

IN THE FAIR WORK COMMISSION

Matter No: AM2019/17

Section 156 - Four Yearly Review of Modern Awards

SUBMISSION IN REPLY OF UNITED WORKERS' UNION

9 April 2020

1. This submission is responsive to the statement of 23 March 2020 ('the Statement') and the Background Paper ('the Paper') published on the same day in aid of the finalisation of tranche 3 awards.
2. This submission addresses provisional views and other issues raised in the Paper concerning the *Food, Beverage and Tobacco Manufacturing Award 2010*, the *Miscellaneous Award 2010*, the *Registered and Licensed Clubs Award 2010* and the *Security Services Industry Award 2010*.
3. We apologise about the delay in lodging this submission.

Food, Beverage and Tobacco Manufacturing Award

4. We agree with the concerns raised by the AMWU at [96] of the Paper and the proposed amendments to this award noted at [97].

Miscellaneous Award

5. There is an unresolved dispute as to whether the casual loading is paid with overtime penalties that is awaiting clarification from the overtime for casuals' common issue Full Bench.¹ The exposure draft at clause 11.2 uses the term '*hours*' rather than '*ordinary hours*.' We say this is an appropriate translation from the current award and this wording should remain. It is also appropriate in light of the unresolved nature of the drafting for the entitlement of casual employees to overtime in this award indicated in the Full Bench decision of 8 October 2019.²
6. The current award insofar as it provides any guidance as to when the casual loading is paid notes at clause 10.4(a) notes casual '*employees must be paid a loading of 25% in addition to the relevant minimum wage*'.

¹ AM207/51.

² *4 yearly review of modern awards –overtime for casuals* [2019] FWCFB 6953 ('the Overtime for Casuals Decision').

7. One of the principal findings of the Full Bench decision of 8 October 2019³ in AM2017/51 concerning the Miscellaneous Award's current treatment of casual employees entitlement to overtime was that it is '*confusing and ambiguous*.'⁴
8. At [271] of the Paper referring to clause 11.2 of the exposure draft '*ABI submits that this drafting 'appears to infer that a casual loading will be payable during overtime, ... (and this) departs from the existing drafting of the Miscellaneous Award and the position of ABI in proceedings 2017/51.*' This is only a correct statement concerning the view of ABL. There is no support in the text of the current award or the 8 October 2019 Full Bench decision in AM2019/17 for the view that the casual loading is or will not be payable with overtime. This is in part a feature of the current entitlement insofar as it exists being confusing and ambiguous.⁵
9. The ABL in AM2019/17 at a level of general principle urged upon the Full Bench that the casual loading is not paid with overtime hours. At the hearing of 29 July 2019, the following exchanged took place:

MR IZZO: each element that the casual loading compensates for is entirely satisfied or compensated for during a casual's ordinary hours of work. The casual loading is directed at putting a casual in the same position as that of a permanent. That is all achieved satisfactorily during the ordinary hours of work.

....

VICE PRESIDENT HATCHER: Mr Izzo, you want us to decide this case on the level of principle, too, do you?

*MR IZZO: Yes.*⁶

10. The Full Bench did not make any finding concerning ABL's '*general principle*' and did not make any specific finding concerning this matter for the Miscellaneous Award in the decision of 8 October 2019.
11. The Miscellaneous Award's current confusing and ambiguous treatment of overtime for casual employees appears, in our view, to potentially contemplate that the casual loading is paid with overtime but we accept the careful analysis conducted by the Full Bench in its 8 October 2019 decision in AM2017/51 and that the position is uncertain.

³ 4 yearly review of modern awards –overtime for casuals [2019] FWCFB 6953 ('*the Overtime for Casuals Decision*').

⁴ As above at [45].

⁵ The AiG submitted that there was no entitlement for casual employees under the Miscellaneous Award to overtime, see: *Overtime for Casuals Decision* at [44].

⁶ Transcript of 29 July 2019, AM2017/51 at PN1118 to PN1122.

12. In the Paper at [269] *‘ABI has indicated that it will be submitting in proceedings AM2017/51 that a casual loading does not apply to overtime in the Miscellaneous Award.’* On one interpretation this has already occurred and the Full Bench declined to accept this submission or deal with.
13. As the determination reflecting the *Overtime for Casuals Decision* of 8 October 2019 is yet to be published and the overtime for casuals’ Full Bench is seised with this issue, those proceedings are the appropriate forum where this matter should be resolved.
14. The text of clause 11.2 of the exposure draft should remain, as it is, namely refer to *‘hours’* rather than *‘ordinary hours’*. It is our understanding that the provisional view expressed in the Paper contemplates some alteration to the text of the exposure draft. This should not occur.

Clubs Award

15. We agree with the provisional view expressed at [296] that the words *‘registered or recognised under State Territory or Commonwealth legislation’* in clause 4.1 are superfluous and can be deleted.
16. Further in relation to the ABL proposal to redrafting of clause 4 at [300], the text proposed is appropriate. This is provided that the clause 4.6, on-hire coverage provision, remains as it is in the exposure draft.

Security Award

17. The Full Bench in AM2017/51 in the *Overtimes for Casuals Decision* of 8 October 2019 observed:

[63] It is not in dispute that casual employees are not currently entitled to receive the casual loading when being paid overtime penalty rates, and the above variation is not intended to disturb that position. A draft determination to give effect to the variation will be published in due course and interested parties will be given an opportunity to comment upon it.

18. This conclusion is inevitable due the text of clause 23.3 of the current award which reads where *‘an employee works overtime the employer must pay to the employee the ordinary time rate for the period of overtime together with a loading as follows ... ’* and not something arising from a claim or the review of the awards within this review.

19. The Security Award is also awaiting a draft determination to be issued to reflect the *Overtime for Casuals Decision* that the entitlement of casual employee to overtime be recast.⁷ This issue is clearly sign posted at clause 19.3 of the exposure draft.

20. On 29 July 2019, in our submission filed in the overtime for casuals common issue we:

... withdraw our claim concerning seeking to have the casual loading not absorbed by the overtime penalty. United Voice is shortly to file a variation to this award pursuant to section 157 of the Fair Work Act 2009 ('the Act') which is responsive to the judgment of the Full Federal Court in United Voice v Wilson Security Pty Ltd [2019] FCAFC 66.

21. The non-payment of the casual loading in this award is a long-standing feature of the instrument, we and no other party in this review has made any claim concerning the matter. We place on record that there is no impediment to the UWU seeking to vary the award in the immediate future to remedy this situation by a variation pursuant to section 158 of the Act. Item 27 'Dismissing applications' in Part 5 of Schedule 1 of the Act could not be said to be relevant to any future application under 158 of the Act concerning this matter by the UWU.

Wine Award

22. The matters raised at [438] to [451] of the Paper are uncontroversial and we have no comment to make.

23. We do not oppose the provisional view noted at [452].

24. We do not oppose the provisional view noted at [458].

25. In relation to the matters noted at [459] to [461] there is some duplication as the Association indicates and the deletions from the draft as proposed are appropriate.

26. In relation to the proposed clause 22.1(c) of the text of the exposure draft does reflect the equivalent provision in the current award at clause 13.4(a). The concern of the Association appears to relate to what is in the current text of the award an ambiguity as to whether overtime is paid when a casual employee is working shift work. The reference to clause 13.6 should not be deleted in the exposure draft as clause 13.6 indicate what are ordinary hours for employees covered by this Award. The inclusion of this reference does not 'tighten' the clause but makes it easier to use. The reader is referred to a relevant definition of ordinary hours.

27. The concerns raised by the Association are not issues that we have come across in South Australia where we have many members covered by this award. The Award is complex,

⁷ As above at [62].

in part due to the seasonal nature of the work and that there are seasonal periods of unpredictable *ad hoc* work during vintage. It is our view that the current drafting reflects the current award and is in fact clearer and it is not appropriate to attempt to resolve a theoretical ambiguity that is not, to our knowledge, a real industrial concern, at this stage of the review.

28. We trust these comments assist.

United Workers' Union

9 April 2020