

Australian Industry Group

Application to vary the Funeral  
Industry Award 2020

**Reply Submission**  
(AM2021/61)

**27 AUGUST 2021**

**Ai**  
GROUP

# AM2021/61 – APPLICATION TO VARY THE FUNERAL INDUSTRY AWARD 2020

## 1. INTRODUCTION

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the Decision issued by the Fair Work Commission (**Commission**) on 13 August 2021 (**August Decision**) regarding the Application made by the Australian Workers' Union (**AWU**) to vary the *Funeral Industry Award 2020* (**Funeral Award**). The present Application seeks to vary certain clauses in the Funeral Award to give effect to a consent position reached regarding the interaction between the casual loading and the overtime penalties, as reflected in the Overtime for Casuals common issue proceedings conducted as part of the 4 yearly review of modern awards. The Funeral Award was listed amongst those awards where a consensus was reached that the casual loading and the overtime penalty rate were added separately to the minimum hourly rate.<sup>1</sup>
2. The Commission, in its August Decision expressed provisional views that, inter alia, the cumulative approach to the interaction between the casual loading and overtime loading would not necessitate an amendment to clauses 19.2, 20.6(c) and 20.7(c) because such provisions which deal with rostered days off have no practical application to casual employees engaged by the hour (pursuant to clause 11.1).<sup>2</sup>
3. This reply submission responds to the submission filed by the AWU opposing the provisional views of the Commission as expressed in the August Decision.

### **Application of the cumulative approach to clauses 19.2, 20.6(c) and 20.7(c)**

4. The Application filed by the AWU on 10 May 2021 proposed that the Commission amend the Funeral Award by, inter alia, making the following relevant amendments:

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<sup>1</sup> [2020] FWCFB 4350, [300].

<sup>2</sup> [2021] FWC 4903, [9] and [10].

- By adding the following words at the end of clause 19.2: “The rate will be 175% of the minimum hourly rate for a casual employee”.
  - By adding the following words at the end of clause 20.6(c): “The rate will be 245% of the minimum hourly rate for a casual employee”.
  - By adding the following words at the end of clause 20.7(c): “The rate will be 275% of the minimum hourly rate for a casual employee”.
5. The proposed changes were to provide for a cumulative relationship between the casual loading and the penalties mandated under the relevant clauses.
  6. On 25 June 2021, Ai Group sent Correspondence to the Commission stating that the Overtime for Casuals common issue proceedings did not necessarily pertain to the penalties applicable to unrelieved shiftworkers under clause 20.6(c) and 20.7(c) as such a matter was not a live issue at the time of the proceedings. Ai Group stated that the cumulative approach should not be taken to apply as a matter of course without further examination being conducted into the intended interaction between these provisions and the casual loading.
  7. Since this Correspondence was sent, the Commission expressed provisional views which lend further support to Ai Group’s position. At paragraphs [9] – [10] of the August Decision, the Commission said:

**[9]** Insofar as the application concerns clause 19.2, I am not satisfied that there is any ambiguity or uncertainty requiring rectification. Clause 19.2 prescribes a penalty rate for work performed on an employee’s rostered day off. An entitlement to a rostered day off can only arise with respect to an employee working an average of 38 hours a week across a work cycle of up to 28 days who works the necessary amount of additional hours each day in order to accrue a rostered day off in the cycle. A casual employee cannot, by definition, accrue a rostered day off since, under clause 11.1, they are engaged by the hour and, under clause 11.2, must be paid for each ordinary hour worked. Clause 19.2 has no practical application to casual employees, and there is therefore no need to specify any separate penalty rates for such employees.

**[10]** For similar reasons, I do not consider that any ambiguity or uncertainty arises in respect of clauses 20.6(c) and 20.7(c). The provisions prescribe penalty rates for an

employee who is required to continue work on their rostered day off because they are not relieved, and are not practically applicable to casual employees. A casual employee engaged and paid by the hour cannot, by definition, have days where they are and are not required to work.

8. The AWU has responded by opposing the Commission's provisional views, in part, on the grounds that, as a result of the Casual Terms Award Review, clause 11.1 of the Funeral Award is to be removed and replaced with reference to s.15A(1) of the *Fair Work Act 2009* (Cth) (**FW Act**).<sup>3</sup>
9. Ai Group does not agree with the AWU's reasons for opposing the Commission's provisional views in this respect. The stated justification for making the relevant variations to the Funeral Award following the Overtime for Casuals common issue proceedings was to give effect to the consensus reached regarding the cumulative relationship between the relevant penalties.
10. The removal of clause 11.1 from the Funeral Award and the insertion of a reference to s. 15A(1) of the FW Act could not have been contemplated by the parties at the time that the consent position was reached. As such, this more recent event should not be taken into account in giving effect to the Commission's decision in the Overtime for Casuals common issue proceedings. Ai Group disagrees with the AWU's position that the forecast amendments to clause 11 should dissuade the Commission from the provisional views expressed regarding the relationship between the casual loading and the penalties provided for under clauses 19.2, 20.6(c) and 20.7(c) of the Funeral Award.
11. Ai Group supports the Commission's reasons for refraining from making the AWU's proposed amendments to clauses 19.2, 20.6(c) and 20.7(c) of the Funeral Award.

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<sup>3</sup> [2021] FWCFB 5153.