

4 yearly review of modern awards – Wine Industry Award

Matter No. AM2014/249

NATIONAL FARMERS' FEDERATION

**SUBMISSIONS ON EXPOSURE DRAFT -
WINE INDUSTRY AWARD 2010**

Date: 14 April 2016

1. The National Farmers' Federation (**NFF**) is the peak industry body representing Australian farmers and agribusiness across the supply chain, including all of Australia's major agricultural commodity groups.
2. On 22 March 2016, the Fair Work Commission (**Commission**) issued Directions requiring interested parties to file comprehensive written submissions on technical and drafting issues in relation to the exposure draft of the Sugar Industry Award 2016 by 14 April 2016.
3. This submission relates to the Exposure Draft released for the Wine Industry Award 2016.

The statutory framework

4. Under section 156 of the *Fair Work Act 2009* (**FW Act**), the Commission is required to review each modern award in its own right every four years.
5. Section 134 of the FW Act contains the modern awards objective. Modern awards must provide a 'fair and relevant minimum safety net of terms and conditions' of employment, taking into account the following criteria:
 - a. relative living standards and the needs of the low paid (subsection 134(1)(a));
 - b. the need to encourage collective bargaining (subsection 134(1)(b));
 - c. the need to promote social inclusion through increased workforce participation (subsection 134(1)(c));
 - d. the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
 - e. the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; on weekends or public holidays; or shifts (subsection 134(1)(da));
 - f. the principle of equal remuneration for work of equal or comparable value (subsection 134(1)(e));

- g. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f));
 - h. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g)); and
 - i. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (subsection 134(1)(h)).
6. Under section 136, a modern award can only include terms that are permitted or required by:
- j. Subdivision B of Part 2-3 (terms that may be included in modern awards)
 - k. Subdivision C of Part 2-3 (terms that must be included in modern awards)
 - l. Section 55 (interaction between the National Employment Standards (NES) and modern awards or enterprise agreements); or
 - m. Part 2-2 (NES).
7. Section 138 of the FW Act provides for modern awards to include terms that are either permitted or required to be included, but only to the extent necessary to achieve the modern awards objective and the minimum wages objective.
8. Modern award terms must not exclude the NES, or any provision of the NES (subsection 55(1)).
9. In a statement issued on 5 December 2014, the Commission indicated that the exposure drafts ‘incorporate any technical and drafting changes proposed by the Commission and identify provisions that may need further review. The exposure drafts do not incorporate any substantive changes and do not represent the concluded view of the Commission on any issue.’¹ This reflects the approach taken throughout the award review stage.

Clause 1 – Title and commencement

10. The proposed wording of clause 1.2 is as follows:

‘this modern award, as varied, commenced operation on 1 January 2010’

11. In our view, this could be construed to mean that the variation commenced operation on 1 January 2010. We suggest leaving out the words ‘as varied’ so that clause 1.2 would read:

‘this modern award commenced operation on 1 January 2010’.

¹ FWCFB 6188 [2014].

12. Clause 1.4 refers to the definitions section at Schedule H. Moving the definitions section to Schedule H has the effect of making the award more complex than it needs to be and is contrary to the modern awards objective at section 134(1)(g) ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’.
13. The placement of the definition section at the end of the award requires significant navigation through the document. In our view, the definition should remain in the body of the award.
14. The ‘standard rate’ concept appears to be of limited relevance under exposure drafts published in this review. In our view, a ‘standard rate’ in addition to an ordinary rate or a minimum rate overcomplicates the award and should be replaced with fixed dollar amounts where possible. Ideally, the concept would be removed from use throughout the award (including in the definitions).
15. The definition of ‘vintage’ in proposed clause 8.5(b) could be moved to the definitions section.
16. The definition of ‘wine industry’ is also used in a number of other agricultural sector awards (for example, the Horticulture Award 2010 and the Pastoral Award 2010). The same definition should be used in each award and should reflect the terms of the definition currently in the Wine Industry Award 2010.

Clause 2 –The National Employment Standards and this award

17. As the NES is a defined term, in our view it does not need to be referred to in full in proposed clause 2.1.
18. For consistency with section 61 of the FW Act, the description in proposed clause 2.1 should also accommodate terms and conditions that operate for the benefit of employers covered by the award.
19. To give effect to the changes in paragraphs 16 and 17 above, we suggest the following change to proposed clause 2.1:

‘The National Employment Standards (NES) and entitlements in this award contain the minimum conditions *that apply to the* of employment ~~for~~ of employees covered by this award.’
20. Proposed clause 2.3 should reflect the terms of the current award and also deal with the situation where there is no noticeboard (for example, because the employee works from a vehicle) and/or limited phone or internet coverage:

‘The employer must ensure that copies of ~~the~~ *this* award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through *other* accessible ~~electronic~~ means.’

Clause 3 – Coverage

21. ‘Wine industry’ is a defined term and does not need to be replicated in separate parts of the award. Clause 3.2 should be deleted if ‘wine industry’ is to remain in the definitions section of the award.

22. Clause 3.3 should be amended with a reference to the horticulture industry for simplicity and ease of understanding, noting that ‘horticulture industry’ is a defined term:

‘This award covers any employer which supplies labour on an on-hire basis in the *wine* industry ~~set out in clauses 3.1 and 3.2~~ in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

23. A similar change could be made to clause 3.4:

‘This award covers employers which provide group training services for trainees engaged in the *wine* industry ~~and/or parts of industry set out at clauses 3.1 and 3.2~~ and those trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

24. Clause 3.5(a) does not need to spell out the name of the FW Act in full, as ‘Act’ is a defined term in the award. We suggest the following change:

‘(a) employees excluded from award coverage by ~~the *Fair Work Act 2009 (Cth)*~~ (the Act);’

Clause 5 – Facilitative provisions

25. It is not clear to the NFF why such a term is necessary in modern awards whose terms speak for themselves. In our view it is inconsistent with the modern award objective in section 134(1)(g) of the *Fair Work Act 2009 (Cth)* (FW Act) and an unnecessary duplication.

26. However, if this clause is to be maintained, it should reflect all terms of the award that give parties the capacity to agree on award variations, for example Individual Flexibility Arrangements are not referred to in the current clause.

27. The current clause in the exposure draft should be amended as follows:

‘5. Facilitative provisions

5.1 A facilitative provision provides that the standard approach in an award provision may be departed from by agreement *either* between an employer and an individual employee, or an employer and the majority of employees in the enterprise or part of the enterprise concerned, *depending on the terms of the provision*.

5.2 Facilitative provisions in this award are contained in the following clauses:

| Clause | Provision | Agreement between an employer and: |
|--------|--|------------------------------------|
| 4.1 | <i>Award flexibility</i> | <i>An individual</i> |
| 6.6(a) | <i>Full-time or part-time conversion</i> | <i>An individual</i> |
| 8.4 | Ordinary hours of work | The majority of employees |
| 8.5(c) | Spread of hours | The majority of employees |
| 8.6 | Ordinary working hours | The majority of employees |
| 8.8 | Make-up time | An individual |
| 9.2(b) | Shiftworkers—meal breaks | An individual |
| 19.5 | Time off instead of payment for overtime | An individual |
| 20.3 | Annual leave—conversion to hourly entitlement | The majority of employees |
| 20.6 | Annual leave in advance of accrued entitlement | An individual |
| 24.2 | Substitution of certain public holidays | The majority of employees |

Clause 6 – Types of employment

28. Clause 6.4(c) deals with the rate of pay for part-time employees. As currently worded, this clause is inconsistent with the piecework arrangements in proposed clause 12. For consistency, it should clarify that part-time pieceworkers are paid on a different (non-time worked) basis:

‘(c) *Except in the case of pieceworkers, a part-time employee must be paid for ordinary hours worked at the minimum hourly rate prescribed in clause 10 – Minimum wages for the work performed.*’

29. Similarly, in its current form, clauses 6.5(a) and (b) are inconsistent with the piecework arrangements in proposed clause 12. To address this inconsistency and having regard to the approach taken in other agriculture sector awards where piecework rates are payable, clauses 6.5(a)-(b) should be amended as follows:

‘(a) A casual employee is an employee who is engaged and paid *as a casual employee*.

(b) *Except in the case of pieceworkers, for each ordinary hour worked, a casual employee must be paid:*

(i) the minimum hourly rate; and

(ii) a loading of 25% of the minimum hourly rate,

for the classification in which they are employed.’

30. The casual conversion clause should remain in its current terms pending any outcome of the casual and part-time issue common proceedings (AM2014/196&7). If changes

are to be made before then, they should not vary substantive terms of the award. For example:

- a. proposed clause 6.6(a)(i) omits reference to casual employees who work on an 'occasional' basis;
 - b. proposed clauses 6.6(a) & (b) refer to a six month period, while the award currently provides 12 months.
31. Proposed clause 6.6(b)(iii) should be varied to ensure that employees giving notice of an election to convert are required to give a minimum of four weeks' notice. The current use of the word 'may' suggests that the requirement to give notice, or a certain period of notice, is not mandatory.

Clause 8.5(b)(iii) – Vineyard employees during the vintage

32. It is not clear whether proposed clause 8.5(b)(iii) remains relevant or not. If it is to be retained, the reference to clause 28.2(d)(ii) is incorrect and should be 28.2(d)(i).

Clause 9.3 – Overtime meal break

33. Proposed clause 9.3 should reflect the current term in clause 28.3 of the award. The revised approach is less clear than the current term.

Clause 10.4 – Wages and Allowances

34. The cross reference in clause 10.4 is correct in the exposure draft of the award, but incorrect in the comparison table of the award and the exposure draft. The term should refer to clause 10.3(a):

'~~Clause 10.4(a)~~ 10.3(a) does not apply to adult apprentices who commenced on or after 1 January 2014 and are in the second and subsequent years of their apprenticeship.

Clause 16.3(a)(ii) – Travel and expenses

35. The changes to proposed clause 16.3(a)(ii) make the provision less clear than the terms of the current award. In our view, the language in clause 24.1(b) the current award should be retained.

Clause 19.3(a) – Length of rest period

36. Proposed clause 19.3(a) is a new clause which inserts a new substantive requirement into the award. This is inconsistent with the approach adopted by the Commission in relation to the exposure draft proceedings, and in our view it should not be retained in the exposure draft.

Clause 20.9 – Transfer of business

37. Clause 20.9 should be deleted as it is inconsistent with the NES. The same provision was deleted from the Pastoral Award 2010 following a decision in *4 yearly review – alleged NES inconsistencies* [2015] FWCFB 3023 (8 May 2015).

Schedule C – Summary of Monetary Allowances

38. As discussed earlier in this submission, it is not clear whether use of the ‘standard rate’ concept should continue in modern awards. The concept is no longer used throughout the award, and complicates the wage summaries unnecessarily.
39. In our submission, it should be removed and the award should instead reflect the fixed dollar amounts payable in each case.

Schedule E – National Training Wage

40. Recent changes to the Commonwealth vocational education and training model necessitate updating of the language in modern awards in relation to training packages.
41. The definition of ‘traineeship’ should be amended as follows:
- ‘traineeship** means a system of training which has been approved by the relevant State or Territory training authority, which meets the requirements of a training package developed by the relevant Industry Skills Council and endorsed by the *Ministerial Council for Tertiary Education and Employment National Quality Council*, and which leads to an AQF certificate level qualification.
42. A similar amendment should be made to the definition of ‘training package’:
- ‘training package** means the competency standards and associated assessment guidelines for an AQF certificate level qualification which have been endorsed for an industry or enterprise by the *Ministerial Council for Tertiary Education and Employment National Quality Council* and placed on the National Training Information Service with the approval of the Commonwealth, State and Territory Ministers responsible for vocational education and training, and includes any relevant replacement training package.
43. We understand that the training packages and allocation of traineeships to wage levels listed in Schedule E.7 are complete and up to date.

Schedule F – Part-day public holidays

44. We note that this clause is likely to be revised following proceedings in AM2014/301.



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