

4 yearly review of modern awards – Horticulture Award

Matter No. AM2014/231

NATIONAL FARMERS' FEDERATION

**SUBMISSIONS IN REPLY ON EXPOSURE DRAFT –
HORTICULTURE AWARD 2016**

Date: 5 May 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. This submission is in response to amended directions issued 23 March 2016 instructing interested parties to file written submissions in reply on the technical and drafting issues related to exposure drafts in Group 3 by 5 May 2016.
3. This submission deals with submissions made in relation to the Exposure Draft of the Horticulture Award 2016.

The Statutory Framework

1. Under section 156 of the *Fair Work Act 2009* (**FW Act**), the Fair Work Commission (**Commission**) is required to review each modern award in its own right every four years.
2. 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)).
3. Under section 136, a modern award can only include terms that are permitted or required by:
 - a. Subdivision B of Part 2-3 (terms that may be included in modern awards)
 - b. Subdivision C of Part 2-3 (terms that must be included in modern awards)
 - c. Section 55 (interaction between the National Employment Standards (NES) and modern awards or enterprise agreements); or
 - d. Part 2-2 (NES).
4. 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.
5. Modern award terms must not exclude the NES, or any provision of the NES (subsection 55(1)).
6. 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.

Reference to other proceedings

7. As a general comment, matters raised in these proceedings that are concurrently being dealt with in other modern award review proceedings are beyond the scope of these proceedings and should not be addressed.

Clause 5 – Facilitative provisions

8. We support the submission of Voice of Horticulture that clause 10.2(a) should be removed from the table of facilitative provisions. Piecework arrangements are substantive award terms and do not result in any variation of the award.

Clause 6.4 – Part-time employees

¹ FWCFB 6188 [2014].

9. We do not agree with the Australian Workers Union (AWU) submission in relation to this clause. The issue raised by the AWU is being dealt with in the casual and part-time common issue proceedings and should not be dealt with as part of the exposure draft process.

Clause 6.5(c) - Casual loading

10. We agree with the change of wording proposed by the AWU in relation to this clause but note that casuals do not receive overtime and refer to comments in our submission of 14 April 2016.

Clause 8 – Ordinary hours of work and rostering

11. In response to Ai Group's submissions in relation to the hours of work and shiftwork provisions, this is a matter that should be the subject of discussion between the parties including the appropriate title of the clause and the location of terms dealing with hours of work for shiftworkers.

Clause 8.1(a)(iii) – Ordinary hours and roster cycles

12. In our view, the wording in clause 22.1(c) of the current award should be retained.

Clause 8.1(a)(iv) – Ordinary hours and roster cycles

13. We do not agree with the AWU's submission.
14. We note Ai Group's concern that the addition of 'and paid in accordance with clause 15 – Overtime' may create confusion as to whether time of in lieu is available to employees or only payment at overtime rates. In our view, the terms are sufficiently clear.

Clause 9.1(a) – Meal break

15. We note the submission of Ai Group that clause 9.1(a) should revert to the language in the current award. We are not opposed to this change.

Clause 9.1(c) - Meal break

16. We agree that the current award refers to the minimum wage and are open to discussion on how the minimum rate provision interacts with the all purpose allowance for the purposes of the Award.

Clause 9.2 – Rest break

17. In response to submissions by Ai Group, VOH and the AWU on this clause we refer to our earlier comments. Further discussion between the parties on the appropriate form of wording may be appropriate.
18. We do not agree with the form of wording proposed by the AWU, which amounts to a new substantive claim and should not be considered.

Clause 9.2(c) – Rest break

19. The AWU has made a claim to insert a definition of 'applicable rate of pay' and replace the words 'appropriate minimum wage' with the term 'applicable rate of pay'.

20. We do not agree with this proposal as it would introduce new complexity to the award, which already includes the concepts ‘ordinary hourly rate’, ‘minimum hourly rate’ and (unless removed), ‘standard rate of pay’.

Clause 9.3(a) – Ten hour break after ceasing work for the day

21. We do not oppose inserting the words ‘or shift’ at the end of this clause.

Clause 10.2 – Pieceworkers

22. We do not agree with the AWU proposal and refer to our earlier comments in our submission dated 14 April 2016. We note that the rate of pay for annual leave is currently at issue in the annual leave common issue proceedings.

Clause 10.3(b) - Juniors

23. We note the submissions of the AWU, Business SA and Voice of Horticulture (VoH). In our view, rounding to the nearest cent is appropriate.

Clause 10.4(a) – Period of payment

24. We agree with the submission of the AWU in respect of this clause.

Clause 11 - Allowances

25. We are not opposed to submission by VoH for clause 11.3(a)(iii) to be deleted and subsequent rewording of clause 11.3(a)(ii).

26. We note that the parties are agreed that the travelling allowance and the tool and equipment allowance should not be treated as all purpose allowances in the Award.

Clause 11.3 – Expense related allowances

27. We note the proposal by Ai Group and refer to our proposed wording in our submission of 14 April 2016.

28. We also note that both the NFF and AWU agree that clause 15.4 of the exposure draft should be deleted.

Clause 11.3(b)(i) – Tool and equipment allowance

29. We support the proposed change of wording outlined in the Ai Group submission.

Clause 14.1(h) - Shiftwork

30. We agree that the wording in the current award should be retained.

Clause 15 - Overtime

31. We note the comments of VoH and the AWU in relation to clause 15. This issue is being dealt with in award flexibility common issue proceedings and should not be dealt with in these proceedings, as outlined at paragraph 8 above.

Clause 16.8 – Proportionate leave on termination

32. We note that the issue raised by the AWU is being dealt with in the annual leave common issue proceedings and should not be dealt with in the exposure draft process.

Schedule B – Summary of hourly rates of pay

33. The parties have made a number of claims in relation to Schedule B.
34. The NFF agrees with the AWU that shift loadings should be reflected in Schedule B.3, however we note that overtime does not apply to casuals under the Award.
35. We agree with the submission by Ai Group that calculation of rates set out in Schedule B is based on the minimum hourly rate, not the ordinary hourly rate. This should be clarified in the tables to avoid confusion.
36. We agree that the word ‘first’ could be removed from Schedule B.2.3 as it does not reflect the terms of the Award.

Schedule G - Definitions

37. We note the submission of Ai Group in relation the definition of ‘ordinary hourly rate’ and suggest that this issue be resolved by referencing both clauses 10.3(a) and 10.1(a).
38. We note the submission of VoH in relation to new definitions of ‘shift’ and ‘day shift’. It is not clear to us that any additional definitions of this kind are necessary.

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