part-time employees jointly and contends that the issue is one of drafting rather than of substance. The AWU proposal, however, represents a departure from the existing terms and conditions as contained in the Funeral Award. The provision which they wish to include is as follows:

"(d) Work performed by part-time and casual employees, as prescribed in clauses 20.1(a)-(c), is subject to the applicable minimum engagement periods prescribed at clauses 10.5 and 11.3"

ABI and NSWBC Position

- 2.10 ABI and NSWBC oppose both the provisional view adopted by the Commission in the August Decision in relation to this matter and the insertion of the wording proposed by the AWU.
- 2.11 The Funeral Award currently prescribes the following minimum engagements:
- (a) Clause 10.4 provides a minimum engagement of three hours for part-time employees;
 - (b) Clause 10.5 provides for a minimum engagement of four hours for casual employees;
 - (c) Clause 24.1(a) provides for a minimum engagement of two hours for work performed on a Saturday by any employee (were the work being performed is not in relation to a funeral, in which case the engagement is once again for four hours); and
 - (d) Clause 24.1(b) provides for a minimum engagement of two hours for work performed on a Sunday (regardless if it is for a funeral or not).
- 2.12 To the extent that there is tension or conflict between the existing minimum engagement provisions, the principle of *generalia specialibus non derogant* should be applied. That is, that where there is a conflict between the general and specific provisions, provisions of general application should give way to the specific, and the specific provisions shall prevail.
- 2.13 In this case, clauses in 24.1(a) and (b) provide a specific minimum engagement for particular types of work, whereas clauses 10.4 and 10.5 provide general provisions by class of employee. In our submission, clauses 24.1(a) and (b) should be given their full effect and should operate to the exclusion of the generic minimum engagement provisions operating by class of employee.

United Voice Submissions

- 2.14 United Voice submits that the Funeral Award should not be “read down” to reduce the minimum engagement periods of part-time and casual employees as this goes against the modern awards objective of “the need to promote social inclusion through increased workforce participation.”³ United Voice also submit that any interpretation of the Funeral Award which reduces the minimum engagement period for part-time and/or casual employees should be rejected.
- 2.15 ABI and NSWBC respectfully reject those assertions, for the reasons advanced in paragraphs 2.12-2.13 above.

3. MINIMUM PAYMENT FOR PUBLIC HOLIDAYS

- 3.1 The AWU propose to introduce a new entitlement for a minimum payment of work performed on a public holiday. The AWU seek two inclusions under the heading at clause 24 to insert:

“Work performed by part-time and casual employees as prescribed in clause 24 is subject to the applicable minimum engagement periods prescribed at clauses 10.4 and 10.5 respectively”.

- 3.2 Secondly, the AWU seek to delete the current paragraph 24.1(c) and insert the following:

“(c) Public holidays

For work performed on a public holiday, employees will be paid at the rate of 200% of their ordinary rate, with a minimum payment of two hours’ pay”.

- 3.3 Our clients do not necessarily oppose these variations provided they do not interfere with other minimum engagement entitlements and do not operate so as to allow for “double-dipping” on public holidays.

4. UNIFORM ALLOWANCE

- 4.1 “Clause 15.8 Uniform Allowance” in the Funeral Award currently states as follows:

“Where a full-time employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing or laundering the uniform”.

- 4.2 We submit that the current clause specifically and clearly refers to a “full-time employee” and accordingly plainly does not apply to other categories of employees. The Funeral Award has operated for the last nine years to only provide the uniform allowance entitlement to full-time employees and is not, as the United Voice suggests, already applying to part-time and casual employees.⁴

- 4.3 ABI and NSWBC submit that the extension 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 are already under financial strain having to provide this allowance.

³ Fair Work Act 2009, s 134(c).

⁴ United Voice, Submission, 20 December 2018.

- 4.4 United Voice have argued in their submission dated 20 December 2018 that clause 15.8 already applies to part-time employees through clause 10.4(a)(iii) which states that part time employees “receive on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.” Our clients respectfully reject that contention.
- 4.5 There are obvious difficulties with that contention, given that it ignores the clear wording of clause 15.8, and also ignores the logistical issues that arise with pro-rating the cost and laundering of a uniform.
- 4.6 United Voice have also argued that casual employees are entitled to receive the allowance because the Funeral Award does not specifically prescribe that the casual loading is paid in lieu of any entitlement. Again, that contention must be rejected by reason of the clear and unambiguous language of clause 15.8.
- 4.7 Historically, this particular provision has been in operation since conception of the Funeral Award in 2010.⁵ It is similar in nature to the pre-reform awards (non-enterprise) such as in the *A.C.T. Funeral Industry Award 2002*.⁶
- 4.8 In the Full Bench Decision relating to the introduction of the modern award, the Full Bench held (underlining added):
- “[57] The Funeral Industry Award 2010 contains a number of changes resulting from submissions following the release of the exposure draft. In relation to classifications, we have included some additional descriptors in the definitions clause and made other changes to provide clarity in the application of the grading structure. Clauses 12.3 and 15.8 have been redrafted.”
- 4.9 The above passage clearly demonstrates that the clause was deliberately drafted to apply to full-time employees only.

6 February 2019

⁵ MA000105, PR991075.

⁶AP815104CRA A.C.T. Funeral Industry Award 2002.