

Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements

Submission no: 26

Received: 18/08/2005

Submitter: Ms Janet Giles

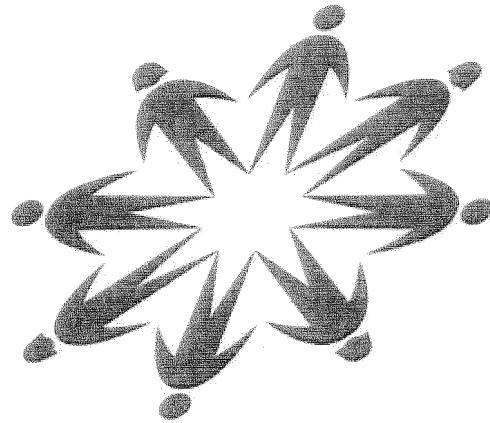
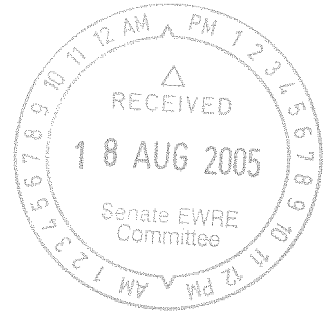
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SA UNIONS

Submission to the Senate
Inquiry into
Workplace Agreements

SA Unions Submission to the Senate Inquiry into Workplace Agreements

SA Unions is the peak Trade Union Organisation in South Australia. We are pleased have the opportunity to make this submission to the inquiry into agreement making as it provides an opportunity to highlight the existing problems with Australian Workplace Agreements in our state and draw attention to our strong concerns about expanding a system of individual contracts as proposed by the Prime Minister in May this year.

Our evidence has been gathered by our affiliate unions and also by The Young Workers Legal service which is a service under the auspices of SA Unions which provides free advice and advocacy for young workers in South Australia who are not union members.

We see three major problems with the current system of Australian Workplace Agreements. (Individual Contracts)

1. *The failure of the no-disadvantage test and the role of the Office of Employment Advocate*

We have consistently found the lack of proper tests against appropriate awards and agreements leading to AWA's being offered at significantly lower rates of pay and worse conditions than workers on awards and agreements. In addition there is a common problem of agreements being signed and not being registered with the OEA or the OEA registering agreements without properly applying the no-disadvantage test.

2. *The "sign if you want the job" culture*

We have found that most workers who sign AWA's had no or little understanding of their work rights or felt pressured into signing if they wanted the job. This contradicts the concept of "choice" that is portrayed as the basis of individual agreement making.

3. *The use of individual contracts in conjunction with the training system*

We believe this is a major issue for young workers in particular and seriously undermines the wages and working conditions of trainees and apprentices as well as binding them to Individual contracts due to the nature of the training system.

In this submission we will also address our concerns about the proposed changes to Workplace Laws. Based on our experience of AWA's under the current system, we believe the proposed changes will only increase the level of exploitation of workers, particularly those who are the most vulnerable. i.e. young workers, workers from non English speaking background and those in precarious and low paid work with little bargaining power.

The Failure of the No-disadvantage test and the Office of employment Advocate

The system of individual agreement making currently enshrined in the federal Workplace Relations Act is one based on the principle that the Office of Employment Advocate must register the agreement only after they have been checked as not disadvantaging the worker in relation to the appropriate industry award.

We have examples gathered in South Australia where employers have asked workers to sign AWA's and not had them approved by the OEA and also clear examples where the conditions in the AWA are significantly worse than the appropriate award.

Attached is a comparison of an AWA and the appropriate award for a worker from Subway, a franchised sandwich making food chain. This demonstrates that although the hourly rate is slightly higher on the AWA, the loss of penalty rates and leave conditions means that the worker is worse off under an AWA in comparison to the award for that industry. (appendix 1)

In addition we have examples of AWA's which have the following conditions which are inferior to the provisions contained in the appropriate award and collective agreements for the industry:

Telstra

- Sick leave on agreement with manager rather than an entitlement.
- No overtime, time in lieu or penalty rates for hours of work.
- Pay not specified apart of the agreement, only as an attachment which is subject to annual review by the employer and is subject to performance and "prevailing market conditions".
- Includes the following clause "Your total Reward has been calculated to include and compensate you for any benefits otherwise available to you under any applicable law, award and agreement"
- No specified entitlement to sick leave. "Sick leave will be by agreement with your manager".
- No other leave specified in the agreement except for 4 weeks annual leave and long service leave.

Mirror Image property Services (Cleaner)

- Hourly rate \$15.88
- If worker works on weekend then hourly rate is \$17.11.
- No overtime, public holidays and other penalty rates.
- Hourly rate increased by 50c per hour from July 2005 and 50c per hour from July 2006.
- No minimum shifts
- Rosters changed by mutual consent or by the employer with "as much notice as possible"
- May be called in at short notice.
- No annual leave, leave loading or sick leave.

Great Southern Rail – Serco (Hospitality Attendant)

- “ You may be required to perform any duties within your competency and skill levels, provided such duties comply with any health and safety legislation”
- Annual salary of \$38685 with \$420 annually to compensate for attending to passengers during the night. This salary is inclusive and so there is no separate entitlement to overtime, annual leave loading, penalty rates etc.
- Ordinary hours of work are an average of 41.33 hours per week during a 196 day roster.
- Rosters changed by agreement or with 7 days notice.
- In emergencies may be recalled at any time.
- Required to attend passengers during night sleeping hours.
- Salary is compensation for all hours worked.

Shahin Enterprises trading as Subway, Dog on the Run, Hot Chooks, New Zealand Natural and Brumby’s (over 15 locations)

- Ordinary hours defined as being from 6am until 12 midnight Monday to Sunday (no overtime payments or penalty rates paid during these hours)
- Rosters drawn up with one week’s notice or less as mutually agreed.
- Rates of pay range from \$8.02 (junior rate – under 17)to \$17.04 (top adult rate)
- During period of employment employer may engage workers as trainees. Trainees are employed and paid under a training agreement as well as an AWA.
- Trainee rates of pay vary from \$6.18 per hour for a junior under 17 to \$13.12 for top adult trainee rate.
- The AWA exempts trainees from employment conditions and wages included in the appropriate award.
- Public holidays paid at ordinary rate.
- No annual leave loading.
- Part time employees have no entitlement to annual leave and sick leave.

Comit Potato and Onion Specialists (process employee)

- Normal hours of work for day work defined as 5am until 6pm and up to 40 hours per week, Monday to Saturday and up to 12 hours per day. Day workers may be required to work Sundays with one day notice and 100% loading.
- Afternoon shift (finishing after 6pm) or night shift (finishing after midnight or before 5am) 15% loading for these shifts.
- Pay classified in three categories- basic, skilled and excellent against 5 levels as assessed and determined by management.
- Hourly rates of pay (these rates are well below the minimum wage)

Classification	Basic	Skilled	Excellent
Level 1	10.54	10.74	10.94
Level 2	10.98	11.18	11.38
Level 3	11.42	11.62	11.82
Level 4	12.02	12.22	12.42
Level 5	12.95	13.15	13.35

T&R Murray Bridge Abattoir (Food process worker)

One week's notice for the employer to introduce one of four options of working arrangements:

1. Day work 8 hours/day, 40 hour week 8am-4pm Monday to Friday,
2. 7 Day Work- up to 8 hours/day, average 40 hours per week 4am to 8 pm Monday to Sunday.
3. Afternoon shift 8 hours/day average 40 hours per week, between 2pm and 4 am Monday to Friday with 12 % loading. Supervisor to notify extra production hours on a shift to shift basis.,
4. 10 hour days – up to 10 hours per day average 40 hours per 4 day production cycle. 4 am to 8am Monday to Friday. – extra production days advised with 2 days notice and hours on a day to day basis.

- Time in lieu and leave banked to be used during compulsory shut downs.
- No annual leave loading or allowances.
- Maximum severance pay- 4 weeks notice and 2 weeks pay.
- Pay from \$12.50 an hour for general tasks to \$16.00 an hour for boning room.(\$500 a week- \$600 a week)

Aboriginal Health Council (Aboriginal Health Worker)

A State Government funded service, salary is in line with SA Public Sector Salaried Employees Interim Award at classification ASO5 at \$51, 373. However, the conditions vary from the award in the following way

- Only 5 weeks paid maternity leave
- Unpaid parental leave of only 12 months.
- Agreement terminated should funding for the position not be continued by the SA government.
- May be terminated if drivers license lost for any reason.
- No specification of hours of work.

We have attached a copy of an AWA which has been approved by the Office of the Employment Advocate even though a number of items have not been included. This agreement includes significant disadvantages in relation to the appropriate award such as a redefinition of hours of work, low wages, no annual leave and sick leave and no entitlements to meal breaks. (appendix 2)

All of this evidence demonstrates that the no-disadvantage test is not being used to ensure that workers will not be worse off under individual agreements.

A recent case in the SAIRC has also raised serious concerns about the conduct of the AWA system and Office of the Employment Advocate in relation to the no disadvantage test.

[2005-08-05] SAIRC 60 - Yurong Holdings Pty Ltd v Renella	Appeal - underpayment of wages
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Comments by Judge McCusker in this case include:

"15.....But the plain fact is that ***under this AWA the respondent worker was paid grossly less than she was entitled to as a minimum under the State Award. She received in wages \$4333.65. She should have received \$5772.01. The AWA sought to cut her minimum entitlement by approximately 25 per cent. The appellant's contention that the other AWA's all of which contained the same terms passed the "no disadvantage test" (tr 69) does nothing to improve its argument. Rather it shows a troubling situation.*** To the degree the appellant seeks relief under the equity and good conscience provision, I reject the argument.

16. The appeal is dismissed." (Appendix 3)

The "sign if you want the job" culture

The disproportionate level of power between workers in the individual bargaining context is a major factor in determining if the system is fair. One of the fundamental principles of the Australian Industrial Relations system is the importance of balance between the interest of employers and the interests of workers.

A large number of precariously employed workers and those who are young or do not have access to information about their entitlements sign an individual contract because they are not in the position to bargain on an equal footing with their employer.

The areas where AWA's are most common are in areas of high employment turnover where workers know they are disposable. This is particularly true in the traditional areas of youth employment such as the fast food industries.

In South Australia we have a network of young people and unions (the U-who network) which has been actively supporting the issues for young workers for the last two years. In the process of this work, they have collected over 900 survey returns from young workers. These overwhelmingly show that young workers do not know their entitlements at work or how to get support or advice.

We commonly hear from young workers, some of whom are still at school, that when they took the job they signed a range of forms including their AWA without even knowing they were signing a contract of employment.

To quote Judge McCusker again from the decision in relation to SAIRC Renella Case:

15. . In considering this submission I leave aside for the moment the manifest disadvantage of the respective bargaining positions of a 15 year-old Year 10 student negotiating her terms with an experienced businessman. Moreover I accept it is lawful to require a new employee to sign an AWA as a pre-condition of employment irrespective of the fact it this is hardly a matter of real choice from the employee's point of view...

The use of AWA's in conjunction with the training system

We are particularly concerned about the use of AWA's in conjunction with the training and apprentice system. Whilst supporting need for a high quality training system that addresses the current shortage we have in key areas of the labour market, we have many examples now of young people being asked to sign an AWA as well as a contract of training. This is also occurring in the school system with the SA VET in Schools program.

Apart from the worrying aspect of young trainees being subject to a range of inferior working conditions, the fact that the training system is one based on indenture means that trainees and apprentices on AWA's are "trapped" on these working conditions while they remain on the traineeship or apprenticeship. They are not at liberty to leave their employment if they are unhappy with the conditions because they cannot break the contract of training if their employer does not agree. If they do break the contract then they will be jeopardized in any further training opportunities.

In South Australia nearly 50% of traineeships are not completed. We have clear evidence that this is largely due to the working conditions and treatment of trainees.

In South Australia this year, the Housing Industry Association has employed all of their apprentice intake (around 200 young people) on AWA's and contracts of training. These AWA's do not contain some provisions that are guaranteed in the award for apprentices such as travel allowance and protective clothing. The contract of training is also for a longer period than the allowable length of an AWA. (three years).

The Impact of Proposed Changes to the Industrial Relations System

Although we are cynical about the effectiveness of the protection for workers in current system of AWA's, at least there is a theoretical test against the appropriate industry award.

We believe this has ensured that AWA's do have a number of conditions still included in them which would otherwise have been stripped away.

The introduction of the minimum rates award against which individual contracts are measured with only 5 minimum conditions:

1. minimum pay
2. unpaid maternity leave
3. 4 week annual leave
4. 8 days sick leave
5. 38 hours per week

will have the result of seriously reducing working conditions and wages for a large number of south Australian workers.

The change to the relative status of individual agreements and collective agreements and awards will ensure that individual contracts are more likely to become the norm in employment arrangements. The reduction in the powers of the Commission in relation to the making of agreements generally will also mean fewer opportunities for workers to have disputes and grievances dealt with.

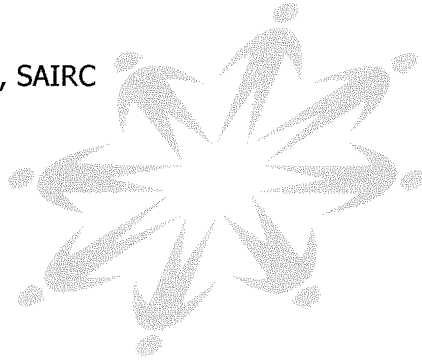
In Conclusion

We have copies of all the AWA's mentioned in the report and are happy to provide them to the Inquiry. We also have workers who are willing to provide evidence to the inquiry should you come to Adelaide as part of your investigations.

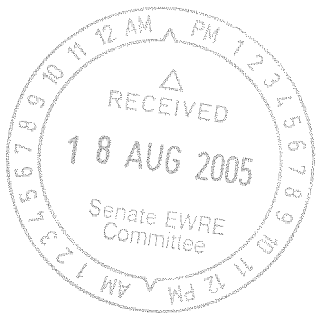
Appendix 1- AWA / award comparison

Appendix 2- Correspondence from OEA

Appendix 3- Decision of Judge McCusker, SAIRC

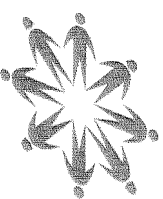


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AWARD TO AWMA COMPARISON

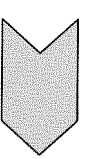
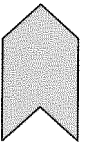
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Overview

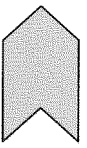
This is a comparison between the **Delicatessens, Industrial and Commercial Canteens, Unlicensed Cafes and Restaurants Etc Award (The Award)** and the **Subway, Paralowie Australian Workplace Agreement (The AWA)**.



Overview cont...

The Award is an industrial instrument of the South Australian Industrial Relations Legislation and is administered by the South Australian Industrial Commission and Court.

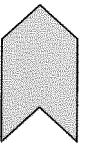
The AWA is registered and approved subject to Section 170 of the Federal **Workplace Relations Act 1996.**



Overview cont...

The terms and conditions of the AWA
override the terms of the Award and the
State Act to the degree of any inconsistency.

The AWA applies to employee parties
otherwise covered as Kitchen Hands, Shop
Assistants and Food Beverage and
Supervisory employees.

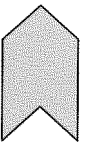


Overview cont...

This AWA applied to a client (worker) of the Young Workers Legal Service/SA Unions.

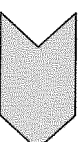
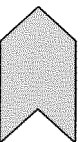
The worker was employed as a trainee Sandwich Artist/Sales Assistant.

“Sandwich Artist” is an approved AQF II qualification with a duration of 12 months (full-time).



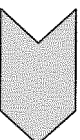
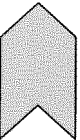
AWARD TO AWA COMPARISON - Juveniles

PROVISION	AWARD	AWA
	Monday to Friday (38 Hours)	Monday to Sunday (includes weekends, holidays and weekends)
WAGES	\$	\$
Juveniles	Weekly	Weekly Casual
Under 17 years	253.70	271.51 8.02
17 years	304.40	328.37 9.69
18 years	355.20	385.35 11.37
19 years	431.30	470.65 13.88
20 years	456.70	499.19 14.72
21 years	Adult Rate	511.38 15.07



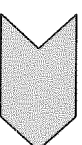
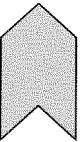
AWARD TO AWA COMPARISON - Adults

PROVISION	AWARD	AWA
	Monday to Friday (38 Hours)	Monday to Sunday (includes weekends, holidays and weekends)
WAGES	\$	\$
Adults	Weekly	Weekly Casual
Cook (trades person)	542.20	Level 3 Supervisory
Senior Cook	508.50	598.77 (all hours)
General Cook	487.60	Level 2 Fully Competent
Food & Beverage Assistant	507.40	571.50 16.39
Shop Assistant	507.40	Level 1 Starting Rate
Kitchen Hand	468.90	511.38 15.07



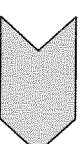
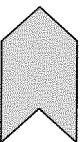
AWARD TO AWA COMPARISON - Supervision

PROVISION	AWARD	AWA
	Monday to Friday (38 Hours)	Monday to Sunday (includes weekends, holidays and weekends)
Supervision	Weekly	Weekly Casual
1 – 5 Employees	17.26	
6 – 10 Employees	23.59	
11 or more Employees	28.80	
	These rates listed will move each year subject to State/Federal Wage fixing principals/ processes	These rates listed will remain fixed for the 3 years of the agreement. (Unless altered by agreement)



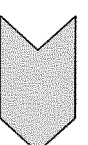
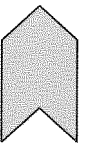
AWARD TO AWA COMPARISON

PROVISION	AWARD	AWA
<p><i>Classifications</i></p>	<p>Each of the Award classifications is identified by task description (and qualification) and is enforceable in a court or commission</p>	<p>The AWA classifications have no task descriptions and are at the absolute discretion of the employer</p>
<p><i>Probation</i></p>	<p>No probationary period in the Award</p>	<p>3 month probationary period for full-time employees and proportionate (longer) for part-time and casuals</p>



AWARD TO AWA COMPARISON - Hours

PROVISION	AWARD	AWA
HOURS	38 hours per week	38 hours per week
	Monday to Friday	Monday to Sunday
	6.00 am to Midnight	6.00 am to Midnight
		Weekly employees can have the 38 hours averaged over 52 weeks
Saturday		
Up to 12 noon	25% per hour	NO (included in the rate)
After 12 noon	50% per hour	NO (included in the rate)
Sunday	All day 100% per hour	NO (included in the rate)

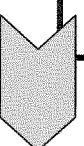
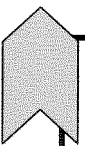


AWARD TO AWA COMPARISON - Hours

PROVISION	AWARD	AWA
PART-TIME EMPLOYMENT	12 hour per week minimum engagement No more than 5 daily starts	NO entitlement
MINIMUM ENGAGEMENT	3 hours	3 hours
SHIFT WORK		
Afternoon shift	15% loading	NO (included in the rate)
Morning shift		
Night Shift	15% loading	NO (included in the rate)
OVERTIME	All time worked in excess of 38 hours per week and 9 hours per day is paid at overtime rates	Overtime penalties must be agreed by the employer 4 weeks in advance (in writing) and cannot exceed 2 hours in any day)
Overtime Rates	50% for the first 3 hours 100% thereafter	50% for the first 2 hours 100% thereafter
		The employer and employee may AGREE to work overtime at ordinary rates

AWARD TO AWA COMPARISON - Provisions

PROVISION	AWARD	AWA
MEAL ALLOWANCE	\$6.60	\$6.60
	20 minute paid break after 4 hours of overtime	NO entitlement
ANNUAL LEAVE	Applies to full-time and part-time employees	Applies to full-time employees only
Part-time Employees	Proportionate payment for 28 consecutive days	NO annual leave (cash provision in lieu and in advance in the hourly rate)
Annual Leave Loading	17.5% loading	NO annual leave loading (cash provision in lieu and in advance in the hourly rate)
Taking Annual Leave	Leave can be taken before due date by agreement	No entitlement
MEAL BREAKS	30 minutes after 5 hours (unpaid)	30 minutes after 5 hours (unpaid)
	Where an employee is not given a meal break overtime rates apply after 5 hours	NO entitlement
38 HOUR STANDARD	38 hour week	38 hour week
	9 day fortnight with 11 RDO's	NO Entitlement



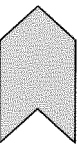
AWARD TO AWA COMPARISON - Provisions

PROVISION	AWARD	AWA
HOLIDAYS	11 days Work on holidays at double time rates	9 days NO (included in the rate) (Paid if not required to work) Weekly and part-time employees will not work more than 4 public holidays per year
UNIFORMS	Provided and returned to employer on termination Maintained and laundered by employer	Provided and returned to employer on termination NO (included in the rate)
MIXED FUNCTIONS	Where an employee works more than half the day at a higher rate, the higher rate applies for the whole day	NO entitlement
SICK LEAVE	10 days per year	10 days per year
SUPERANNUATION	REST preferred fund	Any fund (employers choice)
BEREAVEMENT LEAVE	Unpaid leave from death to funeral	No entitlement
INTRODUCTION OF CHANGE	Employer to notify employees/ Union of significant effects	No entitlement



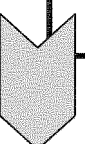
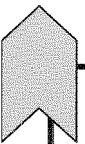
AWARD TO AWA COMPARISON - Provisions

PROVISION	AWARD	AWA
RIGHT OF ENTRY	SDA may enter	NOT in AWA
VEHICLE ALLOWANCE	Where employees vehicle used for work 44 cents/km	NO entitlement
BLOOD DONORS LEAVE	2 hours/day x 4 days/year	NO entitlement
RATIOS	1 junior to 1 adult	NOT in AWA
FIRST AID KIT	Detailed in Award	NOT in AWA
UNION TRAINING	10 days unpaid leave per year	NO entitlement
NOTICE BOARD	Must be in a place visible by the employees	NO entitlement
CONSULTATION	Union involvement in enterprise flexibility negotiations	NO entitlement
	Establish consultative committee	No entitlement
	Capacity to refer to the SA Industrial Commission	No entitlement



AWARD TO AWA COMPARISON - Provisions

PROVISION	AWARD	AWA
FARES AND TRAVELLING	Travel between places of employment paid by employer	NO entitlement
COLD WORK		
Entering cold chambers	13 cents per hour	NO entitlement
Working below zero (cent)	33 cents per hour	NO entitlement
POSTING OF AWARD	In a place visible to the employees	AWA completely excludes the Award
TERMINATION & REDUNDANCY	TCR Test Case provisions	Workplace Relations Act
		Employees absent form employment for more than 2 days (without notice) are deemed to have terminated without notice
DISPUTES/GRIEVANCES	Capacity to refer to the SA Industrial Commission	NO entitlement
TRAINING		
Trainees	Complete training wage arrangements schedule including referral of disputes to DFEEST	Rates as per junior rates minus 20% and AWA conditions (with no referral to DFEEST)
Apprentices	Apprenticeship rates and conditions	NOT in AWA



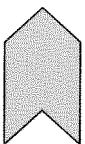
AWARD TO AWA COMPARISON

EMILY PERRY	ROBERT CRAY
Works at Subway, Parolowie	Works at Charlies Delii/Diner
Employed under the AWA	Employed under the Delicatessens Award
Works part-time – 5 days each week	Works part-time – 5 days each week
Started 12 months ago	Started 12 months ago
21 years of age	21 years of age
Employed as a Sandwich Artist/Sales Assistant	Employed as Kitchen Hand/Food & Beverage Assistant
Makes sandwich, par-baking bread rolls, cashier and serving drinks	Assists the cook in the kitchen, makes sandwiches, cashier and serves food and beverages
Works Wednesday, Thursday, Friday, Saturday and Sunday	Works Wednesday, Thursday, Friday, Saturday and Sunday
Works from 9.00 am to 5.30 pm on Wednesday, Thursday and Sunday	Works from 9.00 am to 5.30 pm on Wednesday, Thursday and Sunday
Has 30 minutes for a meal break each day	Has 30 minutes for a meal break each day
Total hours each week are 37 hours	Total hours each week are 37 hours



AWARD TO AWA COMPARISON

<p style="text-align: center; font-size: 1.2em; margin: 0;">EMILY PERRY</p> <p style="text-align: center; font-size: 0.9em; margin: 0;">(employed under AWA)</p> <p style="margin: 10px 0 0 20px;">The AWA/employer deems Emily to be Level 1 Starting Rate \$511.38/week and \$15.07/hour part-time</p>	<p style="text-align: center; font-size: 1.2em; margin: 0;">ROBERT CRAY</p> <p style="text-align: center; font-size: 0.9em; margin: 0;">(employed under Award)</p> <p style="margin: 10px 0 0 20px;">The Classification and Wage provisions determine that Robert is part Kitchen Hand \$468.90/week, part Shop Assistant \$507.40/week and \$13.35/hour part-time. \$13.35/hour ordinary hours \$20.02/hour time and a half \$26.70/hour double time \$14.69/hour, Mon-Fri after 6.00 pm</p>
<p>The AWA rate is a flat rate for all hours within 38 hours per week</p>	<p>Because Robert spends more than half the day at the higher duties then the higher rate applies all day</p>
<p>Emily's weekly pay (before tax) is : \$15.07 x 37 hours = \$557.59</p>	<p>Robert's weekly wage (before tax) is : Wed, Thurs - \$13.35 x 16 hours = \$213.60 Sun \$26.70 x 8 hours = \$213.60 Sat \$20.03 x 6.5 hours = \$130.20 Fri \$13.35 x 3.5 hours = \$46.73 Fri \$14.69 x 3 hours = \$44.07</p>
<p style="text-align: right; font-weight: bold;">Total \$557.59</p>	<p style="text-align: right; font-weight: bold;">Total \$648.20</p>



AWARD TO AWA COMPARISON

<p>EMILY PERRY (employed under AWA)</p>	<p>ROBERT CRAY (employed under Award)</p>
<p>The rates contained in the AWA would remain at the current levels for the 3 year term of the AWA.</p> <p>The rates may be varied in the 3 years providing there is agreement between the employer and Emily.</p>	<p>The rates contained in the Award would increase each year based on applications by SA Unions to increase the rates through the State Wage fixing processes.</p>



Australian Government
Office of the Employment Advocate



CERTIFICATE OF AUTHENTICITY

21 July, 2005

Agreement number: [REDACTED]

Employer Name: [REDACTED]

[REDACTED]

Dear [REDACTED]

This certificate confirms that the Employment Advocate on 25 July 2001 approved the Australian workplace agreement (AWA) between [REDACTED] and [REDACTED].

Please find attached a copy of the said AWA (with Undertaking) and Approval Notice.

Yours sincerely,

Steve Ronson
Regional Manager - SA & NT

08 83068648

GPO Box 9842, In your capital city
General Enquiries 1300 366 632

Helping employers and employees to achieve better workplaces

AUSTRALIAN WORKPLACE AGREEMENT

1. Parties to the AWA

This Agreement is made between [redacted] (The Employer) trading as [redacted] situated at

AND [redacted] FULL NAME [redacted] ADDRESS

2. Dates of Operation

This AWA shall take effect as at the 18th day of APRIL 2000 or the day after the approval notice is issued from the Employment Advocate (whichever is the later) and expire three years hence.

3. Operation of AWA

Operation of this AWA is in conjunction with the Delicatessens, Industrial and Commercial Canteens, Unlicensed Cafe and Restaurants Award. Where there is inconsistency between this AWA and the above-mentioned Awards, this Agreement shall prevail.

4. Hours of Work

The employer shall offer a minimum average of 10 hours work per week to permanent casual staff and where those hours disadvantages the employee because of his/her unavailability to work Monday to Friday before 6pm, the employer shall compensate by providing additional hours over school holiday periods.

5. Hourly Rate of Pay

The hourly rate of pay is \$14.10 per hour for customer service. These rates apply at all times and are increased by 7% per hour if the ten-hour minimum is not achieved. A pay increase of 30 cents will apply from 1/12/00 and an additional 40 cents from 1/12/01. Junior rates apply as follows Under 17 - 50% (\$7.05); 17yo - 60% (\$8.46); 18yo - 70% (\$9.87); 19yo - 85% (\$12.00); 20yo - 90% (\$12.70)

6. Traineeship

Where this AWA is to cover the employment conditions of a trainee, the rate appearing in clause 5 may be reduced by 20% for on-the-job training. Minimum average hours for a trainee shall be 15 per week.

7. No Annual Leave; Leave Loading or Sick Leave

The above rate incorporates a component for annual leave, annual leave loading and sick leave, and as such, those provisions do not apply.

8. Meal Breaks and Rest Pauses

Where the employer is unable to give the employee a meal break in accordance with the Award, the employee shall receive two 15 minute paid breaks in lieu.

9. Anti-discrimination Provision

The Parties to this AWA agree to adopt the model anti-discrimination provision as contained in the Workplace Relations Regulations.

10. Dispute Resolution Procedure

The parties to this AWA agree to adopt the model dispute resolution procedure as contained in the Workplace Relations Regulations.

Australian Workplace Agreement made under the Workplace Relations Act 1996, between:

18/4/01

[Redacted] PTY LTD (The Employer)

[Redacted] (The Employee)

[Redacted] (Signature)

[Redacted] (Signature)

- Director
WITNESSED BY [Redacted] (Signature)

[Redacted] (Name in Print)

[Redacted] (Address)

UNDERTAKING IN RELATION TO AUSTRALIAN WORKPLACE AGREEMENTS

Agreement number: HD02573E2
HD02573E3

The Employment Advocate
GPO Box 9842
SYDNEY NSW 2001

Dear Sir/Madam

In relation to the AWA(s) identified in your letter of 2 July 2001:

I am authorised to give the following undertaking on behalf of ~~GAJAN PTY LTD~~
~~GAJAN PTY LTD~~ and I hereby give the following undertaking with respect to ~~the~~
~~agreement~~, and ~~the~~ ~~agreement~~

- to offer ~~the~~ and ~~the~~ additional hours Monday to Friday, with ~~the~~ and ~~the~~ having the right to refuse the additional hours if unavailable to work.

Signed by or on behalf of the employer, GAJAN PTY LTD

Signature: ~~GAJAN PTY LTD~~ Position: ~~GAJAN PTY LTD~~

Printed Name: ~~GAJAN PTY LTD~~ Date: 17.7.2001



APPROVAL NOTICE

25 July 2001

Agreement number: H30257383

~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXX~~
~~XXXXXXXXXXXXXXXXXXXX~~

This notice confirms that the Employment Advocate approved the agreement (AWA Individual) between ~~XXXXXXXXXXXXXXXXXXXX~~ and ~~XXXXXXXXXXXXXXXXXXXX~~ today.

A copy of the approved agreement (AWA Individual) including any undertakings/other action is attached.

Please note that the undertaking given to the Employment Advocate during the approval process is deemed to be a legally binding part of the agreement (AWA Individual).

In assessing the AWA against an award for the purpose of the no-disadvantage test, the award applied was the:

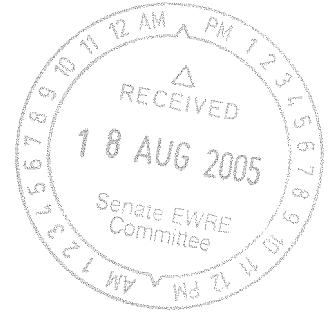
DELICATESSENS, INDUSTRIAL & COMMERCIAL CANTEENS, UNLICENCED CAFES AND RESTAURANTS AWARD

The *Workplace Relations Act 1996* requires all AWAs to contain provisions relating to discrimination and dispute resolution. If your AWA does not contain these provisions, or if the provisions it contains do not meet the requirements of the Act, the model clauses set out in the regulations to the *Workplace Relations Act 1996* apply. A copy of the model clauses is provided in the enclosed information sheet.

Under the *Workplace Relations Act 1996*, an employer must give the employee a copy of this notice, the approved agreement and any undertakings/other action. This should be done as soon as practical after receiving this notice.

If you have any questions concerning this notice, please do not hesitate to contact the Office of the Employment Advocate on 1300 366 632 quoting the above agreement number.

GPO Box 9842, In your capital city
General Enquiries 1300 366 632



Yurong Holdings Pty Ltd v Renella [2005] SAIRC 60

INDUSTRIAL RELATIONS COURT (SA)

YURONG HOLDINGS PTY LTD

v

RENELLA, Deanna

JURISDICTION: Appeal

FILE NO/S: 3617 of 2004

HEARING DATE: 6 July 2005

JUDGMENT OF: His Honour Judge JP McCusker

DELIVERED ON: 5 August 2005

CATCHWORDS:

Appeal – Underpayment of wages - Whether respondent's employment covered by the Delicatessens, Industrial and Commercial Canteens, Unlicensed Cafés and Restaurants Etc Award ("the Award") or an Australian Workplace Agreement ("AWA") – Remuneration under AWA significantly less than the minimum standard provided for under the Award - No filing receipt for AWA issued in accordance with the Act - AWA has no effect – Respondent's employment was therefore covered by the Award – Plea for equity and good conscience variation to outcome refused - Appeal dismissed – S 170VD, s 170VQ Workplace Relations Act 1996 (Cth) – S 154 Industrial and Employee Relations Act 1994.

Coulton and Others v Holcombe and Others (1986) 65 ALR 656

Anikin v Sierra and Another (2004) 211 ALR 621

Foale and Johnston v G and J Hines Pty Ltd [2002] SAIRC 44

REPRESENTATION:

Counsel:

Applicant: Mr D Xie with him Ms A Xu

Respondent: In person with her Ms J Sprialis

Solicitors:

Applicant: N/A

Respondent: N/A

- 1 This appeal is from the decision of an Industrial Magistrate awarding the respondent worker \$1438.34, underpayment of wages plus \$107 interest. The worker was employed from 12 April 2003 (tr 4) to 26 January 2004 (tr 7) by Bakers Delight, Dernancourt. During that period, she worked the Saturday, Sunday and Monday shifts (tr 14). Her work hours varied between three and a half to five hours on those shifts (tr 13). During the whole of the period of her employment she was paid at a flat rate of \$8.35 per hour (tr 13). This was significantly lower than the appropriate rate provided for in the *Delicatessens, Industrial and Commercial Canteens, Unlicensed Cafés and Restaurants Etc Award (SA)* (“the Award”). The appellant’s main defence to the respondent worker’s claim stated that her employment was regulated by an Australian Workplace Agreement (“AWA”) and that overrode the Award (Exhibit R1, tr 42). All staff at Bakers Delight Dernancourt worked under the same terms (tr 55). The business has over 50 people working on these AWAs (appeal tr 2).

- 2 If the appellant were to establish this Australian Workplace Agreement operative for the period of employment then it would succeed and the respondent worker would get nothing. S 170VQ of the Workplace Relations Act 1986 states as follows:-
 - “(1) During its period of operation, an AWA operates to the exclusion of any award that would otherwise apply to the employee’s employment.

 - (2) [N/A]

 - (3) [N/A]

 - (4) During its period of operation, an AWA operates to the exclusion of any State award or State agreement that would otherwise apply to the employee’s employment.

 - (5) [Repealed]

 - (6) [N/A]”

- 3 One matter however troubled the appellant’s defence at the hearing before the Industrial Magistrate. The appellant had not been able to produce the filing receipt of the AWA issued by the Office of the Employment Advocate. The appellant nevertheless argued that the respondent worker had made this agreement and should be bound by it. Otherwise the respondent worker would succeed due to a mere technical oversight that had no substance to it. That would be unjust, so it argued. But for the mere technical oversight the Office of the Employment Advocate would have approved this AWA. After all it approved all the other ones and they were the same.

4 The Industrial Magistrate took note of s 170VD which provides as follows:-

“An AWA or ancillary document has effect as provided by this Part, and not otherwise. In particular:

- (a) an AWA for a new employee **has no effect before a filing receipt is issued for the AWA**; and
- (b) an AWA for an existing employee has no effect before an approval notice is issued for the AWA.”

(The emphasis is mine.)

5 His Honour dealt with the consequence of this in the following terms:-

“15 The applicant was a new employee. No filing receipt, which means a receipt issued by the Employment Advocate, was issued in relation to the AWA she signed.

16 S 170VPB of the Act deals with the process of approval of the AWA by the Employment Advocate. Where a filing receipt has been issued the Employment Advocate must approve an AWA if the Employment Advocate is sure that the AWA passes the no-disadvantage test and is satisfied that the AWA meets the additional approval requirements contained in s 170VPA. The approval of the AWA signed by the applicant did not occur, there being no record of the receipt of the AWA by the Office of the Employment Advocate.

17 The applicant did sign an AWA on or about 11 April 2003. The AWA was not witnessed. The AWA was not given to the applicant five days before the signing of the same. The AWA at no relevant time had a filing receipt issued by the Employment Advocate.

18 In my view it is immaterial whether the non issue of the filing receipt by the Employment Advocate resulted from a failure to lodge the AWA with the Employment Advocate or such filing receipt went astray in the normal postage of such items. The provisions of s 170VD referred to above provide that the AWA for a new employee has no effect before a filing receipt is issued for the AWA.

- 19 In respect of the applicant there was no AWA governing the terms and conditions of her employment. The Award governed the terms and conditions of her employment.”
- 6 On appeal the appellant employer reiterated much the same case it had raised unsuccessfully before the Industrial Magistrate. It added some new contentions some of which strictly speaking should not be heard on the appeal, having not been raised in the hearing below: *Coulton and Others v Holcombe and Others* (1986) 65 ALR 656. However I will detail each in order and say why they are unfounded in any event.
- 7 The first is that the appellant had mistakenly overpaid the respondent worker an amount of \$24.90 during the period she had worked for them. As stated above this claim was not made at trial. In fact it was only raised before me in the Notice of Appeal. It was not mentioned in submissions. It was not identified to permit me to examine its merit. At the hearing the Industrial Magistrate gave every opportunity to the appellant employer to point to any part of the calculations it challenged. As no overpayment has been demonstrated this ground is rejected.
- 8 The second claim is that from the amount of the claim should be deducted the sum of \$477.20 for bread taken by the respondent worker while an employee. It should be noted the sum of \$477.20 was claimed (see Exhibit R3), but was in the form of assertion and not demonstrated. I presume it is in truth an estimate calculated by the appellant on the assumption (unproven) that the respondent worker took one or more loaves at the end of each shift and multiplying that figure by the retail price of the loaf. Such a plea ignores the fact that this bread was given to the respondent worker “gratis”. The appellant employer encouraged staff to take the bread at the end of a shift because otherwise, “we have to chuck them out” (tr 56).
- 9 The third claim in this group is that “this employee is believed to be responsible for a till deficit of \$751.00 . This is a very grave allegation. It is pressed on the appeal. Yet not one piece of probative evidence beyond assertion was identified or suggested to back it up.
- 10 The appellant’s next submission is that there are errors in the calculation of \$1438.34 (appeal tr 2). The basis of the Court’s calculation was Exhibit A1. The calculations of the Award entitlement attached to the Summons were prepared with the assistance of the Department for Industrial Affairs. There were also available the payslips (Exhibit A2). The Excel spreadsheets (Exhibit A1) were noted down daily by the respondent worker (tr 12) and were testified to by her as an accurate contemporaneous record (tr 14, 45, 49). That provided an appropriate evidential basis for the calculation. The Industrial Magistrate accepted the respondent’s evidence and preferred it over the evidence of the appellant

(par 21). Nothing produced by the appellant gives any basis to disturb that conclusion: *Anikin v Sierra and Another* (2004) 211 ALR 621 at par 38. Indeed an examination of the figures show accordance with the relevant computations in cl 6.5.1.2 of the Award. While examining those details (Exhibit A1), I note the respondent worker was required to work Easter Saturday (19 April 2003), Adelaide Cup Day (19 May 2003), Labour Day (6 October 2003) and Australia Day (26 January 2004), and paid the same flat rate of \$8.35 per hour for these days.

- 11 The appellant also argued the respondent was part-time and not casual, the classification used in the Department's calculations (tr 4). The Award provides the following provisions:-

“CLAUSE 4.2 PART-TIME EMPLOYEES

- 4.2.1.2 Employees specifically engaged by the week on or after the 21st September, 1988 for a lesser specified number of hours than 38 (which shall be at least 12 hours per week) shall be deemed to be part-time employees.

CLAUSE 4.3 CASUAL EMPLOYEES

- 4.3.1 A casual employee shall mean an employee whose contract of hiring is less than a contract of hiring by the week, and does not include a part-time employee as defined in clause 4.2.
- 4.3.2 Casual Employees shall be paid a minimum hourly rate higher by 20% than the appropriate weekly rate prescribed by clause 5.1 Wages. In calculating the hourly rate for a casual employee, the weekly rate as increased by the 20% casual loading shall be divided by 38 and the result rounded off to the nearest cent.
- 4.3.3 Where the ordinary hours of duty on any day Monday to Friday commence at or extend beyond 6.00 p.m., the minimum hourly rate for casual employees will be increased to 30% in lieu of 20%, for such hours worked beyond 6.00pm.”

- 12 The evidence both from Exhibit A1 and the Departmental calculations show that the respondent worker did not have a minimum of 12 hours per week engagement. It varied between 10 and 15 depending on the

requirements of the appellant (tr 13). The classification of the respondent worker as casual was correctly made. Moreover this was not a matter challenged by the appellant at the appropriate stage before the Industrial Magistrate.

- 13 As indicated above, the appellant argued that notwithstanding the lack of an AWA filing receipt, the respondent worker should be held to her agreement. This is much the same argument as the appellant made to the Industrial Magistrate. I have treated this argument, in part at least, as relying on the equity and good conscious provisions in the Act: see *Foale and Johnston v G and J Hines Pty Ltd* [2002] SAIRC 44 at pars 56 – 59, 69. I therefore set out the terms of the AWA relied on (Exhibit R1):-

“AUSTRALIAN WORKPLACE AGREEMENT

1. Parties to the AWA

This Agreement is made between Yurong Holdings Pty Ltd (The Employer) trading as Bakers’ Delight situated at 840 Lower North East Road DERNANCOURT SA

AND

Deanna Renella

20 Willow Drive Paradise

FULL NAME

ADDRESS

2. Dates of Operation

This AWA shall take effect as at the 11th day of April 2003 or the day after the approval notice is issued from the Employment Advocate (whichever is the later) and expire three years hence.

3. Operation of the AWA

Operation of this AWA is in conjunction with the following Awards:

- Bread and Yeast;
- Delicatessen, Commercial and Industrial Canteens, Unlicensed Café & Restaurants
- **Where there is inconsistency between this AWA and the above-mentioned Award, this Agreement shall prevail.**

4. Hours of Work

The employer shall offer regular work each week and where those hours disadvantages the employee because of his/her unavailability to work Monday to Friday, the employer shall compensate by providing additional hours over school holiday periods. Each shift shall be for a minimum two-hour period.

5. Hourly Rate of Pay

The hourly rate of pay of \$16.70 applies at all times. A pay increase of 30 cents will apply from 1/12/03 and an additional 40 cents from 1/12/03. Junior rates apply as a percentage of the above-mentioned Adult rate as follows: Under 17 – 50%; 17yo – 60%; 18yo – 70%; 19yo – 85%; 20yo – 90%.

6. Traineeship

This Agreement may operate in conjunction with a ‘contract of training’.

7. No Annual Leave; Leave Loading or Sick Leave

The above rate incorporates a component for annual leave, annual leave loading and sick leave, and as such, those provisions do not apply.

8. Meal Breaks and Rest Pauses

Where the employer is unable to give the employee a meal break in accordance with the Award, the employee shall receive two 10 minute breaks in lieu.

9. Anti-discrimination Provision

The parties to this AWA agree to adopt the model anti-discrimination provision as contained in the Workplace Relations Regulations.

10. Dispute Resolution Procedure

The parties to this AWA agree to adopt the model dispute resolution procedure as contained in the Workplace Relations Regulations.

Australian Workplace Agreement made under the Workplace Relations Act 1996, between:

Yurong Holdings Pty Ltd
(The Employer)
(signed) *(Signature)*
- *Director*

WITNESSED BY

(not signed)

Deanna Renella
(The Employee)
(signed) *(Signature)*

(Signature)”

(The emphasis is mine.)

- 14 In developing this argument the appellant (appeal tr 8) submits that it would not have employed the respondent worker except on the AWA terms. The best I can make of this argument is that the appellant should not have been saddled with a liability it made such significant efforts to avoid.

- 15 In considering this submission I leave aside for the moment the manifest disadvantage of the respective bargaining positions of a 15 year-old Year 10 student negotiating her terms with an experienced businessman. Moreover I accept it is lawful to require a new employee to sign an AWA as a pre-condition of employment irrespective of the fact it this is hardly a matter of real choice from the employee's point of view. But the plain fact is that under this AWA the respondent worker was paid grossly less than she was entitled to as a minimum under the State Award. She received in wages \$4333.65. She should have received \$5772.01. The AWA sought to cut her **minimum** entitlement by approximately 25 per cent. The appellant's contention that the other AWAs all of which contained the same terms passed the "no disadvantage test" (tr 69) does nothing to improve its argument. Rather it shows a troubling situation. To the degree the appellant seeks relief under the equity and good conscience provision, I reject the argument.
- 16 The appeal is dismissed.