

14 August 2017

Vice President Hatcher  
Fair Work Commission  
Level 10, Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2011  
By email: [amod@fwc.gov.au](mailto:amod@fwc.gov.au)

**Re: AM2014/197 – Casual employment – draft determinations – Wine Industry Award – Pastoral Award – Hair and Beauty Industry Award**

## BACKGROUND

1. The Casual and Part-time Full Bench issued a Decision<sup>1</sup> on 5 July 2017 (**the Decision**) including directions to proponent parties to file draft determinations to give effect to the relevant parts of that Decision. Interested parties were also directed to respond to those draft determinations on or before 2 August 2017. This date was extended to 14 August 2017 on our application.
2. These submission of The Australian Workers' Union (**AWU**) respond to those directions and specifically, the draft determinations filed by the following parties:
  - 2.1. The Shop Distributive and Allied Employee's Association (**SDA**) regarding overtime rates for casual employees under the *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**);
  - 2.2. The National Farmers Federation (**NFF**) regarding the minimum daily engagement period for casual junior dairy operators who are school students under the *Pastoral Award 2010* (**Pastoral Award**);
  - 2.3. The South Australian Wine Industry Association (**SAWIA**) regarding the minimum daily engagement period in circumstances where there is an unexpected weather event under the *Wine Industry Award 2010* (**Wine Award**).

## HAIR AND BEAUTY INDUSTRY AWARD – SDA DRAFT DETERMINATION

3. The SDA was directed to draft a determination to give effect to the Decision. However, this is a difficult task taking into account the number of drafting and technical issues raised in the award-stage proceedings that have not yet been

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<sup>1</sup> [2017] FWCFB 3541.

dealt with. Many of these issues deal with the casual provisions, the ordinary hours provisions and the overtime provisions contained in the Hair and Beauty Award. We deal with some of these issues in our submissions below.

4. The relevant extracts of the SDA's draft variation appears as follows:

*Insert new paragraphs (b) and (c) following paragraph (a) of clause 31.2 as follows:*

*(b) Hours worked by casual employees in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate thereafter.*

*(c) Hours worked by casual employees in excess of 10 ½ hours per day shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary rate of pay thereafter in accordance with clause 28.3.*

5. The relevant extracts of the Decision at paragraphs [676] and [677] appear as follows (our emphasis at underlined):

*[676] For these reasons, we conclude that it is necessary to vary the awards to provide for overtime penalty rates to apply to casuals in order to meet the modern awards objective... Each award should provide that casual employees should receive the same overtime penalty rates as full-time and part-time employees performed in excess of 38 hours per week or, where the casual employee works in accordance with a roster, in excess of 38 hours per week averaged over the course of the roster cycle. In respect of daily hours, the position should be as follows:*

...

*(3) In the Hair and Beauty Award, hours worked in excess of 10½ hours in a day should attract overtime penalty rates consistent with clause 28.3.*

*[677] In each case overtime penalty rates are to be applied to the ordinary hourly rate of pay, with the casual loading also to be applied to the ordinary hourly rate of pay. Overtime rates should not compound upon the casual hourly rate of pay.*

6. The underlined passage above refers clause 28.3 of the Hair and Beauty Award. This clause provides a different entitlement to that implied by the words in the Decision. Clause 28.3 appears as follows:

**28.3 Maximum hours on a day**

*An employee may be rostered to work up to a maximum of nine hours on any day, except that an employee may be rostered to work one*

*10.5 hour day per week and by mutual agreement in writing, a second 10.5 hour day.*

7. Both the wording in the Decision and the SDA draft variation has the effect of expanding the daily maximum hours to 10.5 hours a day to any number of days. The Award only allows this to occur one day per week, or by mutual written agreement – two days per week.
8. Given the interaction between the overtime and ordinary hours provisions are yet to be considered in the award-stage of the 4-yearly review, it is unclear what the assumptions of the Casual and Part-time Full Bench were when they determined at [676] that ‘casual employees should receive the same overtime penalty rates as full-time and part-time employees’ (in regards to averaging and weekly hours).
9. The Exposure Draft for the Hair and Beauty Award contains a question from the Commission ‘is overtime payable for work on Monday-Saturday outside ordinary hours in clause 13.1 [clause 28.2 of the award]? The Question implies an ambiguity as to whether employees are entitled to overtime outside the span of hours. The ambiguity exists because clause 31.2 creates overtime for ‘hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2... (our emphasis).’ The AWU has previously confirmed in submissions that all hours worked in excess of the ordinary hours in clause 28.2 is necessarily overtime.<sup>2</sup> From the above analysis, it is unclear if the Full bench intended to maintain a separate entitlement to overtime outside the span of hours for part-time and full-time employees only, or if this entitlement was not comprehended to exist at all.
10. Further, the Full Bench specifically state that overtime should be payable for casuals in excess of the daily maximum of hours at clause 28.3. However, the corresponding overtime clause 31.2(a) does not currently create the same entitlement for any employees. It seems unlikely that the Full Bench intended to apply overtime in excess of the daily maximum of hours for casuals but not part-time and full-time employees. Our Draft Determination reflects this and reflects our understanding of the Award in accordance with our drafting and technical submissions of 20 January 2017 in AM2014/271.

#### *AWU and SDA amended Draft Determination*

11. The AWU and the SDA propose a variation to the original draft determination filed by the SDA.<sup>3</sup> This variation is attached to these submissions and marked ‘AWU and SDA Draft Determination – Hair and Beauty Industry Award (Exposure Draft marked up).’

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<sup>2</sup> See AWU 20 January 2017 Submission in AM2014/271 at paragraph 24 .

<sup>3</sup> See SDA 20 August Draft Determination in AM2014/196 and AM2014/197.

12. The Unions' Draft Determination reflects the style and layout of the Exposure Draft for the Hair and Beauty Award<sup>4</sup> where loadings are expressed as percentages and the overtime provisions are separate to the penalty rates provisions. To assist the Commission and the parties, we have tracked our changes in red and strikethrough based on the wording used in the Exposure Draft.
13. In addition to addressing the issues identified above, we have also added words to limit the weekly averaging period to ensure compliance with both clause 30.1 of the Award (which states that 'a roster period cannot exceed four weeks') and section 147 of the *Fair Work Act 2009*. Section 147 requires modern awards to include terms 'specifying, or providing for the determination of, the ordinary hours of work for each classification of employee...and each type of employment permitted by the award.' The Unions' proposal ensures there is a method to averaging the weekly hours in this award.
14. The AWU reserves its right to further propose changes as part of the drafting and technical proceedings in AM2014/271.

#### **PASTORAL AWARD – NFF DRAFT DETERMINATION**

15. The NFF case to reduce the minimum engagement period for casual and part-time dairy operators from 3 hours to 2 was not made out, with the exception of 'junior employees who are school students'. The relevant passage from the Decision appears at paragraph 771 (our emphasis at underlined):

*[771] We do not consider therefore that the minimum engagement period for casual and part-time employees in dairying operations should be reduced from 3 hours to 2 hours on an across-the-board basis. However we do consider that the NFF's evidence (particularly that of Ms Wearden and Ms Shearman) did demonstrate that the 3 hour minimum engagement period might inhibit the employment of school students, because school hours did not permit school students to attend dairy farms to assist with milking before the milking had begun. Casual dairy farm work would provide a valuable employment entry point, as well as additional income, for school students in rural areas, and we do not consider that the modern awards objective is served if such employment is inhibited. We will therefore reduce the minimum engagement period to 2 hours for junior employees who are school students. We will direct the NFF to prepare a draft determination to give effect to our decision, and the AWU and any other interested parties will be given an opportunity to make further submissions about the form of the variation*

16. The AWU understand the Decision constrains the reduction to the minimum engagement to apply in circumstances where the student would otherwise not be

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<sup>4</sup> Published by the Fair Work Commission on 16 November 2016.

able to perform a 3-hour shift due to the imposition of their school hours; and to an employee who is all of the following:

- 16.1. a casual; and
- 16.2. a school student; and
- 16.3. a junior; and
- 16.4. a dairy operator.

17. The NFF's draft determination would have the effect of broadening the Decision by altering the part-time provisions; and applying the exception to 'junior employees and school students' rather than to 'junior employees who are school students.

#### *AWU Draft Determination*

18. The AWU's alternative draft determination is attached to these submissions and marked 'AWU Pastoral Draft Determination – Casual Dairy Operator'. The AWU's Draft specifically refers to 'full-time students' and to shifts worked on a day the student is required to attend school. These two features reflect the reasoning applied by the Full Bench above – that 'school hours did not permit school students to attend dairy farms to assist with milking before the milking had begun.'

#### **WINE INDUSTRY AWARD – SAWIA DRAFT DETERMINATION**

19. The SAWIA case to reduce the 4 hour minimum engagement to 2 hours for both harvesting/pruning operations and cellar door operations was not made out. In respect of harvesting and pruning, the Full Bench at paragraphs [792] to [794] devised a confined exception to deal with the impact of unexpected weather events on casual employees. The following extracts are indicative:

*[792] We do not consider that this confined problem justifies a wholesale change to the casual minimum engagement period when it is capable of resolution in a more discrete way...*

*[793] It may be accepted that s.524 provides an opportunity for a winery business to stand down employees where work must stop due to a weather event which could not reasonably have been expected at the time that employees were engaged for the performance of work. Such a weather event could reasonably be characterised as a "cause for which the employer cannot reasonably be held responsible" under s.524(1)(c). However we do not consider that s.524 should be left as the sole mechanism for dealing with the discrete problem we have identified. Once a stand down is effected under s.524, the effect of s.524(3) is that no further payment is required to be made by the employer. That could mean, for example, that if a winery employer called in its casual workforce to perform harvesting work in the belief that*

*weather conditions would be suitable, but it began raining almost immediately after work commenced, then the employer could stand down the employees at the point and not have to pay them further. That would potentially be unfair to employees, for whom attendance at work had cost time and money. Section 526 provides a mechanism for a dispute about a stand down to be arbitrated by the Commission, and s.526(4) requires the Commission in dealing with such a dispute to “take into account fairness between the parties concerned”. Thus (as the SAWIA submitted), resort to s.524 by an employer may lead to it being embroiled in dispute proceedings under s.526, with the requirement for fairness to be taken into account creating the potential for a range of possible outcomes.*

*[794] We consider that the identified problem would be better resolved by an adjustment to the minimum engagement provision which dealt with the specific situation at hand, appropriately balanced the interests of the employer and employees, and provided certainty as to the outcome. The variation would be to reduce the minimum engagement period from 4 hours to 2 hours in circumstances where a weather event not expected at the start of a pruning or harvesting shift prevents the completion of 4 hours’ work.*

#### *AWU and United Voice Draft Determination*

20. We attach an amended Draft Determination marked ‘AWU and United Voice Draft Determination – Pruning and Harvesting’. This draft is identical to that filed by United Voice on 11 August 2017.
21. The basis for our position is found in the submissions of United Voice filed on 11 August 2017.



Roushan Walsh  
**NATIONAL LEGAL OFFICER**  
The Australian Workers’ Union

14 August 2017

**‘AWU and SDA – Hair And Beauty Industry Award Draft Determination  
(Exposure Draft marked up)’**

## **DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards – Casual employment and Part-time employment**

(AM2014/196 and AM2014/197)

**HAIR AND BEAUTY INDUSTRY AWARD 2010**

MA000005

Hair and Beauty

VICE PRESIDENT HATCHER  
SENIOR DEPUTY PRESIDENT HAMBERGER  
DEPUTY PRESIDENT KOVACIC  
DEPUTY PRESIDENT BULL  
COMMISSIONER ROE

SYDNEY, DD/MM 2017

*4 yearly review of modern awards – Part-time employment and Casual employment – Hair and Beauty Industry Award – SDA Claim – overtime for casual employees.*

A. Further to the decision and reasons for decision <<decision reference>> in <<file\_no.>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, the *Hair and Beauty Industry Award 2010* is varied as follows.

[1] Delete the words in clause 28 and insert the following:

**28 Ordinary hours of Work**

**28.1 This clause applies to all employees.**

**28.2 ~~Ordinary hours~~ Weekly maximum hours and span of hours**

(a) Ordinary hours must not exceed an average of 38 per week **averaged over a maximum 4-week roster period** and may be worked within the following spread of hours:

<b>Days</b>	<b>Spread of hours</b>
Monday to Friday, inclusive	7.00 am–9.00pm

Saturday	7.00 am–6.00pm
Sunday	10.00 am–5.00pm

**(b)** If a casual employee does not work in accordance with a roster longer than one-week, the ordinary hours must not exceed 38 hours per week.

**(c)** Hours of work on any day will be continuous, except for rest periods and meal breaks.

**28.3 Maximum hours on a day**

**(a)** An employee may be rostered to work up to a maximum of nine hours on any day.

**(b)** Despite clause 28.3(a):

**(i)** an employee may be rostered to work one 10.5 hour day per week; and

**(ii)** an employer and employee may agree in writing that the employee may work a second 10.5 hour day.

**28.4** This clause does not operate to limit or increase or in any way alter the trading hours of any employer as determined by the relevant State or Territory legislation.

[2] Delete the words in clause 31.2(a) and insert the following:

**31.2 Overtime rates**

~~Overtime hours worked~~ **Work performed** in excess of, ~~or outside~~ the ordinary number of hours of work prescribed in clauses 28.2 and 28.3 ~~are~~ **is overtime and is** to be paid at:

**(a)** 150% of the **ordinary** hourly rate for the first three hours; and 200% of the ~~minimum~~ **ordinary** hourly rate after three hours **for full time and part time employees**; and

**(b)** 175% of the ordinary hourly rate for the first three hours; and 225% of the ordinary hourly rate after three hours **for casual employees (inclusive of the casual loading)**.

[3] This determination will operate on and from .....

VICE PRESIDENT



**‘AWU Pastoral Draft Determination – Casual Dairy Operator’**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards – Casual employment and Part-time employment**

(AM2014/196 and AM2014/197)

**PASTORAL AWARD 2010**

MA000035

VICE PRESIDENT HATCHER  
SENIOR DEPUTY PRESIDENT HAMBERGER  
DEPUTY PRESIDENT KOVACIC  
DEPUTY PRESIDENT BULL  
COMMISSIONER ROE

SYDNEY, DD/MM 2017

*4 yearly review of modern awards – Part-time employment and Casual employment – Pastoral Award – NFF Claim – casual and part-time dairy operators – minimum engagement for casual junior employees who are school students*

A. Further to the decision and reasons for decision <<decision reference>> in <<file\_no.>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, the *Pastoral Award 2010* is varied as follows:

[1] By inserting the following clause 10.4(g):

- (g) Casual employees may be paid a minimum payment of two hours’ work at the appropriate rate where all of the following applies:
  - (i) the employee is a casual employee; and
  - (ii) a junior employee; and
  - (iii) a full-time school student; and
  - (iv) a dairy operator; and
  - (v) is engaged to work a shift after attending for school that day, where attendance at school prevents the employee from performing three hours’ work.

[2] This determination will operate on and from .....

**‘AWU and United Voice Draft Determination – Pruning and Harvesting’**

**DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards – Casual employment and Part-time employment**

(AM2014/196 and AM2014/197)

**WINE INDUSTRY AWARD 2010**

MA000090

Wine Industry

VICE PRESIDENT HATCHER  
SENIOR DEPUTY PRESIDENT HAMBERGER  
DEPUTY PRESIDENT KOVACIC  
DEPUTY PRESIDENT BULL  
COMMISSIONER ROE

SYDNEY, DD/MM 2017

*4 yearly review of modern awards – Part-time employment and Casual employment – Wine Industry Award – SAWIA Claim – minimum engagement – vineyard work – unexpected weather*

A. Further to the decision and reasons for decision <<decision reference>> in <<file\_no.>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, the *Pastoral Award 2010* is varied as follows:

[1] By deleting current clause 13.3 and inserting the following:

13.3 Minimum engagement

- (a) On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours’ work, except as set out in clause 13.3(b).
- (b) If a casual employee cannot be safely employed to perform pruning and harvesting work in a vineyard because of the following circumstances:
  - (i) there is an unexpected and unforecast weather event including rain, hail, snow, bushfire and/or severe dust storm; and
  - (ii) there are no other duties for the affected casual employees to perform where it is reasonable to provide such duties; and

- (iii) the employer has communicated with the affected casual employees as soon as reasonably practicable of the weather event described in clause 13.3(b)(i); and advised regarding:
- the effect of the weather event on the continuation of the pruning and harvesting work; and
  - the circumstances that prevent the completion of four hours' work; and
  - Whether other duties are reasonably available pursuant to clause 13.3(b)(ii).

Then the casual employee will be paid for the work performed on that occasion, provided that they must be paid for a minimum of two hours' work

[2] This determination will operate on and from .....