



BACKGROUND PAPER

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Funeral Industry Award 2010*

(AM2014/269)

MELBOURNE, 16 AUGUST 2018

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

Background

[1] The purpose of this background paper is to address two outstanding substantive issues relating to the review of the *Funeral Industry Award 2010* (Funeral Award).

[2] The Funeral Award is one of the Group 4 awards. A decision relating to the Group 4 awards was issued on 21 March 2018 (the *March 2018 decision*).¹ An [exposure draft](#) based on the Funeral Award was republished on 26 March 2018. In a further decision issued on 7 August 2018 (the *August 2018 decision*) the Full Bench identified two substantive issues relating to the Funeral Award.² The decision noted that a conference would be convened before Justice Ross on **Friday 17 August** in **Sydney** at **2.00 pm** to discuss the two substantive issues. This background paper has been prepared to facilitate the discussions at that conference.

[3] The two issues are closely related. The first relates to the interaction between the clauses dealing with minimum periods of engagement for part-time and casual employees who are recalled to work overtime. The second issue relates to the provisions relating to work performed on Saturdays and Sundays. The two issues are set out in detail below.

Issue 1: Recall and removal provisions and minimum periods of engagement for part-time and casual employees

[4] This issue concerns the interaction between the clauses relating to recalls (clause 19.1(b) of the exposure draft) and removals (clause 19.4) and the clauses providing minimum periods of engagement for part-time and casual employees (clauses 10.5 and 11.3).

¹ [\[2018\] FWCFB 1548](#)

² [\[2018\] FWCFB 4175](#)

Minimum engagement periods for part-time and casual employees

[5] The minimum periods of engagement for part-time and casual employees are three and four consecutive hours, respectively.

[6] Clause 10.5 of the exposure draft deals with minimum engagement for a part time employees and states:

10.5 A part-time employee must be rostered for a minimum of three consecutive hours on any shift.

[7] Clause 11.3 of the exposure draft deals with minimum engagement for casual employees and states:

11.3 A casual employee must be paid for a minimum of four hours' work each time the employee is required to attend work, including when engaged more than once in any day.

Recall to work

[8] Clause 19.1(b) of the exposure draft provides a minimum payment of one hour's work for recall work outside the hours of 7.00 am to 7.00 pm (if this work had not already been arranged) on each occasion the employee is recalled.

[9] Clause 19.1 of the exposure draft states:

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.

(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 applicable overtime or penalty rate specified in either clause 19.1(a) or clause 20.1 on each occasion the employee is recalled to work overtime.

(c) The base hourly rate for calculating overtime will be the employee's minimum hourly rate in clause ~~15.1~~ ~~16.1~~.

Removals

[10] Clause 19.4(a) of the exposure draft provides that where an employee is called to undertake removal work between the hours of 7.00 pm and midnight and that work is completed at or before midnight, the employee will be paid a minimum payment of two hours for any removal work performed. Clause 19.4(b) of the exposure draft provides a minimum payment of two hours for any removal work between the hours of midnight and 7.00 am.

[11] Clause 19.4 of the exposure draft states:

19.4 Removals

(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 the minimum hourly rate for the first three hours of work and 200% of the minimum hourly rate thereafter with a minimum payment of two hours.

(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 the minimum hourly rate with a minimum payment of two hours.

(c) If a removal starts between the starting and finishing times as prescribed in clause 13.2, the employee will be paid at the rate prescribed in clause 19.1. If a subsequent removal is requested after 7.00 pm, although the original removal started before that time, the employee will be paid at the rate as prescribed in clause 19.4, for the subsequent removal.

The March 2018 decision

[12] In the *March 2018 decision* the Full Bench *provisionally* held that where a part-time employee is recalled to work overtime, the employee is to be paid the minimum of one hour's pay at the applicable overtime or penalty rate at clause 19.1(b) of the exposure draft.³ In relation to recalls for part-time employees the Full Bench noted the following:

[468] The wording of the minimum engagement clause for part-time employees is such that the three hour minimum applies only to a part-time employee's rostered or ordinary hours.

[469] As such, we have formed a *provisional* view that the minimum engagement period provided for in clause 10.5 of the exposure draft does not apply to the recall provisions in clause 19.1(b) for part-time employees. It is our *provisional* view that clause 10.5 of the exposure draft applies to an employee's work rostered during ordinary hours, whilst clause 19.1(b) applies to an employees work outside their fixed starting and finishing times.

[470] The exposure draft states that a part-time employee has an agreed regular pattern of hours which specifies the hours and days worked and the starting and finishing times of each day, as provided at clause 10.3. It is our view that the rostering of a minimum of three consecutive hours referred to at clause 10.5 of the exposure draft refers to this agreed regular pattern of work. Therefore, the minimum engagement period does not apply in circumstances where an employee is working in excess of the rostered hours.

[471] Clause 10.7 of the exposure draft provides that all time worked in excess of the hours agreed under clause 10.3 or 10.4 will be overtime and paid for at the overtime rates at the rates prescribed in clause 19.

[472] It is therefore our *provisional* view that where a full-time or part-time employee is recalled to work overtime the employee is to be paid the minimum of one hour's pay at the applicable overtime or penalty rate at clause 19.1(b) of the exposure draft. We note that the purpose of the overtime or penalty rate is to compensate employees for the disutility of working in addition to their ordinary hours and in those circumstances part-time and full-time employees do need the added protection of a minimum engagement.

³ [2018] FWCFB 1548, at [472]

[13] In relation to recalls for casual employees, the Full Bench held that the casual minimum engagement provisions are different to part-time employees. Specifically, clause 11.3 of the exposure draft provides that casual employees ‘must be paid for a minimum of four hours’ work each time the employee is required to attend work, including when engaged more than once in any day.

[14] In line with their *provisional* view about recalls, the Full Bench said:

‘the minimum engagement of part-time employees for rostered work in clause 10.5 does not apply to **removals** work performed outside the ordinary hours of work. It is our *provisional* view that part time employees would receive a minimum payment of 2 hours if they were called to perform removal work.’⁴

[15] In line with their *provisional* view about recalls, the Full Bench held that the casual minimum engagement period in clause 11.3 applies where a casual employee is required to undertake **removals** as per clause 19.4.⁵

Parties’ submissions

[16] In response to the *March 2018 decision*, the AWU filed a submission supporting the *provisional* view of the Full Bench regarding the application of the minimum engagement provision for casual employees. However, the AWU objected to the *provisional* view of the Full Bench in relation to part-time employees.

[17] The AWU submit that the minimum engagement provisions specific to recalls and removals provide protection for full-time employees only, as full time employees do not have a general minimum engagement provision in the Funeral Award.⁶ They submit that part-time and casual employees, however, do have general minimum engagement provisions in the Funeral Award which are intended to be observed for all purposes, including recalls and removals. The AWU submit that the *provisional* view of the Full Bench regarding the application of the minimum engagement provision for part-time employee introduces an inconsistency in respect to part-time employees’ minimum engagements under the Funeral Award.

[18] ABI submit that the Commission’s *provisional* view in relation to the minimum engagement for casuals in the industry has been made on the basis of guaranteeing a minimum number of hours of work to a class of employee not traditionally entitled to such a guarantee.

The August 2018 decision

[19] After consideration of the parties’ submissions, the Full Bench noted in the *August 2018 decision* that the *provisional* view set out in the *March 2018 decision* in relation to the application of the minimum engagement provisions for part-time employees was incorrect. The Full Bench indicated the AWU submission had merit and agreed that the specific

⁴ [2018] FWCFB 1548, at [478]

⁵ [2018] FWCFB 1548, at [479]

⁶ AWU [submission](#), 26 April 2018, at para 33

minimum engagement provisions relating to both part-time and casual employees (clauses 10.5 and 11.3) are applied for these types of employees instead of the minimum engagement provisions set out at clauses 19.1 and 19.4. The relevant extracts from the *March 2018 decision* are set out below:

[469] As such, we have formed a *provisional* view that the minimum engagement period provided for in clause 10.5 of the exposure draft does not apply to the recall provisions in clause 19.1(b) for part-time employees. It is our *provisional* view that clause 10.5 of the exposure draft applies to an employee's work rostered during ordinary hours, whilst clause 19.1(b) applies to an employees work outside their fixed starting and finishing times.

[470] The exposure draft states that a part-time employee has an agreed regular pattern of hours which specifies the hours and days worked and the starting and finishing times of each day, as provided at clause 10.3. It is our view that the rostering of a minimum of three consecutive hours referred to at clause 10.5 of the exposure draft refers to this agreed regular pattern of work. Therefore, the minimum engagement period does not apply in circumstances where an employee is working in excess of the rostered hours.

[471] Clause 10.7 of the exposure draft provides that all time worked in excess of the hours agreed under clause 10.3 or 10.4 will be overtime and paid for at the overtime rates at the rates prescribed in clause 19.

[472] It is therefore our *provisional* view that where a full-time or part-time employee is recalled to work overtime the employee is to be paid the minimum of one hour's pay at the applicable overtime or penalty rate at clause 19.1(b) of the exposure draft. We note that the purpose of the overtime or penalty rate is to compensate employees for the disutility of working in addition to their ordinary hours and in those circumstances part-time and full-time employees do need the added protection of a minimum engagement.

...

[475] The casual minimum engagement provision has broader application and, in our *provisional* view, clause 11.3 applies to any work undertaken by a casual employee, including overtime recall work where the employee is required to attend work. The *5 July 2017 decision* noted the following purpose of minimum engagement periods:

[399] 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.⁷

[476] The policy behind the above reasoning applies to the four hour minimum engagement for casual employees recalled to work overtime. Casual employees do not have the certainty of agreed hours like full-time or part-time employees and the payment of the minimum engagement period for each attendance at work provides some guarantee of sufficient work.'

[20] In the *August 2018 decision* the Full Bench noted:

⁷ [2017] FWCFCB 3541, at [399]

[290] Upon reflection, it appears that our *provisional* view set out in the *March 2018 decision* is incorrect and the AWU submission has merit. We agree that the specific minimum engagement provisions relating to part-time and casual employees (clauses 10.5 and 11.3) are applied for these types of employees instead of the minimum engagement provisions set out at clauses 19.4 and 20.1.’

[21] In the *August 2018 decision* the Full Bench indicated that this issue would be referred to a separate Full Bench, as it is a substantive item. It was noted that in the interim, a conference of interested parties would be convened.

Issue 2: Penalty rates for work on a Saturday or Sunday and minimum periods of engagement

[22] This issue concerns the interaction between the provisions relating to work performed on Saturdays and Sundays in clauses 20.1(a)(i) and 20.1(b) of the exposure draft and the minimum periods of engagement for part-time and casual employees in clauses 10.5 and 11.3.

[23] Clause 20.1 of the exposure draft deals with penalty rates as follows:

20. Penalty rates

20.1 Work on Saturday, Sunday or public holidays

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 **150%** of the minimum hourly rate for the first three hours worked, and **200%** of the minimum hourly rate thereafter, with a minimum of two hours’ pay.

(ii) Where an employee is 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 the minimum hourly rate; and/or
- if the work exceeds three hours, all additional time will be paid at **200%** of the minimum hourly rate.

(b) Sunday

For all time worked on a Sunday an employee will be paid 200% of the minimum hourly rate, with a minimum payment of two hours’ pay.

(c) Public holidays

(i) **200%** of the employee’s minimum hourly rate will be paid for all work performed on a public holiday.

(ii) The rates prescribed in clause 20.1(c) for shiftworkers are in substitution for, and not cumulative on, the shift penalty prescribed in clause 18.5.

(d) Work performed by part-time and casual employees, as prescribed in clauses 20.1(a)-(c), is subject to the applicable minimum engagement periods prescribed at clauses 10.5 and 11.3.

[24] The text at clause 20.1(d) was *provisionally* inserted into the exposure draft following the *March 2018 decision*.

[25] As outlined earlier, the minimum periods of engagement for part-time and casual employees are three and four consecutive hours, respectively.

[26] In the *March 2018 decision* the Full Bench *provisionally* held that the minimum engagement periods in clauses 10.5 and 11.3 are intended to operate to the exclusion of those provided for in clauses 20.1(a) and (b), such that part-time and casual employees will have a minimum engagement period of three and four hours respectively. The Full Bench *provisionally* adopted a proposal by the AWU to insert clause 20.1(d), set out in red text above.

[27] Interested parties were given the opportunity to provide submissions in relation to the insertion of clause 20.1(d).⁸

[28] The AWU and United Voice supported the *provisional* view of the Full Bench. United Voice submitted that the addition of clause 20.1(d) will ensure that part-time and casual employees have certainty regarding their minimum engagement periods.⁹

[29] ABI opposed the *provisional* view and the insertion of the AWU's wording¹⁰ on the basis that it effectively allows casuals to be paid double of what a full or part-time employee would receive for performing removal work after hours even though the work being performed by either a full-time, part-time or casual employee is identical. They submitted that this variation will have a significant financial impact on the funeral industry and that is likely that the cost of increasing the minimum engagement from two to four hours (particularly when that work is already paid for at overtime rates) for casuals undertaking weekend or removal work will be passed on to mourning families, particularly by smaller operators who cannot employ or will have limited numbers of permanent employees available to perform the same work for a lesser rate of pay.¹¹

[30] In the *August 2018 decision* the Full Bench indicated that this was a substantive issue and would be referred to a separate Full Bench and that, in the interim, a conference of interested parties would be convened.

Conference

[31] A conference will be convened before Justice Ross on **Friday 17 August** in **Sydney** at **2.00 pm** to discuss the two substantive issues outlined in this background paper.

⁸ [2018] FWCFB 1548, at [490]

⁹ UV [submission](#), 18 April 2018, at para 37

¹⁰ ABI & NSWBC [submission](#), 20 April 2018, at paras 16-17

¹¹ ABI and NSWBC [submission](#), 24 July 2017, at paras 17-18

[32] Parties are encouraged to have discussions among themselves prior to the conference, to explore whether a joint position can be reached. In the absence of such an agreement the parties will be asked to outline the nature of the case they intend to run in relation to these issues, such as witness evidence and estimated number of days required for hearing.