

**From:** Ben Rogers <BRogers@nff.org.au>

**Sent:** Tuesday, 7 July 2020 2:57 PM

**To:** AMOD <AMOD@fwc.gov.au>

**Cc:** rhys.kingston@ablawyers.com.au; stephen.crawford@nat.awu.net.au;

Ruchi.Bhatt@aigroup.com.au

**Subject:** AM2019/17 — 4 yearly review of modern awards — Horticulture Award 2010

Dear Full Bench,

1. This correspondence, sent on behalf of the National Farmers Federation (**the NFF**), responds to proposed changes to Clause 21.4 of the exposure draft of the Horticulture Award 2020 (**the Exposure Draft**) which the Full Bench expressed in its Decision 2020] FWCFB 2124 of 27 April 2020 (described at paragraphs 11 to 14 of Deputy President Clancy's Report to the Full Bench of 1 June 2020).
2. At the conference held by the Deputy President on 26 May 2020 the NFF raised concerns regarding the proposed adoption of the expression "ordinary hourly rate" in place of "minimum hourly wage for his or her classification" at Clause 21.4 of the Exposure Draft.
3. The proposed change alters at least *the language* which is presently found at clause 25.3 of the of the current Horticulture Award 2010 (**the Current Award**), and will have the practical effect of meaning that overtime payments for casual employees must be calculated at a rate that is inclusive of any all-purpose allowances.
4. In the NFF's opinion, whether or not overtime which is currently payable (i.e. under the drafting in the Current Award) should be calculated on a rate which is inclusive of the all-purpose allowance is ambiguous . Views differ.
5. The current 'overtime for casuals' provision (in both the Current Award and, prior to the proposed amendment, the Exposure Draft) followed extensive discussion which was facilitated by the Commission. However, to the best of our knowledge and recollection the issue of the all-purpose allowance was not raised at any time during those discussions.
6. As to whether the overtime rate is currently 'inclusive' we make the following observations:
  - (a) The language of the casual overtime provisions of the Current Award expressly links the rate on which overtime is calculated to the amount set out in clause 14 by employing the language ("minimum weekly wage") used in (both the text and tables) of that clause 14 without picking-up the all purpose allowance.
  - (b) That expression "minimum weekly wage" is nested in the language used to determine the amount of some of the all purpose allowances — for example, the leading hand allowance is a percentage of the "standard rate", and the "standard rate" is defined to mean "the minimum hourly wage for a Level 2" — so if "minimum hourly wage" had the same meaning as "ordinary hourly rate" it would result in a circular reasoning.
  - (c) The Fair Work Ombudsman's position is that, according to the current drafting, casual overtime is calculated based on an exclusive approach, and that approach is consistent with the understanding of a significant proportion of growers.
  - (d) We are informed that the 'overtime for casuals' provisions in the Horticulture Award have resulted in significant increases in the sector's labour costs, a fact which is having impacts not just on its bottom line but also upon its capacity to employ. Language which leads to an **inclusive** approach may therefore have consequences for both employers

and employees in the sector. We estimate at least \$1000 per annum for many producers.

7. That said, we do not take issue with the notion that if the ‘inclusive’ interpretation of the current provision is correct then the proposed language is appropriate and desirable so that the position is beyond doubt. However, if the ‘exclusive’ approach is correct then it is our contention that the proposed change of language will constitute a substantive change to existing pay arrangements.

8. Subsequent to the conference on 26 May 2020, we have become aware of the Full Bench decision of 30 October 2017 ([2017] FWCFB 5536 at [200] to [203]) which rejected the Ai Group’s application in relation to the Horticultural Award:

*that the casual loading is based on the minimum hourly rate before adding any all purpose allowance(s) and that for this reason the reference to ‘ordinary hourly rate’ should be replaced with ‘minimum hourly rate’.*

The Full Bench indicated that they would not:

*depart from the ‘general approach’. The term ‘ordinary hourly rate’ in clause 6.5(c)(i) of the exposure draft will remain such that any allowances described as payable for all purposes will operate on a ‘truly all purpose basis’.*

9. We have also been directed to a number of decisions which establish that, in their particular contexts, overtime should be calculated on a rate which includes the all-purpose allowances: [2015] FWCFB 4658 at [35], 2015 FWCFB 6656 at [110], 2017 FWCFB 3177 at [29], 2018 FWCFB 3802 at [243].

10. It may therefore be that the Full Bench has already made a determination on this issue.

11. We note however, that those determination were all made before the current casual overtime provisions were adopted in to the Current Award on 02 April 2019. As such, the current language of the overtime provisions may be interrupted as using the expression “minimum hourly rate” with an awareness of those determinations and in light of the principles they express/adopt. That is, if the ‘inclusive’ approach was intended then the language “ordinary hourly rate” would have been used. As such, the choice of the “minimum hourly rate” language means that the ‘exclusive’ approach applies (although we again stress and acknowledge that to our recollection this issue was never actually raised during the discussion about that language).

12. Again, in the NFF’s submission:

- (a) If the correct interpretation of the current Horticulture Award 2010 is that the calculations of overtime should be done on an ‘inclusive’ basis then the proposed new drafting is appropriate.
- (b) Furthermore, if the Commission decided this issue for the purposes of the Exposure Draft — and irrespective of the interpretation of the Current Award — in the decision referred to in paragraphs 8 and 9 above then the proposed new drafting is appropriate.
- (c) However, if the correct interpretation of the current Horticulture Award 2010 is the ‘exclusive’ approach, and the decisions at [8] and [9] did not alter that position specifically in relation to the overtime for casual provisions of the Exposure Draft, then it is our view that the language should not change and “minimum hourly wage for his or her classification” should be retained.

Regards,

Ben Rogers  
General Manager – Workplace Relations and Legal Affairs



(02) 6269 5666  
Locked Bag 9 Kingston ACT 2604  
14 Brisbane Avenue, Barton ACT  
[nff.org.au](http://nff.org.au) | [@NationalFarmers](https://www.instagram.com/NationalFarmers)

*The information in this email and any attachments is strictly for the intended addressee(s) for purposes agreed and approved by the National Farmers' Federation. It may contain confidential or legally privileged information. If you have received this email and you are not the intended addressee, any confidentiality and privilege are not waived and you are not permitted to read, distribute or otherwise use the information it contains. Unless otherwise specified, media releases and other information intended for the public domain may be circulated and reproduced without further permission. This email does not constitute formal advice or consent, commitment or agreement by the sender or the National Farmers' Federation unless specifically approved and indicated. If you have received this communication in error or wish to be removed from a distribution list, please contact the National Farmers' Federation on +61 2 6269 5666.*