

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission on Draft Determination for the Horticulture Award 2010

AM2014/196 & AM2014/197
Casual Employment &
Part-Time Employment

20 September 2018



4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 & AM2014/197

DRAFT DETERMINATION FOR THE HORTICULTURE AWARD 2010

1. This submission is filed in response to:
 - The Commission's decision¹ of 9 August 2018 in the *4 Yearly Review – Casual Employment and Part-time Employment Case*; and
 - The draft determination relating to the *Horticulture Award 2010 (Horticulture Award)* issued by the Commission pursuant to the decision.
2. During this case, Ai Group has presented detailed submissions and evidence in opposition to casuals under the Horticulture Award being entitled to overtime penalties. Despite this, in its principal decision² of July 2017, the Full Bench decided that casuals in the horticulture industry should receive overtime penalties. Accordingly, this submission does not seek to re-argue the case for why overtime penalties should not be payable to casuals in the industry.
3. After the main decision was issued, Deputy President Kovacic conducted conferences with interested parties (i.e. Ai Group, the NFF, the AWU and the NFF). At those conferences all parties vigorously represented their Members' interests. A proposal emerged to implement the overtime penalties that the Commission had determined were necessary, whilst providing a more flexible approach to cater for the needs of businesses in the horticulture industry.

¹ [2018] FWCFB 4695

² [2017] FWCFB 3541

4. In the Commission's decision of 9 August 2018, the Full Bench made the following comments about the proposal:

[81] Deputy President Kovacic subsequently conducted some follow-up conferences with the parties (that is, the AWU, the NUW, the Ai Group and the NFF). Arising out of those conferences, a proposal for the implementation of the principal decision emerged which contained the following elements:

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[82] In the course of those conferences the Commission sought the parties' views as to whether or not they would be prepared to support the above proposal as the basis for the resolution of the abovementioned issues regarding casual employment in the *Horticulture Award*. The parties subsequently advised that they would not oppose or object to the *Horticulture Award* being varied to reflect the proposal.

Conclusion

[83] To the extent that the above proposal represents what could be characterised as a broad industry consensus as to an acceptable approach to implementing our conclusion in the principal decision concerning overtime penalty rates for casual employees in the *Horticulture Award*, we would provisionally be prepared to accept and give effect to it. Although it involves some problematic elements, including a less beneficial span of hours and overtime penalty rate for casual employees than for permanent employees, it may arguably be justifiable on the basis that it would give effect to the principal decision on at least an introductory basis, in circumstances where the horticultural industry has never paid penalty rates for casual overtime before and is rife with award compliance problems. However, we acknowledge that there are likely be other parties who, because they did not attend the scheduled hearing on 1 February 2018, did not have the opportunity to participate in the conference which occurred on that day and the ensuing exchange of views regarding the proposal. To that end, we propose to publish a draft determination to give effect to the proposal and then provide interested parties with 21 days to make further submissions in relation to it. We will then determine whether any further conferences or hearings should be conducted before making a final determination.

5. Ai Group's position on the proposal remains the same as we advised to the Commission at the conclusion of the conferences chaired by Deputy President Kovacic, i.e. we do not oppose the Award being varied to reflect the proposal.
6. We have reviewed the draft determination issued by the Commission and are of the view that it reflects the proposal.