

Fair Work Commission  
Level 4, 11 Exhibition Street  
Melbourne, VIC 3000  
By email: amod@fwc.gov.au

9 May 2017

**Re: AM2014/269 AWU additional submissions – overtime rates for shiftworkers  
– minimum engagement for part-time and casuals (recalls and removals) –  
*Funeral Industry Award 2010***

**BACKGROUND**

1. The following parties attended a Conference on 29 March 2017 to discuss the drafting and technical issues found in the Exposure Draft for the *Funeral Industry Award 2010* as published on 16 November 2016:
  - The Australian Workers' Union (**AWU**)<sup>1</sup>
  - United Voice (**UV**)<sup>2</sup>
  - Australian Business Industrial & NSW Business Chamber (**ABI**)<sup>3</sup>
  - Australian Federation of Employers and Industries (**AFEI**)<sup>4</sup>
2. On 31 March 2017, together with a Revised Exposure Draft, the President, Justice Ross published a Report summarising the status of the drafting and technical issues as identified by item number in the 22 February 2017 Summary of Submissions – Technical and Drafting.
3. The President directed as follows:
  - 3.1. Items 10, 17 and 18 (uniform allowance, minimum engagement/ payment on weekends and public holidays) are substantive claims, and draft directions are to be filed if the relevant party or parties wish to pursue those claims.
  - 3.2. Item 12 (term 'applicable rate') will be dealt with on the papers by the Full Bench provided the parties agree to that course, and further submissions are to be filed in replacement of those previously filed by 4:00pm 19 April 2017.

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<sup>1</sup> See AWU 20 January 2017 Submission in AM2014/269 *Funeral Industry Award 2010* ('AWU January Submission').

<sup>2</sup> See UV 16 December 2016 Submission in AM2014/269 *Funeral Industry Award 2010* ('UV December Submission').

<sup>3</sup> See ABI 18 January 2017 Submission in AM2014/269 *Funeral Industry Award 2010* ('ABI January Submission').

<sup>4</sup> See AFEI 18 January 2017 Submission in AM2014/269 *Funeral Industry Award 2010* ('AFEI January Submission').

3.3. Items 15 and 16 (recalls and removals – minimum engagement/payment) will be dealt with on the papers by the Full Bench unless any party proposes a different course and further submissions may be filed in replacement to those previously filed by 4:00pm 19 April 2017.

4. In regards to paragraph 3.1 above, the AWU have filed draft consent directions.<sup>5</sup>
5. In regards to paragraphs 3.2 and 3.3 above, the AWU seeks leave to file the submissions set out below. We seek leave because the submissions were due on 19 April 2017.
6. All clauses unless otherwise stated refer to the Revised Exposure Draft published on 31 March 2017.

### **PROPOSED COURSE**

7. The AWU reserves it's position as to whether it requests a hearing in regards to the outstanding drafting and technical issues arising in these proceedings.
8. Submissions have not yet been made regarding items 10, 17 and 18. We also note, that the submissions of UV on 19 April 2017 were relied upon by ABI and AFEI in their additional submissions of 20 and 21 April 2017. This submission of the AWU supplements the material filed by UV with relevant and omitted detail regarding the applicable pre-modern award.
9. In the circumstances it may be beneficial for the Full Bench to navigate the detail of the parties' submissions by way of a short oral hearing. The AWU suggests the parties revisit this issue when all written submissions have been filed.

### **ITEM 12 – OVERTIME RATE FOR SHIFT WORKERS – CLAUSE 18.6**

#### **Background**

10. Parties were asked via additional text contained in the Exposure Draft to confirm whether the term 'applicable rate' in clause 18.6 (overtime for shiftworkers) refers to the shift rate (including the shift loading in clause 18.5) or the 'minimum hourly rate'. The AWU and UV both confirmed the clause refers to the applicable shift rate in clause 18.5.<sup>6</sup>
11. AFEI submitted that overtime for shiftworkers is paid on the 'minimum hourly rate' exclusive of shift loadings<sup>7</sup> and ABI propose to change 'applicable rate' at clause 18.6 to 'applicable minimum hourly rate'.<sup>8</sup>

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<sup>5</sup> See AWU 19 April 2017 correspondence and draft consent orders in AM2014/269 *Funeral Industry Award 2010*.

<sup>6</sup> UV December Submission at [8-3]; UV 22 February Submission in AM2014/269 *Funeral Industry Award 2010* at [8-11]; AWU January Submission at [9]; AWU 22 February 2017 Submission in AM2014/269 *Funeral Industry Award 2010* at [7].

<sup>7</sup> AFEI January Submission at [36].

<sup>8</sup> See ABI January Submission at [9.7].

## Summary of AWU position

12. The AWU are strongly of the view that shiftworkers are paid overtime on their shift rate. Our position reflects:
  - 12.1. An ordinary reading of the text contained in the modern award;
  - 12.2. The principle of additional remuneration contained in the modern awards objective; and
  - 12.3. The (pre-modern) *Funeral Industry Award 2003* on which the modern award is based.
13. The AWU consider the proposal to change the term 'applicable rate' to 'minimum hourly rate' or 'applicable minimum hourly rate' reflects an inaccurate interpretation of the term 'applicable rate' and to adopt either proposal is accordingly a substantive change that will reduce the rate of pay for employees in the funeral industry.
14. The ABI proposal is particularly confusing as the minimum hourly rate of course varies according to an employees classification, but otherwise does not absorb other rates such as penalties or allowances. To use the term 'applicable minimum hourly rate' is superfluous and misleading, as it is not used in other awards when referring to the 'minimum hourly rate.'

## Plain reading of the provisions

15. The shift penalty and shift overtime provisions appear as follows (our mark up at underlined):

### **18.5 Afternoon shift penalties**

- (a) *A shiftworker whilst on afternoon shift will be paid 120% of the minimum hourly rate.*
- (b) *A shiftworker on a non-continuing afternoon shift will be paid 150% of the minimum hourly rate for all ordinary hours worked during the shift.*

### **18.6 Overtime for shiftworkers**

- (a) *All time worked in excess of, or outside the ordinary working hours in clause 18.2, or on a shift other than a rostered shift, will be paid for at 150% of the applicable rate for the first three hours and 200% thereafter.*
- (b) *When less than 7 hours 36 minutes' notice has been given to the employer by a relief employee that they will be absent from work, and the employee whom the relief employee should relieve is not relieved and is required to continue to work on the employee's*

*rostered day off, the unrelieved employee will be paid 200% of the applicable rate.*

...

**19.1 Payment for overtime—other than shiftworkers**

- (a) *For work performed outside the hours fixed as the times for starting and finishing work in clause 13.2, an employee will be paid 150% of the minimum hourly rate for the first three hours worked and 200% of the minimum hourly rate thereafter.*

16. Clause 18.6 is clearly drafted to ensure the rate paid to a shift worker performing overtime will vary according to which shift penalty applies at clause 18.5 – the ‘applicable rate’.
17. By comparison, the overtime provisions for employees (other than shiftworkers) at clause 19.1 has clearly been drafted to be calculated on the ‘minimum hourly rate.’

**Principle of additional remuneration**

18. The shift penalties for afternoon shifts and non-continuous afternoon shifts are respectively paid rates of 120% and 150% of the minimum hourly rate.<sup>9</sup> These rates reflect the relative difficulty of performing non-continuous shiftwork relative to continuous shiftwork, and of performing shiftwork relative to day-work. A shiftworker who continues to work into a period of overtime is entitled to be compensated for the distinct and compounding cost of performing overtime in the circumstances.
19. Section 134 of the *Fair Work Act 2009 (FW Act)* provides that the Fair Work Commission (**Commission**) must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account a range of factors – this is ‘the modern awards objective’. These factors include consideration of the need to provide additional remuneration for the distinct categories of overtime and shiftwork and the associated concepts of performing work that is unsocial, irregular or unpredictable.<sup>10</sup> The submissions of ABI and AFEI are *inconsistent* with these principles.

**Practical effect of ABI and AFEI submissions:**

20. On ABI and AFEI’s construction of clause 18.6, the following applies:

- 20.1. continuous and non-continuous shiftworkers performing overtime are paid the same wage as a day-worker; and

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<sup>9</sup> Revised Exposure Draft, clause 18.5.

<sup>10</sup> *Fair Work Act 2009*, section 134(da).

- 20.2. non-continuous shiftworkers performing overtime are paid the same as continuous shiftworkers performing overtime; and
- 20.3. non-continuous shiftworkers would be paid the same wage for the first three hours of overtime as they receive when performing their ordinary hours.
21. This could not be the intended effect of the award. Shiftwork penalties and overtime penalties are distinct payments reflecting distinct disabilities associated with the work. It appears that the award modernisation Full Bench specifically inserted the term 'applicable rate' to refer to the varying continuous and non-continuous shiftwork rates. This finding is supported below with further analysis of award modernisation.

### **Award Modernisation**

22. In its Statement of 25 September 2009,<sup>11</sup> the award modernisation Full Bench confirmed the modern *Funeral Industry Award 2010* would be based on the *Funeral Industry Award 2003*<sup>12</sup> that had applied in Victoria ('the **Victorian Award**').<sup>13</sup>
23. The Victorian Award had two career streams – 'funeral directors' and 'coffin makers'. A range of provisions was separately provided for in each career stream. This included different shiftwork provisions in each stream. It is true that for the 'funeral directors' classifications, the overtime rates for shiftworkers were paid in substitution for, and not cumulatively to the shift rates prescribed. However, for 'coffin makers', overtime rates for continuous shiftworkers were clearly paid in excess of shift rates and for non-continuous shiftworkers, the same is arguable.
24. The following excerpts are found at clauses 7.6 and 7.9 in Schedule B of the *Victorian Award* (our emphasis at underlined):

#### **7.6 Afternoon or night shift allowances**

*7.6.1 A shift worker whilst on afternoon or night shift will be paid an additional 15% to the employee's ordinary time rate.*

*7.6.2 A shift worker who works on an afternoon or night shift which does not continue:*

*7.6.2(a) for at least five successive afternoons or nights in a five day workshop or six successive afternoons or nights in a six day workshop; or*

*7.6.2(b) for at least the number of ordinary hours prescribed by one of the alternative arrangements in 7.2 and 7.3 of this Schedule,*

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<sup>11</sup> [2009] AIRCFB 865 at [75].

<sup>12</sup> AP825425CRV.

<sup>13</sup> at [75]

*will be paid at the rate of time and a half for the first three hours and double time thereafter.*

7.6.3 A shift worker who:

7.6.3(a) *during a period of engagement on a shift, works night shift only; or*

7.6.3(b) *remains on night shift for a longer period than four consecutive weeks; or*

7.6.3(c) *works on night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least 1/3rd of his or her working time off night shift in each shift cycle*

*will during this period or cycle be paid an additional 30% for all time worked during ordinary working hours on the night shift.*

## **7.9 Overtime**

7.9.1 *The assignment of overtime by an employer to an employee will be based on specific work requirements and the practice of "one in, all in" overtime will not apply.*

7.9.2 *Subject to 7.9.3 of this Schedule, shift workers for all time worked in excess of or outside the ordinary working hours of shift workers in 7.2 and 7.3 or on a shift other than a rostered shift, will be paid at the following rates:*

7.9.2(a) *if employed on continuous work: double time;*

7.9.2(b) *if employed on other shift work: time and one half for the first three hours and double time thereafter.*

25. The Victorian Award provided for afternoon and night shifts. Each shift attracted the same shift penalty, subject to the rotation of shifts. Continuous shiftworkers were paid a loading of 115%; non-continuous shiftworkers were paid a loading of 150% for the first 3 hours and 200% thereafter; and continuous shiftworkers on non-rotating night shift were paid a loading of 130%.

26. It is not clear how clause 7.9.2(b) of the Victorian Award interacts with 7.6.2. The apparent effect is that non-continuous shiftworkers would be paid less when working overtime than when performing the majority of their ordinary hours (as they receive double-time after 3 hours on a shift). It is unlikely this was the intended effect.

27. On this analysis, at worst, under the Victorian Award, continuous shiftworkers in the coffin-making stream were clearly paid in excess of their shift rate (at 200%) when performing overtime. At best, all shiftworkers in the coffin-making stream were paid in excess of their shift rate.

28. The 6 classifications in the modern award make up the once separate career streams as can be seen at clauses 12.1 to 12.6. The classification descriptors clearly reflect the merging of funeral director and coffin making duties. For example, a Grade 2 employee can be a funeral director's assistant, an unqualified embalmer or an "employee engaged in coffin staining, including puttying, filling and sanding or buffing by mechanical means or operating a spray gun, applying stains, fillers and/or undercoats". Grades 1, 3 and 4 similarly contain both career types; Grade 5 refers to coffin manufacturing/assembly; and Grade 6 refers to qualified embalmers. There is no longer a regime of separation.
29. In addition to merging the classifications, the modern award provides a single set of provisions governing overtime for shiftworkers. In the absence of parties' submissions and; in the absence of commentary or specific wording found in the award modernisation statements and decisions; the AWU submits that the best inference to be made, is that the Full Bench rationalised an arrangement that entitled all workers to cumulative payment for working overtime and shiftwork regardless of their classification.
30. The plain wording of the modern award supports this inference. Moreover, in considering the proposals of ABI and AFEI to amend the payment of overtime on the 'applicable [shift] rate' to the 'minimum hourly rate' or the 'applicable minimum hourly rate', the Commission must also consider the principles contained in the modern awards objective as set out above at paragraph 19.
31. If the Commission accepts the position of the AWU and UV, to remedy any doubt, the AWU supports the proposal of UV to insert a definition of 'applicable rate' at clause 18.6 as follows:

*applicable rate means the rate of pay that the employee would have earned if they worked ordinary hours at the time they were working overtime, including shift allowances and penalty rates.*<sup>14</sup>

#### **ITEM 15 – OVERTIME – RECALL – MINIMUM ENGAGEMENT – CLAUSE 19.1(b)**

32. Parties were asked via additional text contained in the Exposure Draft how clause 19.1(b) interacts with the minimum engagement provisions for part-time and casual employees in clauses 10.5 and 11.3.
33. Clause 19.1(b) ensures that a full-time employee is entitled to a minimum payment of one hour if they are recalled to work before 7:00am or after 7:00pm. Clause 19.1(b) has work to do as full-time employees do not have minimum engagement provisions attached to their classification.
34. Part-time and casual employees recalled to work must be paid for three hours and four hours (respectively) in accordance with clauses 10.5 and 11.3. The text

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<sup>14</sup> See United Voice 19 April Submission at [14].

at clause 19.1(b) does not exclude the operation of the general provisions applicable for all part-time and casual employees.

35. To clarify the interaction between these clauses, we suggest an additional clause 19.1(c):

*Work performed by part-time and casual employees as prescribed in clause 19.1(b) is paid in accordance with the applicable minimum engagement periods prescribed at clauses 10.5 and 11.3.*

36. The current clause 19.1(c) would be renumbered '19.1(d).

**ITEM 16 – OVERTIME – REMOVALS – MINIMUM ENGAGEMENT – CLAUSES 19.4(a) AND 19.4(b)**

37. Parties were asked via additional text contained in the Exposure Draft how clauses 19.4(a) and 19.4(b) interact with the minimum engagement provisions for part-time and casual employees in clauses 10.5 and 11.3.

38. This question is similar to the previous. Accordingly, our submissions follow similarly.

39. The 'minimum payment of two hours' for removals performed in accordance with clauses 19.4(a) and 19.4(b) are applicable to full-time employees only. Removals performed by part-time and casual employees in accordance with these clauses are subject to a minimum engagement period of 3 and 4 hours respectively.

40. We disagree with the ABI submission<sup>15</sup> that the 2-hour minimum engagement periods prescribed at clauses 19.4(a) and 19.4(b) exclude the operation of the general provisions applicable for all part-time and casual employees.

41. To clarify the interaction between these clauses, we suggest an additional clause 19.4(c):

*Work performed by part-time and casual employees as prescribed in clauses 19.4(a) and 19.4(b) is paid in accordance with the applicable minimum engagement periods prescribed at clauses 10.5 and 11.3.*

42. The current clause 19.4(c) would be renumbered '19.4(d).



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

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<sup>15</sup> See ABI January Submission at [9.8].