

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

03 July 2017

Re: AM2014/269 AWU additional submissions – (items 10, 17 & 18) uniform allowance – minimum engagement/payment on weekends and public holidays – *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**)¹
 - United Voice (**UV**)²
 - Australian Business Industrial & NSW Business Chamber (**ABI**)³
 - Australian Federation of Employers and Industries (**AFEI**)⁴
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.

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

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

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

⁴ 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 paragraphs 3.2 and 3.3 above, the AWU filed submissions on 9 May 2017.⁵
 5. In regards to paragraph 3.1 above (items 10, 17 and 18), the President directed the AWU and United Voice to file written submissions and any evidence by 4:00pm 31 May 2017.
 6. The AWU does not wish to put on evidence at this time in support of item 17 – minimum payment on weekends. We have proposed to amend clause 20.1(d) to clarify that clauses 20.1(a)(i) and 20.1(b) do not exclude the operation of clauses 10.5 and 11.3 – the substantive part-time and casual employment minimum engagement clauses.⁶ We maintain this issue is technical in nature and rely on our previous submissions. The disputed issue assigned as ‘item 17’ is very similar to those assigned as items ‘15’ and ‘16’ which are being dealt with as drafting and technical issues. The opposing submissions assigned to these 3 item numbers each deal with the interaction between the minimum engagement/payment provisions for part-time and casual employees and other clauses that also deal with a minimum payment – that is, which are the dominant clauses? The AWU submit that in each circumstance, where there is an inconsistency, the more beneficial part-time and casual employment provisions apply.
 7. In regards to item 10, we make brief submissions below. There is a simple explanation for why the modern award only prescribes a uniform allowance for full-time employees. The clause is derived from just one of two classification streams under the pre-modern *Funeral Industry Award 2003*⁷. The AWU propose a minor change detailed below.
 8. In regards to item 18, we also make brief submissions in support of the insertion of a minimum payment on public holidays. A minimum payment is currently provided on Saturdays and Sundays. Having reviewed the pre-modern funeral awards, it appears the minimum payment was not included as a matter of unintended course rather than a considered outcome. We seek leave to file these submissions, as they were due on 31 May 2017.
 9. All clauses referred to below unless otherwise stated refer to the Revised Exposure Draft published on 31 March 2017.

⁵ See AWU 9 May 2017 Submission in AM2014/269 *Funeral Industry Award 2010* (‘AWU May Submission’).

⁶ See AWU 22 February 2017 Submission in AM2014/269 *Funeral Industry Award 2010* (‘AWU February Decision’)[11].

⁷ AP825425CRV.

10. We note these submissions are made with the support of United Voice.

LEGISLATIVE FRAMEWORK

11. We briefly summarise the modern awards objective and the *Preliminary Jurisdictional Decision* of the Full Bench⁸.

12. In exercising its powers in the four-yearly review the Fair Work Commission must ensure that the awards together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account the matters listed in s 134(1)(a) – (h) of the *Fair Work Act 2009* ('the FW Act'). This is the modern awards objective.

13. As applicable to each of our proposals, the Full Bench in the *Preliminary Jurisdictional Decision* relevantly said at [23] (our emphasis):

...The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

14. As will be demonstrated, the AWU's proposed variations are relatively minor and can be dealt with accordingly.

ITEM 10 – UNIFORM ALLOWANCE

15. The question is posed in the Exposure Draft – does the uniform allowance apply to all employees? The AWU have previously made submissions in the affirmative.⁹

Current provisions

16. Clause 16.3(c) is an expense related uniform allowance and appears as follows:

Where a full-time employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform.

⁸ *Four Yearly Review of Modern Awards – Preliminary Jurisdictional Decision* [2014] FWCFB 1788.

⁹ See AWU January Submission at [8] and AWU February Submission at [4] to [5].

17. There is no logic to this provision. The purchase cost of a uniform is the same for any employee regardless of their employment category, and the cost of laundering a uniform is largely subject to the number of shifts worked. For example, a part-time employee as opposed to a full-time employee will have lower laundering costs overall and the same purchase cost per uniform. A part-time employee may also require fewer uniforms at a time or fewer replacement uniforms over time. The expense will adjust to the employment type.
18. These principles are preserved in the AWU's proposal to simply remove words 'full-time' at clause 16.3(c) as follows (amendment underlined and in red):

Where an full-time employee is required to wear a uniform, the employer will reimburse the employee for the cost of purchasing and laundering the uniform.

19. We have previously made submissions to this effect¹⁰ and repeat the remainder in substance. Clause 16.3(c) in its current form is directly inconsistent with other clauses under the award:

19.1. Clause 10.2(c) entitles a part-time employee 'on a pro-rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.'

19.2. For casual employees, the casual loading is not paid in lieu of any specific entitlements under the Award including allowances – see clause 11.

Conference 29 March 2017

20. We note the following passage at PN33 to PN37 in the transcript of proceedings before Justice Ross on 29 March 2017 in regards to the uniform allowance (our emphasis at underlined):¹¹

PN27

JUSTICE ROSS:

...

PN33

I don't think we need to separately constitute a Full Bench to deal with an issue like that, but give some thought to it, put in a note saying you intend to pursue it with some draft directions setting out how long you think you need to put your material in and some time for any employer interests to respond, and we would probably - then a response from you - and we would probably deal with that on the papers, I think, unless anyone wants to have an oral hearing. So just reflect on it, but I think you would need to run it as a claim. Anyone

¹⁰ See AWU January Submission at [8] and AWU February Submission at [4] and [5].

¹¹ Transcript 29 March 2017 in AM2014/269 *Funeral Industry Award 2010*.

have any different view about any of that or anything else you want to say?

PN34

MS WALSH: No, I guess just if it were the case that that's popped in at some point, that expression or limitation to full-time employees, everything else in the award would support the uniform allowance applying to casuals and part-time employees. So if it were the case that that was a fairly trackable change, I guess we probably wouldn't be putting on extensive submissions.

PN35

JUSTICE ROSS: I agree. It may just come down to a construction history argument or it might come down to a merit argument.

PN36

MS WALSH: Yes.

PN37

JUSTICE ROSS: But we don't really know at the moment. It may have been included in the award before you had part-time and casual provisions, but that would be a bit odd. Why would you expressly refer to full-time? I just don't know where it comes from. It is a bit unusual, but I think we need to know more about it. Have a look into it and also, amongst your members, whether it is a requirement or what the practice is at the moment and see how we go. All right?

PN38

MS WALSH: Yes.

Award modernisation

21. In response to the passage above, we have reviewed the award modernisation proceedings. In its Statement of 25 September 2009,¹² the award modernisation Full Bench confirmed the modern *Funeral Industry Award 2010* would be based on the *Funeral Industry Award 2003*¹³ that had applied in Victoria ('the **Victorian Award**').¹⁴
22. Having examined the Victorian Award it is clear the uniform allowance is derived from the funeral directors stream of the Victorian Award.¹⁵ However, the protective clothing provisions provided in the 'coffin makers' stream were not modernised. This is a problem given both classifications were absorbed into the modern award.

¹² [2009] AIRCFB 865 at [75].

¹³ AP825425CRV.

¹⁴ at [75].

¹⁵ See Schedule A – Funeral Directors, clause 6.3.

23. Schedule B – Coffin Makers at clause 4.2 of the Victorian Award appears as follows:

4.2 Protective clothing

4.2.1 *An employee may purchase suitable protective clothing, footwear and/or safety gear to be worn during working hours as required, and the employer will reimburse the employee for the cost of these items. This clause does not apply if the items are provided by the employer.*

4.2.2 *The regular laundering of the protective clothing is the responsibility of the employee.*

4.2.3 *Where the cost of protective clothing and/or footwear is reimbursed to an employee, if the employee resigns or is dismissed, the employer has the right to deduct from any monies owing to that employee the cost of these items based on the following scale:*

Duration of employment	% of total cost that may be deducted by employer
<i>Up to 5 weeks</i>	<i>100%</i>
<i>5 weeks and less than 9 weeks</i>	<i>66-2/3%</i>
<i>9 weeks and less than 13 weeks</i>	<i>33-1/3%</i>
<i>13 weeks and over</i>	<i>0%</i>

The duration period will commence from the date of reimbursement.

4.2.4 *Where an employee is reimbursed the cost of any items purchased under this clause, the items will become the property of the employer.*

24. We have previously analysed the merging of classifications during award modernisation in regards to shift allowances and overtime,¹⁶ but summarise the relevant analysis below.

25. 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 the uniform allowance for ‘funeral director’ classifications, and the protective clothing allowance for ‘coffin maker’ classifications, as set out above. We accept the uniform allowance for ‘funeral directors’ was prescribed only for full-time employees. However, this was clearly not the case for all employees under the award.

26. The 6 classifications in today’s 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

¹⁶ See AWU May Submission at [22] to [31].

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.

Summary of position

27. The AWU understand there are a range of technical issues arising in the merging of classifications that were not picked up in the modernisation process. This appears to be the case in regards to at least the modernisation of the protective clothing allowance and the shiftwork provisions as our submissions here and earlier have demonstrated.
28. Additional consideration should be given to the fact that the current uniform allowance conflicts with the part-time clause and is not explained by the casual employment clauses. Further, there is simply merit in covering the out-of pocket costs to an employee required to purchase and maintain uniforms or protective clothing (however described). As above, Justice Ross indicated that it may come down to a construction history argument or it might come down to a merit argument. We say it comes down to both.

ITEM 18 – MINIMUM PAYMENT – PUBLIC HOLIDAYS

29. The AWU have previously questioned why there is no minimum payment for time worked on public holidays under the Award given there is a minimum payment prescribed on Saturdays and Sundays.¹⁷

Current provisions

30. Clause 20.1 prescribes a minimum of two hours’ pay on Saturdays and Sundays but is silent in regards to public holidays.¹⁸ There is no apparent reason for the inconsistency. The penalty rates applicable on Sundays and public holidays are the same – 200%. That is, the value of performing work on a Sunday and public holiday has been assigned the same numerical value under this award. Accordingly, the imposition or cost to an employee attending work on a public holiday should be valued equally. To use the words contained in section 134(1)(f) of the FW Act, the AWU’s proposal promotes internal consistency in this award as it ensures a “simple, easy to understand” rostering and payment system for work performed on penalty days – Saturdays, Sundays and public holidays.

¹⁷ See AWU February Submission at [12] to [13].

¹⁸ See clause 20.1 of the Exposure Draft in AM2014/269 *Funeral Industry Award 2010*.

Proposed variation

31. The AWU's proposal is to insert a minimum payment on public holidays as follows (amendment at underlined and in red):

20.1 Work on Saturday, Sunday or public holidays

(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, with a minimum payment of two hours' pay.*

(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.*

32. The above proposal does not present a significant change for the following reasons:

32.1. a minimum payment on public holidays presents limited additional wages costs given the existing part-time and casual minimum payment provisions; and;

32.2. any additional wages cost relies on specific circumstances where less than 2 hours work is required on a given public holiday (and by a full-time worker as above);

- 32.3. the proposal is not new in the funeral industry – the entitlement existed in a number of pre-modern instruments; and
- 32.4. a minimum payment on public holidays will ensure consistency across penalty days.
33. Accordingly we submit that the proposed change can be determined with little formality as referred to in the *Preliminary Jurisdictional Decision* cited above.

Modern awards objective

34. The proposed change will have limited impact given that the public holiday work minimum payment would only apply to full-time employees. Part-time and casual employees are entitled to a minimum of 3 and 4 hours work (respectively) pursuant to clauses 10.5 and 11.3 of the Exposure Draft. As such, the likely impact on business, productivity and employment costs is negligible. The remainder of the considerations contained in the modern awards objective do not appear relevant to this application.

Award modernisation

35. As stated above, the award modernisation Full Bench confirmed the Victorian *Funeral Industry Award 2003* would form the basis of the modern award. As such, much of the modern award takes the shape of the Victorian Award including the penalty provisions governing work on Saturday, Sunday or public holidays. The Victorian Award did not provide a minimum payment on public holidays and no such entitlement was actively inserted. However, the following pre-reform awards and NAPSA did prescribe a minimum payment (our mark up at underlined):

35.1. ***A.C.T. Funeral Industry Award 2002***¹⁹

21.5 Overtime worked on a public holiday as defined in clause 21.1, shall be paid at the rate of double time and a half. Payment for work performed during what would have been the normal spread of hours had the day not been a public holiday as defined in clause 21.1, shall be at the rate of time and one half in addition to the payment of a day's pay for the public holiday with a minimum payment of three hours.

35.2. ***Funeral Industry Award (South Australia) 2003***²⁰

29.3 All time worked on a public holiday shall be paid for at the rate of time and a half plus ordinary time for the public holidays with a minimum payment of four hours.

¹⁹ AP815104CRA.

²⁰ AP827092.

35.3. **Funeral Services Award - State 2002**²¹

7.6 PUBLIC HOLIDAYS

7.6.1 Subject to clause 7.6.6 all work done by any employee on:

- the 1st January;
- the 26th January;
- Good Friday;
- Easter Saturday (the day after Good Friday);
- Easter Monday;
- the 25th April (Anzac Day);
- The Birthday of the Sovereign;
- Christmas Day;
- Boxing Day; or
- any day appointed under the Holidays Act 1983, to be kept in place of any such holiday

will be paid for at the rate of double time and a-half with a minimum of 4 hours.

Summary

36. The AWU's proposal is a minor change intended to bring clause 20.1 – the Saturday, Sunday and public holiday penalty provisions into line with one another. The proposal is consistent with a number of pre-modern instruments and appeals to the modern awards objective. The insertion of a minimum payment on public holidays will ensure consistency across penalty days and has only a minor potential cost if any.



Roushan Walsh
NATIONAL LEGAL OFFICER
The Australian Workers' Union

²¹ AN140127.