Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Revised Exposure Draft – Outstanding Technical and Drafting Issues

Wine Industry Award 2010

(AM2014/249)

3 FEBRUARY 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/249 WINE INDUSTRY AWARD 2010

1. On 14 December 2016, the Fair Work Commission (**FWC**) issued directions regarding a revised Summary of submissions published 26 July 2016 (**Summary**) and revised Exposure draft published 29 July 2016 (**Exposure Draft**) in respect of the Wine Industry Award 2010 (**Wine Award**). Specifically, those directions require interested parties to file:

    - any comments in relation to the accuracy of the revised Summary and Exposure Draft by 10 January 2017;
    - written submissions and any evidence in support of the outstanding technical and drafting issues by 20 January 2017;
    - written submissions and any evidence in reply on the outstanding technical and drafting issues by 3 February 2017.

2. The Australian Industry Group (**Ai Group**) files this reply submission in accordance with those directions in response to the submissions filed by United Voice dated 22 December 2016 and 20 January 2017 respectively.

3. We note that this submission does not set out our response to the AWU's claim at item 53 of the revised Summary as the parties have agreed that this is a substantive claim and will be dealt with after the Casual and Part-time Employment Common issue proceedings have been finalised.

Item 35: Clause 9.4 - working through meal break

4. Ai Group opposes United Voice's position in relation to Item 35. More specifically, we oppose the contention that the 50% loading given to an employee working through a meal break under clause 29.4 of the Wine Award is calculated by reference to the rate applicable to the employee at the time the break is not provided.

5. The union's claim does not contain any limitations as to what that applicable rate would be and arguably includes over-award payments as well as shift loadings, penalties and other amounts applicable under the award.

6. The nature of award obligations relating to minimum rates and over-award payments was considered by the Full Bench early on in the 4 Yearly Review.[1] In determining whether award-derived penalties and loadings should be applied to the relevant minimum rate or over-award rate, the Full Bench held:

> [96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings.[2]

7. Given the above, it is clear that the loading in clause 29.4 of the Wine Award (and clause 9.4 of the Exposure Draft) should not apply to over-award payments but only to minimum rates prescribed by the Award or the NES. On the basis of this, the union's claim should be rejected.

8. Furthermore, contrary to United Voice's submission, neither the natural and ordinary construction of the words in clause 29.4 of the Wine Award, nor the history of the making of the Award, supports the union's claim.

9. Clause 29.4 of the Wine Award currently provides:

> An employee not given a meal break in accordance with clauses 29.1, 29.2 and 29.3 must be paid from then on a loading of 50% until the meal break is given.

10. Clause 29.1 provides that a day worker must not be required to work for more than 5 hours without an unpaid meal break, clause 29.2 provides that a shift worker must not be required to work for more than 4.5 hours (or 6 hours in certain circumstances) without an unpaid meal break and clause 29.3 provides that an employee working more than 2 hours of overtime after the completion

[1] [2015] FWCFB 4658 at [95]-[96]

[2] [2015] FWCFB 4658 at [96]

of ordinary hours must be given a paid meal break prior to commencing the overtime and after each 4 hours of overtime thereafter.

11. It is not clear from a reading of clause 29.4 taken in its context that the loading of 50% is intended to be interpreted in the manner suggested by United Voice. The clause does not expressly state that the loading of 50% is to be applied on top of other penalties/loadings the employee may be receiving at the time the meal break is not taken. It simply refers to "*a loading of 50%"* which leaves the rate by reference to which the loading is calculated open to a number of possible interpretations.

12. Whilst United Voice submits that its construction of clause 29.4 is supported by the final sentence of Clause 29.3, it is not apparent why this is so. Firstly, there is no reason why it should be assumed that a consistent approach should be adopted within Clauses 29.3 and Clause 29.4, given they deal with materially different circumstances. Regardless, in our view, it is not clear that the rate referred to in the final sentence of Clause 29.3 actually has the meaning ascribed to it by the union.

13. The final sentence in Clause 29.3 provides:

> The meal break prior to the commencement of overtime must be paid at the rate then applying to the employee for ordinary hours of work and subsequent meal breaks must be paid at the overtime rate then applying to the employee for overtime work.

14. The reference to "*the rate then applying to the employee for ordinary hours of work*" could be interpreted as referring to the minimum hourly rate applying to the employee pursuant to the award or the actual rate received by the employee at the time. This latter interpretation would include over-award payments and should be rejected as it would be contrary to the Full Bench's decision mentioned above.[3]

15. However, even if United Voice's interpretation of Clause 29.3 is correct it does not follow that the same interpretation should apply to the construction of Clause 29.4. Apart from the fact that the two clauses deal with different subject

[3] [2015] FWCFB 4658 at [96]

matter (with clause 29.3 dealing with overtime worked immediately after the completion of ordinary hours and clause 29.4 dealing with a situation where meal breaks are not taken), if the clauses were intended to be interpreted in the same manner arguably the Australian Industrial Relations Commission (**AIRC**) would have drafted them in similar terms. For example, the reference to "*a loading of 50%*" could have been expressed as "*a loading of 50% on the rate then applying to the employee for ordinary hours of work."*

16. The history of the development of clause 29.4 of the Wine Award does not support United Voice's submission either.

17. In the first exposure draft of the modern award published by the AIRC on 22 May 2009, clause 27.4 provided as follows:

> An employee not given a meal break in accordance with clauses 27.1, 27.2 and 27.3, must be paid from then on at the rate of 150% until the meal break is given.

18. Clauses 27.1, 27.2 and 27.3 were identical to the clauses that are now 29.1, 29.2 and 29.3 (except for the last sentence of the current clause 29.3 which was added later on).

19. It is evident from the above that the only difference between the wording in clause 27.4 and the current clause 29.4 is that the words "*a loading of 50%"* were expressed as "*at the rate of 150%*" in clause 27.4.

20. Neither form of wording can be unambiguously interpreted in accordance with United Voice's construction. Furthermore, it appears that the AIRC did not provide any further guidance about how the clause is to be applied during the Award modernisation process or consider it in detail.

21. As mentioned by United Voice, the only submissions which appear to have been made in respect of the breaks clause in the first exposure draft of the modern Wine Award were by the South Australian Wine Industry Association (**SAWIA**) in its submission of 12 June 2009. These submissions predominately related to the rate the meal breaks an employee who works overtime immediately after the completion of ordinary hours should be paid at but the SAWIA also mentioned an issue regarding the application of the 150% rate in

clause 27.4 to a situation where the employee had worked more than 2 hours of overtime and was receiving a 200% rate.

22. However, the issues raised by SAWIA do not appear to have been discussed in the hearing relating to the making of the modern award on 1 July 2009 and were not dealt with by the AIRC in its later decision regarding the making of the award.[4] In noting the changes made to the exposure draft of the modern award, the AIRC's only relevant comment was that "*the rates for paid meal breaks have also been detailed*."[5]

23. In the modern award published on 4 September 2009 with the AIRC's decision, the only changes to the meal breaks clause (contained at clause 28 in this version of the award) were the addition of the words contained in the final sentence of what is now clause 29.3 to the end of clause 28.3 and the substitution of the words "*the rate of 150%*" with "*a loading of 50%"* in Clause 28.4 (now clause 29.4).

24. The wording in the current clause 29 of the Wine Award remains in identical terms.

25. On the basis of the above, the provision's history cannot be seen as providing a proper basis for supporting United Voice's claim.

26. A consideration of the relevant clause in the Wine Industry AWU Award 1999 (**1999 Wine Award**), one of the major predecessor awards to the Wine Award that applied in all states except South Australia to employees engaged in vineyards, also does not support the union's claim.

27. Clause 24.2 of the 1999 Wine Award provided as follows:

> All time worked during the meal break shall be paid for at the rate of double time until a break of not less than the time usually allowed for meals is granted by the employer.

[4] [2009] AIRCFB 826

[5] [2009] AIRCFB 826 at [148]

28. The above clause does not specify that the rate of double time is to be applied to whatever rate the employee is receiving at the time the break is not provided, including to any shift loadings, weekend penalties or over-award payments.

29. There is no sound basis for interpreting the current clause 29.4 of the Wine Award in accordance with United Voice's claim. It is not 'necessary'[6] to achieve the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions.

30. Furthermore, if the 50% loading was to be calculated in accordance with United Voice's interpretation, employers would be required to pay a higher amount to employees that are entitled to receive other penalties or loadings (such as a shift allowance) as the 50% loading would be added to the loaded rate. Such an outcome would be manifestly unfair to both employers and employees because it would mean that employees who are not given their prescribed meal breaks would be compensated in different ways with certain employees receiving a higher payment then others.

31. The 50% loading referred to in clause 29.4 of the modern award (and clause 9.4 of the Exposure Draft) is intended to and should be applied the minimum hourly rate applying to the relevant employee under the Award.

32. Importantly, the equivalent clause in the Horticulture Award 2010 (**Horticulture Award**), which applies to an inherently similar industry, expressly states that the loading for working through a meal break is applied to the appropriate *minimum* wage.

33. Clause 23.1(b) of the Horticulture Award provides as follows:

> All work performed on the instruction of the employer during a recognised meal break will be paid for at 200% of the appropriate minimum wage. Such payment will continue until the employee is released for a meal break of not less than 30 minutes.

34. Whilst the loading amount is different under the two awards, in our view the applicable loading should be applied to the same rate under both awards– that

[6] In the manner contemplated by s.138 of the *Fair Work Act 2009*

is, to the minimum hourly rate. Given the close resemblance between the two industries, there is no apparent justification for adopting different approaches.

Item 49: Clause 16.2(d) – boilers and flues

35. Ai Group opposes the United Voice's position in relation to item 49. More specifically, we oppose their submission that an employee who is entitled to the boilers and flues allowance per clause 24.6(a) of the Wine Award is entitled to receive 50% more than they would otherwise be receiving whilst they are performing the relevant work. In effect, the union appear to contend that the rate should be applied on top of over award payments as well as other amounts that may be applicable under the award such shift rates, weekend rates etc. Taken to its logical conclusion, the union's proposed interpretation would even require that other allowances that may be applicable under the award would be included in the calculation. Such an approach would mean that the award operates in an excessively generous and unreasonable manner.

36. The current clause 24.6(a) of the Wine Award provides as follows:

> **24.6(a) Boilers and flues**
>
> An employee engaged in washing out and chipping boilers or in cleaning flues must be paid 50% extra while they are engaged in such work.

37. United Voice's submission that the requirement to pay 50% extra means that the employee is entitled to be paid 50% more than rate they are actually receiving at the time is not confined in any way.

38. As discussed above, the Full Bench has held in this 4 Yearly Review that award-derived penalties and loadings should not be applied to over-award payments.[7]

39. In light of the above, clause 24.6(a) of the Wine Award cannot be construed in the manner advocated by United Voice. In our view, the entitlement to 50% extra must be interpreted as meaning that the employee is entitled to an allowance of 50% of the minimum hourly rate applying to the employee. In this way, the employee would still receive relevant penalties and loadings (e.g. shift

[7] [2015] FWCFB 4658 at [96]

allowance). However, the boilers and flues disability allowance would be added separately to these and not compounded on a loaded rate.

40. If the allowance in clause 26.4(a) of the Wine Award was to be calculated in accordance with United Voice's claim, an employer would be required to pay a higher boilers and flues allowance to employees entitled to another penalty or loading as the 50% allowance would be added to the loaded rate. There is no sound basis for requiring employers to pay a higher disability allowance to certain employees over others in this manner. The purpose of the clause is to make an additional payment to compensate employees for the nature of the work and therefore all employees carrying out that work should receive the same payment. Any other approach would be unfair.

41. Interpreting clause 26.4(a) of the Wine Award in the manner that Ai Group has proposed is consistent with how the requirement to pay "X% extra" in other clauses of the Award is interpreted. For example:

- clause 28.3(e)(i) specifies that an employee who works on afternoon or night shift must be paid 15% extra for such shift; and

- clause 28.3(e)(ii) specifies that an employee who during a period of engagement on shift works night shift only, or remains on night shift for longer than 4 consecutive weeks, or works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift must be paid 30% extra for all time worked during ordinary working hours on such night shift.

42. In our view, it is not contentious that the requirement to pay 15% or 30% extra in these clauses is calculated on the minimum award-derived hourly rate relevant to the employee concerned. On the basis of this, we see no justification for adopting a different approach in relation to the boilers and flues disability allowance.

43. Clause 24.6(a) does not appear to have been the subject of any detailed consideration by the AIRC in the course of the Part 10A Award Modernisation proceedings. It would appear that the clause was derived from the Wine Award 1999. Clause 22.2 of that award provided as follows:

> **22.2 Boilers and flues allowance**
>
> Employees engaged in washing out and chipping boilers or in cleaning flues, shall be paid for the time during which they are so engaged at the rate of time and a half.

44. The clause does not specify that rate of "time and half" is to calculated in the manner contemplated by the United Voice's claim.

45. Ai Group contends that the wording adopted within the exposure draft should be retained to ensure that there no uncertainty as to the nature of the award obligation. This is consistent with the need to ensure that the Award is 'simple and easy to understand.'[8] We do not view this as constituting a substantive change to award entitlements.

Item 62: Clause 24.3(a)(i) – rostered day off falling on public holiday

46. We strongly oppose United Voice's submissions with respect to clause 34.3(a)(i) of the Wine Award (and clause 24.3(a)(i) in the Exposure Draft).

47. The current clause 34.3 of the Wine Award provides as follows:

> **34.3 Rostered day off falling on public holiday**
>
> **(a)** Except as provided for in clauses 34.3(b) and (c) and where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:
>
> **(i)** 7.6 hours of pay at the ordinary time rate; or
> **(ii)** 7.6 hours of extra annual leave; or
> **(iii)** a substitute day off on an alternative week day.
>
> **(b)** Where an employee has credited time accumulated pursuant to clause 28.4, then such credited time should not be taken as a day off on a public holiday.
>
> **(c)** If an employee is rostered to take credited time accumulated pursuant to clause 28.4 as a day off on a week day and such week day is prescribed as a public

[8] As per section 134(1)(g) of the *Fair Work Act 2009*

holiday after the employee was given notice of the day off, then the employer must allow the employee to take the time off on an alternative week day.

(d) Clauses 34.3(b) and (c) do not apply in relation to days off which are specified in an employee's regular roster or pattern of ordinary hours as clause 34.3(a) applies to such days off.

48. Clause 32.3 of the first exposure draft of the modern award published by the AIRC on 22 May 2009 was in identical terms to the current clause 34.3 (save for the cross-references mentioned in the clause) and there appears to have been no further consideration of the clause or any submissions raised with respect to it during the award modernisation process.

49. It appears that the wording of the current clause is in almost identical terms as the comparable provision in the Manufacturing Award that was made during the Priority Stage of the award modernisation process.

50. Clause 44.3 of the Manufacturing Award provides as follows:

44.3 Rostered day off falling on public holiday

(a) Except as provided for in clauses 44.3(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:

(i) 7.6 hours of pay at the ordinary time rate; or
(ii) 7.6 hours of extra annual leave; or
(iii) a substitute day off on an alternative week day.

(b) Where an employee has credited time accumulated pursuant to clause 34.6, then such credited time should not be taken as a day off on a public holiday.

(c) If an employee is rostered to take credited time accumulated pursuant to clause 34.6 as a day off on a week day and such week day is prescribed as a public holiday after the employee was given notice of the day off, then the employer must allow the employee to take the time off on an alternative week day.

(d) Clauses 44.3(b) and (c) do not apply in relation to days off which are specified in an employee's regular roster or pattern of ordinary hours as clause 44.3(a) applies to such days off.

51. It is evident that the relevant clauses in the Wine Award and Manufacturing Award are virtually identical. Consequently, we repeat and refer to our submissions regarding the meaning of "ordinary time rate" with respect to

clause 44.3(a)(i) of the Manufacturing Award in our submission dated 28 October 2016 in relation to that award.[9]

52. As the FWC is currently considering the meaning of "ordinary time rate" as used in clause 44.3(a)(i) of the Manufacturing Award, United Voice's claim should be dealt with after the position in the Manufacturing Award has been resolved. Indeed, at the conference held between the relevant parties with respect to the Wine Award on 8 August 2016, it was agreed that further discussions may resolve the issue in the Wine Award once the position in the Manufacturing Award becomes clearer. Should this position not be adopted, Ai Group would seek the opportunity to be heard further in relation to this issue.

[9]Available at: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201475-sub-aig-311016.pdf. See [11]-[47]