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20 January 2017

Associate to Deputy President Clancy
Fair Work Commission
By Email: chambers.clancy.dp@fwc.gov.au
CC: amod@fwc.gov.au

Dear Associate

AM 2014/249 - Wine Industry Award

We refer to the directions issued by the Commission in this matter on 14 December 2016, and our initial response to those directions dated 22 December 2016. In that response, we advised that we would provide our written submissions in support of the claims maintained in the exposure draft process.

Please find attached those submissions.

If you have any queries please contact Industrial Officer, Simon Blewett on 8352 9341. Any correspondence to our office regarding this matter should be marked for the attention of Simon Blewett.

Yours faithfully

SIMON BLEWETT
Senior Legal Officer

IN THE FAIR WORK COMMISSION AUSTRALIA

4 Yearly Review of Modern Awards
Wine Industry Award
Matter No: AM2014/249

UNITED VOICE SUBMISSIONS REGARDING THE EXPOSURE DRAFT

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Introduction

1. In its submissions of 22 December 2016, United Voice identified the claims it pursued in the exposure draft technical and drafting process. Those claims are the claims arising under items 35, 49 and 62 of the Commission's revised summary of submissions published on 26 July 2016.

2. Each of those claims relates to the adoption, by the drafter of the exposure draft, of the concept of the "minimum hourly rate" to determine the rate of payment to employees in particular circumstances.

3. The "minimum hourly rate", is identified in clause 10.1 of the exposure draft. The minimum hourly rate is the hourly rate for day workers performing work in the span of ordinary hours (between 6.00 am and 6.00 pm Monday to Friday).

4. United Voice's contention is that the equivalent provisions of the modern award do not confine payment to employees in the relevant circumstances by reference to the ordinary time rate of a day worker. United Voice contends, rather, that the modern award provides for the relevant rate to be the rate applicable to the employee on the occasion of the payment. For instance, if the employee is a shift worker at the relevant time, or is working on a Sunday at the relevant time, the relevant rate will be the rate being paid to that shift worker, or on that Sunday.

5. United Voice contends that the effect of the adoption of the concept of "minimum hourly rate" is to reduce the payment to which the employee will be entitled in the relevant circumstances below that to which they are currently entitled. It is inappropriate to effect such a reduction in the absence of a substantive case. No such substantive case has been mounted by any of the award parties.

Item 35

6. Item 35 concerns the difference in effect between clause 9.4 of the exposure draft, and its equivalent provision in the modern award, clause 29.4.

7. Clause 29.4 of the modern award 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."*

8. As is evident from its text, clause 29.4 has to operate upon different circumstances (those arising under clause 29.1, 29.2 or 29.3).

9. Clause 29.1 provides that a *day worker* must not be required to work 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 ½ hours without a paid meal break. Clause 29.3 provides that an employee required to work more than 2 hours overtime must be given a paid meal break prior to the commencement of the overtime and after each 4 hours of overtime worked thereafter.

10. Clause 29.4 then provides that if, in any of these circumstances, the meal break is not provided, a loading of 50% is given.

11. Read in context, it is clear that Clause 29.4 of the modern award deliberately does not specify the rate by reference to which the 50% loading is calculated. It leaves that rate to be determined by the circumstances. Where the employee denied a meal break is a day worker working their ordinary span of hours, the rate will be the ordinary time rate for that day worker. Where the employee is a shift worker, the rate will be the ordinary rate for that shift worker. Where the employee is a day worker or a shift worker about to commence more than 2 hours overtime, the rate will be the ordinary rate then applying to that employee. And where the employee is an employee working more than 4 hours overtime after the initial 2 hours overtime, the rate will be the overtime rate then applying to that employee for overtime work.

12. This is the natural and ordinary construction of the words of Clause 29.4. It is also the way that they would be expected to operate.

13. This construction is supported by the final sentence of Clause 29.3. That sentence 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."*

This sentence of Clause 29.3 envisages that the rate to be paid for a meal break before overtime commences will be the ordinary rate "then applying to the employee". That is, it envisages the rate will differ according to the circumstances – for instance, whether the employee is a day worker, or a shift worker, or depending on the day on which the occasion of the meal break arises. And this sentence clearly envisages that the rate to be paid for a meal break after 4 hours overtime will be a different rate again, that being the relevant overtime rate.

14. The fact that clause 29.3 itself envisages different rates to be paid for meal breaks makes it likely that Clause 29.4 is also intended to encompass different rates, according to the circumstances.

15. The history of the development of these provisions also demonstrates that this is the correct construction.

16. In May 2009, the Australian Industrial Relations Commission published the exposure draft of the modern award. The relevant provisions were clauses 27.1 to 27.4. Clauses 27.1 and 27.2 are identical to the clauses that are now 29.1 and 29.2. Clause 27.3 was identical to what is now clause 29.3, except that it did not contain the final sentence of what is now clause 29.3, referred to above. Clause 27.4 was the same as what is now clause 29.4 save that in lieu of the words "a loading of 50%", Clause 27.4 contained the words "at the rate of 150%". [1]

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[1] See *Award Modernisation Statement* [2009] AIRC CFB 450, at [109] and attachment A, available at http://www.airc.gov.au/awardmod/databases/liquor_manufacturing/Exposure/wine.pdf

17. The only submissions which appear to have been made on this aspect of the exposure draft were made by the South Australian Wine Industry Association in its submissions of 12 June 2009. [2] It submitted that Clause 27.3 should be amended to clarify that the meal break provided for by that clause should be at ordinary time rates. In respect of Clause 27.4, it noted a complication about the application of a 150% rate to circumstances where an employee was working overtime and receiving a 200% rate.

18. There appears to have been no discussion about this matter in the hearing relating to the modern award on 1 July 2009. In its decision making the modern award, the AIRC Full Bench made brief references to changes made to the exposure draft. In respect of meal breaks, the bench stated:

> *"The rates for paid meal breaks have also been detailed".* [3]

19. The modern award published with that decision provided for meal breaks at Clause 28. The final sentence of that which is now Clause 29.3 was added to Clause 28.3. And the words "a loading of 50%" were substituted for the words "the rate of 150%" in Clause 28.4.

20. It is clear from this history that the Commission deliberately intended that different rates be paid for meal breaks according to the circumstances in which they arose; it quite clearly rejected the SAWIA proposal that meal breaks be paid at ordinary time rates. And more importantly for present circumstances, it clearly intended that different rates would be used to calculate the 50% loading where a meal break was not provided, again according to the circumstances of the non-provision of the meal break.

21. For all these reasons, United Voice contends that under the modern award the loading of 50%, to be given to an employee where a meal break is not provided, is to be calculated by reference to the rate applicable to the employee in the circumstances of the non-provision. In any circumstance other than the non-provision of a meal break to a day worker during the ordinary span of hours, this rate will be higher than the "minimum hourly rate".

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[2] See SAWIA submissions, 12 June 2009, at paragraph 27, available at http://www.airc.gov.au/awardmod/fullbench/industries/awardmodindustry.cfm?award=liquor_manufacturing

[3] See *Award Modernisation decision* [2009] AIR CFB 826, at [148]

22. Therefore the adoption of the concept of "minimum hourly rate" in the exposure draft effects a reduction in the current entitlement of employees, other than day workers working within the ordinary span of hours, where a meal break is not provided. Given the absence of any substantive case for such a reduction, it is not appropriate that it be made.

23. United Voice submits that Clause 9.4 of the exposure draft should be amended by deleting the words "of the minimum hourly rate" (to maintain the current wording of the modern ward). Alternatively, United Voice submits that the words "of the minimum hourly rate" should be deleted and the words "of the rate then applying to the employee" should be inserted in lieu thereof.

Item 49

24. Item 49 concerns the difference in effect between Clause 16.2(d) of the exposure draft and its equivalent provision in the modern award, Clause 24.6(a).

25. Clause 24.6(a) provides:

> *"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."*

26. United Voice submits that the meaning of Clause 24.6(a) is clear: where an employee is engaged in the relevant work he or she must be paid 50% more than they would otherwise be receiving. This is the only open construction of the words of the clause. It also is the only open construction given the purpose of the clause, which is to make an additional payment to compensate for the nature of the work.

27. United Voice contends that Clause 16.2(d) of the exposure draft effects a reduction in this entitlement for workers performing the relevant work other than day workers working the span of ordinary hours.

28. Clause 16.2(d) provides:

"An employee engaged in washing out and chipping boilers or in cleaning flues must be paid 150% of the minimum hourly rate while they are engaged in such work."

29. By adoption of the concept "minimum hourly rate" the exposure draft limits the entitlement to 150% of the ordinary rate for a day worker working within the ordinary span of hours, regardless of the circumstances in which the particular employee is working. This represents a reduction in the current entitlement of employees.

30. It is also a reduction which is unfair. A simple example demonstrates this. A worker engaged on a Sunday is entitled to be paid at the rate of 200%. If that worker is directed to work washing out and chipping boilers his or her payment would arguably be *reduced* to 150% while engaged in that work, or at the least, he or she would receive no additional payment to compensate them for the nature of the work. That cannot be appropriate.

31. In any event, in the absence of any substantive case being made to support this reduction, it is inappropriate that it be made.

32. For these reasons, United Voice submits that the words "150% of the minimum hourly rate" be deleted from Clause 16.2(d) and that the words 50% extra be inserted in lieu thereof (to maintain the current wording of the modern award). Alternatively, United Voice submits that the words "of the minimum hourly rate" be deleted and the words "of the rate then applying to the employee" be inserted in lieu thereof.

Item 62

33. Item 62 deals with the difference in effect between and Clause 24.3(a)()i) of the exposure draft and Clause 34.3(a)(i) of the modern award.

34. Clause 34.3 makes provision for a rostered day off falling on a public holiday. Clause 34.3(a)(i) provides where an employee's rostered day off falls on a public holiday the employee is entitled, to 7.6 hours pay at the ordinary time rate. [4]

35. United Voice contends that the phrase "ordinary time rate" used in the clause means the ordinary time rate for the employee concerned.

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[4] Amongst other alternatives

36. It is generally accepted that phrases such as "ordinary time rate" refer to the rate for the ordinary or standard hours prescribed by an award or agreement, as opposed to overtime hours, or the usual or normal hours worked by a particular worker. [5] This is the meaning that should be provided to the phrase "ordinary time rate" in Clause 34.3(a)(i).

37. In some circumstances, phrases similar to "ordinary time rate" have been construed as excluding loadings and penalties such as shift loading [6] However this is not the way in which the phrase "ordinary time rate" is used in the modern award. It is used in Clause 15.2, where it can only sensibly mean the rate of pay for the ordinary hours worked by the employee concerned; where those ordinary hours are shift hours it would include the shift penalty. And it is used in Clause 30.6, where again, it can only mean the rate for the ordinary time worked by the employee concerned.

38. Therefore, United Voice contends that the effect of Clause 34.3(a)(i) of the modern award is, for a shift worker, that if a rostered day off falls on a public holiday, he or she is entitled to their ordinary rate of pay for the day, including their shift allowance.

39. In contrast, the equivalent provision in the exposure draft, Clause 24.3(a)(i) provides that where a employee's rostered day off falls on a public holiday then the employee is entitled to 7.6 hours of pay at the "minimum hourly rate". That is, for a shift worker, he or she would be entitled to 7.6 hours pay not inclusive of the shift allowance.

40. This constitutes a reduction in the entitlement of a shift worker. No substantive case has been made to support that reduction.

41. For these reasons, United Voice submits that Clause 24.3(a)(i) of the exposure draft should be amended by deleting the words "at the minimum hourly rate" and inserting in lieu thereof "at the ordinary time rate of pay for the employee concerned."

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Simon Blewett

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[5] See *Scott v Sun Alliance* [1993] HCA 46, at [6], [12]; *Catlow v Accident Compensation Commission* [1989] HCA 43, per Dawson J at [5], and per McHugh J at [12], [13].

[6] See in particular Kucks *v CSR Limited* (1996) IRCA 166