From: Stephen Crawford [mailto:stephen.crawford@nat.awu.net.au]
Sent: Friday, 9 September 2016 11:12 AM
To: AMOD
Subject: AM2014/47 - Annual leave - AWU reply re Aquaculture Award

Dear Award Modernisation Team,

Please find attached a submission from the AWU in reply to the NSWFIA's submission dated 26 August 2016 regarding the insertion of the model excessive leave term into the *Aquaculture Industry Award 2010*.

Regards,

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9 September 2016

Re: AM2014/47 - AWU reply to NFF submission - *Aquaculture Industry Award 2010*

Background

1. On 26 August 2016 the New South Wales Farmers (Industrial) Association (NSWFIA) filed a submission opposing the inclusion of the model excessive leave term[1] developed by the Common Issue – Annual Leave Full Bench in the *Aquaculture Industry Award 2010* (the Award).

2. In the alternative, the NSWFIA provided an amended form of words for clause 1.5 (e) of the model term.

3. In a Statement issued on 8 September 2016 the Common Issue – Annual Leave Full Bench confirmed its previous Direction for parties to file reply submissions to positions such as that advanced by the NSWFIA by 4:00pm on Friday, 9 September 2016.

4. The Australian Workers' Union (AWU) supports the inclusion of the model excessive leave term in the Award and does not accept the NSWFIA has identified any compelling need for a departure from the standard provision.

The existing provision

5. The NSWFIA submit clause 23.4 of the Award sufficiently deals with the issue of excessive leave and hence there is no need for the model term to be inserted.

6. A major issue we see with clause 23.4 of the Award, and similar provisions in other modern awards, is that it would be almost impossible to comply with the

[1] See *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3953 at Attachment C

provision. This arises because annual leave accrues progressively under the National Employment Standards[2].

7. Clause 23.4 of the Award seemingly requires the parties to constantly monitor how long it is since each week, or even hour, of annual leave has progressively accrued.

8. As the NSWFIA identify at paragraph [27] of their submission: "in practice small businesses do not have the resources to continually monitor their employees' leave accrual". The resources of individual employees can be even more limited.

9. Further, the current wording in clause 23.4 arguably exposes an employee and/or an employer to civil remedy provisions for contravening section 45 of the *Fair Work Act 2009* if annual leave is not taken within 18 months of the entitlement accruing.

10. This type of legal exposure for award-covered employees should not form part of a fair and relevant safety net of employment conditions in any industry, particularly given evidence received by the Commission in these proceedings about the prevalence of relatively high annual leave balances.

11. Finally, the Full Bench identified a number of differences between existing excessive leave clauses in 'Agriculture Awards' and the model term in its 23 May 2016 Decision[3].

12. These differences led to the Full Bench expressing a provisional view that the existing provisions do not provide a fair and relevant minimum safety net of terms and conditions of employment.[4] This provisional view was subsequently adopted without opposition in the Full Bench's 24 June 2016 Decision.[5]

13. Clause 23.4 of the Award has precisely the same differences that are identified at paragraph [162] of the Full Bench's 23 May 2016 Decision.

14. The material filed by the NSWFIA does not justify a different conclusion from the Full Bench in terms of the safety net for the aquaculture industry.

Proposed amendment to the model term

[2] Section 87 (2) of the *Fair Work Act 2009*
[3] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177 at [162]
[4] Ibid at [163]
[5] *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3953 at [42] to [44]

15. At paragraph [7] of its 26 August 2016 submission the NSWFIA propose the addition of the words "except if the period of annual leave being requested falls within high season as advised by the employer previously" at the end of clause 1.5 (e) of the model term.

16. The AWU does not support this modification to the model term.

17. The NSWFIA has not proposed any definition of "high season" other than what has been "advised by the employer previously".

18. This seemingly would permit a cynical employer to nominate the entire year as its high season and hence entirely nullify the provisions in clause 1.5 of the model term.

19. In addition, the evidence filed by the NSWFIA discloses:

    - "Growers will work hard at differing times of the year to prepare stock for the heavy selling times"[6];

    - "Oyster production varies slightly throughout NSW but generally the peak periods for sales are Easter and Christmas. There are other busy periods for growers depending on their type of operation"[7]; and

    - "The highest volume of sales of oysters for consumption through the fresh fish market is from October through until May"[8].

20. This evidence demonstrates the "high season" varies significantly between employers and that some employers believe their high season comprises two-thirds of the year.

21. This highlights the potential for the NSWFIA's proposed amendment to curtail the benefits intended by clause 1.5 of the model term via dramatically confining the clause's operation.

22. There must also be a serious concern that granting the NSWFIA's amendment could effectively re-open the entire excessive leave issue because employers in almost every industry could lead evidence to show that they have relatively busy and quiet periods during the course of a calendar year.

[6] See paragraph [6] of Bruce Zippel's Statement dated 25 August 2016
[7] See paragraph [4] of Tony Troup's Statement dated 26 August 2016
[8] See paragraph [5] of Jonathon Poke's Statement dated 29 August 2016

23. The appropriate cure to the NSWFIA's problem is to reach agreed arrangements with staff for the taking of leave in accordance with section 88 of the Act.

24. The evidence led by the NSWFIA suggests this is already happening. Although some of the evidence does raise concerns that employers are imposing boundaries on the taking of leave that may traverse beyond what is contemplated by the Act. However, this issue appears beyond the scope of these proceedings.

Stephen Crawford
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