

IN THE FAIR WORK COMMISSION

MATTER: s. 160 APPLICATION TO VARY *FUNERAL INDUSTRY AWARD 2020*

MATTER NO: AM2021/61

THE AUSTRALIAN WORKERS' UNION – SUBMISSION OPPOSING PROVISIONAL VIEW

BACKGROUND

1. On 13 August 2021, Vice President Hatcher issued a Decision¹ concerning an application by The Australian Workers' Union ('**AWU**') pursuant to s 160 of the *Fair Work Act 2009* ('**FW Act**') to vary the *Funeral Industry Award 2020* ('**Funeral Award**') to correct errors or uncertainties.
2. The Decision contains a provisional view regarding proposed amendments to the Funeral Award at [14] and invites parties at [15] to make a submission within seven days if they oppose the provisional view.
3. The AWU opposes elements of the provisional view and provides the following submissions in support of its position.

CASUAL MINIMUM ENGAGEMENT

4. The Decision identifies that clause 11.4 of the Funeral Award contains a casual minimum engagement entitlement of four hours whereas the removal conditions in clause 19.4(a) and (b) refer to a minimum engagement of two hours.
5. The Decision contains a provisional view that this potential conflict should be resolved by varying clause 11.4 to refer to the two-hour minimum engagement for removal work.
6. However, the potential conflict between these provisions has already been resolved during the 4-yearly review of modern awards. A Full Bench determined² to insert the following as a new clause 19.6:

¹ [2021] FWCFB 4903.

² [2019] FWCFB 5082.

Work performed by part-time and casual employees as prescribed in clause 19 is subject to the applicable minimum engagement periods prescribed at clauses 10.5 and 11.4 respectively.

7. The AWU submits clause 19.6 resolves the issue identified in the Decision and hence a variation to clause 11.4 is not warranted.

ROSTERED DAY OFF CONDITIONS

8. In the Decision, Vice President Hatcher rejected the AWU's application to vary clauses 19.2, 20.6(c) and 20.7(c) on the basis that casual employees cannot accrue a rostered day off because clause 11.1 states: 'A casual employee is engaged by the hour and paid as a casual employee.'
9. While the AWU acknowledges the force of the point identified in the Decision, it appears clause 11.1 will shortly be deleted by the Casual Award Terms Review three-member Full Bench³ and replaced with the following:

casual employee has the meaning given by section 15A of the Act.

10. The definition of a casual employee in s 15A of the FW Act does not contain reference to a casual employee being engaged by the hour and paid as a casual employee. Therefore, it appears conceivable that a casual employee could temporarily work a pattern of hours which includes a rostered day off in accordance with s 15A of the FW Act, if the other criteria are satisfied.
11. On that basis, the AWU maintains there is merit in clause 19.2, 20.6(c) and 20.7(c) being varied to prescribe casual rates which include the 25% casual loading.
12. In making this submission, the AWU reiterates a point previously made during the Directions hearing on 18 June 2021, namely, that there can be no contest about the appropriate rates for a casual employee under the Funeral Award because clause 11.2 states the 25% casual loading must be paid for each ordinary hour of work and the 4-yearly review, Overtime for Casuals Full Bench⁴ accepted a consent position that the 25% casual loading must be paid on a cumulative basis when overtime is worked.
13. Therefore, there can be no doubt about the appropriate rate for a casual employee if they can be covered by clause 19.2, 20.6(c) and 20.7(c) and the AWU submits the safer approach is to prescribe casual rates within these

³ [2021] FWCFB 4714 at Attachment B.

⁴ [2020] FWCFB 4350 at [300].

clauses (and amend clause 11.3 accordingly) given the imminent change to clause 11.1 will potentially permit these clauses to apply to casual employees.

19 AUGUST 2021