

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards – *Funeral Industry Award 2010*
– Substantive Issues

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Funeral Industry Award 2010

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Background

1. These submissions are made pursuant to Directions issued by the Deputy President Sams on 16 November 2018.
2. These submissions are made in response to various claims by the Australian Workers Union (**AWU**) and United Voice in relation to the *Funeral Industry Award 2010 (the Award)*.
3. Both parties press the claim that Clauses 10.4(d) and 10.5(c) of the Award, which provide minimum engagement periods for part-time and casual employees respectively, apply for all purposes of the Award, to the exclusion of any other task- or day- specific minimum engagement period provisions in the Award.
4. The AWU also seeks to vary the Award by inserting a minimum engagement period for time worked on public holidays into the overtime and penalty rates clause of the Award.
5. United Voice presses the claim that the uniform allowance provided for in Clause 15.8 of the Award applies to all employees, not only full-time employees, or in the alternative, that the Award should be amended to provide all employees with an entitlement to the uniform allowance.

Legislative Framework for Award Variation

6. As part of its “modern award powers”, the Fair Work Commission (**the Commission**) may, inter alia, make one or more determinations varying modern awards.¹ The performance or exercise of the Commission’s modern award powers is subject to the modern awards objective. That is, the Commission is obliged to ensure that the awards together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters contained in section 134 of the *Fair Work Act 2009 (Cth)*.
7. In the *Preliminary Jurisdictional Issues* decision, the Full Bench stated that:

‘The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. ... The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.’²

¹ *Fair Work Act 2009 (Cth)* s 139(2).

² [2014] FWCFB 1788 at [60].

8. The claims pressed by the AWU and United Voice constitute proposals to make substantive changes to the Award and require the advancement of a merit argument. The proposals, if accepted, will also increase wage costs for, and regulatory burdens on, employers. On this basis, we consider they are significant changes that require the support of probative evidence. We note, however, that neither party has filed evidence or materials in support of their proposed variations.

Minimum Engagement Periods for Part Time and Casual Employees

9. The AWU and United Voice press the claim that the Award provisions providing minimum engagement periods for part-time and casual employees apply for all purposes of the Award, to the exclusion of any other task- or day- specific minimum engagement period contained in the Award.

10. For the purposes of clarity, we have set out the relevant provisions below.

11. At Clause 10.4(d) (**the Part-time Minimum Engagement Provision**), the Award provides:

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

12. At Clause 10.5(c) (**the Casual Minimum Engagement Provision**), the Award provides:

'(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.'

13. At Clause 24.4 (**the Removals Provision**), the Award provides:

'(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.

(c) If a removal is commenced between the starting and finishing times as prescribed in clause 21.2, the employee will be paid at the rate prescribed in clause 24.2. If a subsequent removal is requested after 7.00 pm, although the original removal was commenced before that time, the employee will be paid at the rate as prescribed in clause 24.4, for the subsequent removal.'

14. At Clause 24.2(b) (**the Recall to Work Provision**), the Award provides:

(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.

15. At Clause 24.1(a) and (b) (**the Saturday and Sunday Work Provision**), the Award provides:

'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.'

Minimum engagements and full-time employment

16. United Voice has taken the position that the minimum engagement periods provided in the Removals, Recall to Work and Saturday and Sunday Work provisions are for the benefit of full-time employees only.

17. AFEI submits that this is an inaccurate interpretation, in view of: (a) the ordinary meaning of the words used in the Award; (b) the structure and industrial context of the Award; and (c) the purpose of the minimum engagement provisions in the Award.

18. There are well-established principles for award interpretation, which briefly include:

'The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '... the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken'.'

Ordinary meaning of the words used

19. The Removals, Recall to Work and Saturday and Sunday Work provisions each refer to “an employee” or “the employee” which clearly and unambiguously incorporates any person who is employed, and is not limited to a specified type of employee (whether casual, part-time or full-time). The Removals Provisions are expressed to apply to “an employee” or “the employee” on six occasions.
20. This can be contrasted with other provisions in the Award that are clearly limited in application to a specified type of employee. An example of this is Clause 15.8, which provides that: *“Where a full-time employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform.”*
21. Taking into account this inconsistency, and on a plain reading of the language used in the provisions, AFEI submits the the Removals, Recall to Work and Saturday and Sunday Work provisions apply to all employees (including full time, part time and casual) in the conditions or circumstances contemplated by the respective provision.

Structure and industrial context of the Award

22. The structure and industrial context of the Award does not weigh in favour of a finding that the minimum engagement periods provided in Clause 24 apply exclusively to full-time employees.
23. The minimum engagement periods contained in the Removals, Recall to Work and Saturday and Sunday Work provisions are triggered when certain conditions are met:
 - a. For the Removals Provision, when the employee is performing a specific task (ie. removal work);
 - b. For the Recall to Work Provision, when the employee is working other than arranged overtime;
 - c. For Saturday and Sunday Work, when the employee attends work on particular days; and
 - d. For funerals performed on a Saturday, when the employee is performing a specific task (ie. the carrying out of a funeral) on a particular day.
24. These minimum engagement periods are therefore more specific than the general minimum engagement periods provided for in the Casual and Part-time Minimum Engagement Provisions, and should supersede the more general provisions.³

³ *Perpetual Executors and Trustees Assoc of Australia Ltd v FCT* (1948) 77 CLR 1 at 29; *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corp* (1980) 29 ALR 333 at 347.

25. The industrial context of the Award suggests that the specific minimum engagement period for Removals work in particular has been derived by reference to the particular and precise nature of the work required to be done in the funeral industry. For instance,
- a. Clause 3 of the Award provides that “removal” means the transfer of deceased human remains from the place of death, a cemetery, a hospital, a crematorium, or a city mortuary, to the mortuary of a funeral director and includes a transfer requested by police.
 - b. In NSW, the definition of a ‘basic funeral’ (for the purpose of regulated costs disclosures by funeral directors) includes *‘the transport of the body...where no individual journey is further than 30km.’*⁴
 - c. For an employer operating in a metropolitan area, it should not be contested that it would be reasonably foreseeable for one transfer to be completed in less than two hours.
26. Adopting the unions’ interpretation would mean that part-time and casual employees performing that work would receive payment for three and four hours respectively, which may be substantially in excess of the time actually required for the performance of the work.
27. While there may be circumstances where the removal work exceeds two hours, an employer is required to pay an employee for a minimum of only two hours where the removal work is completed in less than two hours (again, a reasonably foreseeable situation within a metropolitan area, and/or for a ‘basic funeral’). In cases where the removal work takes longer than 2 hours, an employee will be paid for their time worked beyond the two hour minimum engagement period in the Removals Provision. This could occur in circumstances where an employee is engaged by an employer operating in a regional or rural area, where the distance between the mortuary of the funeral director and the places specified in Clause 3 may be greater. A second example is an employee engaged by a medium to large sized organisation that requires multiple transfers to be completed within one period of work.
28. The unions have failed to advance a merit argument or adduce probative evidence for why employers should not be entitled to minimise the cost of removals work.
29. We consider the unions’ interpretation would be inconsistent with the following considerations under the modern awards objective:
- a. The need to promote flexible modern work practices and the efficient and productive performance of work; and
 - b. The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

⁴ Fair Trading Regulation 2012 (NSW) reg 18(c).

The purpose of minimum engagement provisions

30. The Full Board noted in its Decision on Casual employment and Part-time employment that:

'Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However, their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like..'.⁵

31. The unions have not provided any evidence to support any contention that a minimum engagement period of more than 2 hours is necessary to ensure part time and casual employees receive sufficient work and income for each attendance at the workplace for Removals work.

Recall, Removals and part-time employment

Recall

32. AFEI submits that the Part-time Minimum Engagement Provision does not operate when an employee is recalled to work for other than arranged overtime. AFEI relies on the following:

- a. The minimum engagement period of one hour in the Recall to Work Provision applies when an employee is recalled for *'other than arranged overtime'*; and
- b. The Part-time Minimum Engagement Provision requires an employer only to *'roster a part-time employee for a minimum of three hours on each shift'*; and
- c. Clause 22.1 of the Award provides that a "rostered shift" means *'a shift for which the employee concerned has had at least 48 hours' notice'*.

33. An employee may be recalled to work for other than arranged overtime when an urgent or unforeseen circumstance arises outside the spread of ordinary hours. As the Recall to Work Provision contemplates a situation in which overtime was not arranged between the employer and employee, it follows the employee would not have had at least 48 hours' notice of the shift. Therefore, the period of work could not be considered a shift for the purposes of the Part-time Minimum Engagement Provision.

Removals

34. Similarly, the requirement to perform removal work outside the spread of ordinary hours may not be foreseeable or otherwise able to be planned, as the need for this work to be done may arise only when the employer is notified of a death. Given this, an employee may

⁵ [2017] FWCFB 3541 at [399].

not have 48 hours' notice of being required to perform removal work. Therefore, the period of work also could not be considered a shift for the purposes of the Part-time Minimum Engagement Provision.

35. The provisions are therefore not inconsistent and may be read together.
36. This further supports AFEI's view that the task- and day- specific minimum engagement provisions for Recalls and Removals are intended to operate to the exclusion of the general minimum engagement provisions for part-time and casual employees.

Funerals performed on a Saturday

37. We note that where an employee is engaged in the carrying out of a funeral on a Saturday, a four hour minimum engagement period will apply. This is more beneficial than the three-hour minimum engagement period provided in the Part-time Minimum Engagement Provision.
38. If the unions' interpretation is accepted and it is determined the Saturday and Sunday Work Provision applies to full-time employees only, this will mean that part-time employees are comparatively at a disadvantage when engaged in the carrying out of a funeral on a Saturday.
39. This further supports AFEI's view that the task- and day- specific minimum engagement provisions are intended to operate to the exclusion of the general minimum engagement provisions for part-time and casual employees.

Public Holidays

40. The Award currently does not provide a minimum engagement period for work performed on public holidays.
41. The AWU seeks a variation to the Award to insert a two-hour minimum engagement period for work performed on public holidays, which would apply to full-time employees only. The alleged purpose of this variation would be to achieve consistency with the two-hour minimum engagement periods contained in the Saturday and Sunday Work Provisions. The AWU submits the effect of this proposal will be minor.
42. However, a minimum engagement period on public holidays for full-time employees is unnecessary for the following reasons:
 - a. *First*, the 200% penalty rate for time worked on a public holiday is sufficient to compensate for the expense and inconvenience associated with working on a public holiday; and

- b. *Secondly*, if the full-time employee has ordinary hours of work on the day or part-day that is a public holiday, then in addition to receiving the 200% penalty rate for time worked, an employer must pay the employee at their base rate of pay for hours on which they didn't work;⁶ and
 - c. *Thirdly*, an employee may refuse an employer's request to work on a public holiday if the request is not reasonable or the refusal is not unreasonable,⁷ taking into account a range of circumstances, including the employee's personal circumstances.⁸
43. The AWU's proposed variation creates a new entitlement that does not currently exist, increases the regulatory burden on employers, and has the potential to increase wage costs for employers. On this basis, AFEI denies that the effect of the proposal is minor. The AWU has failed to advance a merit argument or adduce probative evidence for why employers should not be entitled to minimise work performed on public holidays.

Uniform Allowance

44. At Clause 15.8, the Award provides:

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

45. United Voice's primary contention with respect to this claim is that the current clause applies to full-time, part-time and casual employees. United Voice relies on the following:
- a. Clause 10.4(a)(iii) of the Award provides 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'*; and
 - b. The Award does not prescribe that the casual loading is paid in lieu of any entitlement and, therefore, absent a specific exclusion, it should be assumed that any condition in the Award applies to a casual employee.
46. United Voice states that the current wording of the provision *'appears to be resulting in confusion about which employees are entitled to receive the allowance'* and proposes an amendment to the provision such that the allowance would be available to "an employee".
47. However, AFEI submits that a plain reading of the provision clearly indicates that the entitlement is confined to full-time employees and, by necessary and logical inference, this excludes any other category of employee.

⁶ *Fair Work Act 2009* (Cth) s 116.

⁷ *Fair Work Act 2009* (Cth) s 114(3).

⁸ *Fair Work Act 2009* (Cth) s 114(4).

48. Further, on 25 September 2009, the Award Modernisation Full Bench confirmed that the Award was based on the Funeral Industry Award 2003,⁹ which had application in Victoria (**the Victorian Award**). The Victorian Award contained two streams, both of which were absorbed into the Award: funeral directors and coffin makers. Of these, only the funeral directors stream contained a uniform allowance. The stream provided at Clause 6.3.1 that *'Where an employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform'* and at Clause 6.3 that *'The provisions of this clause apply to full-time employees only.'* Therefore, the history of the Award supports a determination the uniform allowance is available to full-time employees only.
49. United Voice's secondary contention is that, if it is determined the uniform allowance does not apply to part-time and/or casual employees, the Award should be amended to include all employees such that the requirement to wear a uniform would be the entitling criterion in determining whether an employee receives the allowance or not.
50. United Voice has claimed that *'part time and casual employees will incur costs where they are required to wear and launder a uniform'* and *'a part-time employee may only require 1-2 uniforms in total, depending on their hours of work.'* United Voice has not adduced any evidence of the laundering requirements for casual employees in the industry, nor any probative evidence that part-time or casual employees would incur any material cost associated with the laundering of uniforms.
51. United Voice has not displaced the presumption that the Award no longer achieves the modern awards objective in respect of the uniform allowance.¹⁰
52. AFEI opposes each of the claims pressed by the AWU and United Voice in the Award.

⁹ *Funeral Industry Award 2003* AP825425CRV - Fed.

¹⁰ [2014] FWCFB 1788 at [60].