

**4 yearly review of modern awards**

**Matter No. AM2014/244**

**Exposure Draft of the Silviculture Award 2016**

**NATIONAL FARMERS' FEDERATION  
SUBMISSION IN REPLY**

Date: 7 February 2017

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 responds to submissions of the Australian Workers Union (**AWU**) dated 18 January 2017 in accordance with Directions issued on 14 December 2016.

**Claims Pursued by the AWU**

3. In a submission dated 18 January 2016, the AWU confirmed that it is pursuing items 6, 8, 13, 16, 17, 19, 24, 26, 31, 35, 39, 41, 43, 44 and 46. Each of these will be addressed in turn.
4. The AWU has also proposed a new form of wording for proposed clause 9.2 of the exposure draft, pursuant to item 12. The NFF opposes this new form of wording because it relies on the phrase "applicable rate of pay". We note that this phrase has not been agreed in the context of any other agriculture award exposure drafts and is currently the subject of dispute in a range of other modern award proceedings.
5. In the conference in this matter on 8 August 2016, the NFF agreed to consider alternative proposed wording put forward by the AWU in relation to proposed clause 9.2. Having now had that opportunity, the NFF suggests the following alternative form of wording:

"An employee who is required to defer a meal break prescribed by clause 9.1 will, in addition to their rate of pay for ordinary hours, be paid a loading of 100% of the ordinary hourly rate until the meal break is taken."
6. The NFF agrees to the removal of proposed clause 10.2 as discussed during the conference on 8 August 2016.

**Item 6: Clause 6.3 – Types of employment**

7. The AWU seeks to insert the word "ordinary" into proposed clause 6.3 of the Exposure Draft.
8. The NFF does not agree to this claim, for the reasons set out in our submission of 9 June 2016.

9. Proposed clause 6.3 deals with the meaning of full-time employment. A full time employee is “an employee engaged as such who works an average of 38 hours per week.”
10. The definition of full time employment does not deal with how much a full time employee is entitled to be paid. It simply describes how many hours constitutes full time employment.
11. Inserting the word “ordinary” before the words “38 hours” would represent a substantive change to the award.
12. For example, the span of ordinary hours in the Exposure Draft is from 5.00am until 5.00pm. An employee working five days a week between the hours of 10.00am and 6.00pm would be employed to work 8 hours each day, but only 7 ordinary hours each day (35 ordinary hours each week).
13. Under the current award, the employee would be a full time employee. If the word “ordinary” was inserted into clause 6.3, the employee would not be a full time employee, as they would not be employed to work an average of 38 “ordinary” hours.
14. The employee would also not be a part-time employee under the award. A part-time employee is defined in proposed clause 6.4 of the Exposure Draft as follows:
 

*“A part time employee:*

  - (i) is engaged to work less than 38 hours per week;*
  - (ii) has predictable hours of work; and*
  - (iii) receives, on a pro rata basis, equivalent pay and conditions to those of full time employees who do the same kind of work.”*
15. The employee would not be a casual employee under the award, which is defined as follows:
 

*“A casual employee is an employee who is engaged and paid as a casual employee.”*
16. This would create a strange result where the employee was neither a full time, part-time nor casual employee under the Exposure Draft, even though they would have been employed as a full-time employee under the current award.
17. To preserve the status quo and to avoid unintended consequences, the word “ordinary” should not be added to proposed clause 6.3 of the Exposure Draft.

Item 8: Clause 6.4(a)(i) – Type of employment – Part time employees

18. For the reasons outlined above in relation to clause 6.3, the word “ordinary” should not be inserted into clause 6.4(a)(i).

Item 13: Clause 9.3(b) – Breaks – Overtime crib breaks

19. The NFF is opposed to the insertion of “applicable rate of pay” as the rate defining payment of the crib break. The reference should be to the “ordinary hourly rate”.

Item 16: Clause 10.4(a) – Minimum wages - Pieceworkers

20. The NFF is opposed the AWU's suggested insertion of a new requirement that the piecework agreement be "in writing". Under the current award, piecework agreements are not required to be in writing. Adding a new requirement of this kind would represent a substantive change. It would mean that piecework arrangements could be invalidated by the absence of evidence in writing of the agreement.
21. Both parties have agreed that the wording of the clause in the exposure drafts departs quite substantially from the wording in the current award and carries with it a change in meaning that undermines the utility of piecework arrangements. The alternative clause proposed by the NFF has the effect of reinserting reference to the "relevant classification".

*"Employees may work on piecework rates. Provided that where an employee works on piecework rates, the employee must be paid at least the amount the employee would have received for time worked at the ordinary hourly rate for the relevant classification."*

Item 17: Clause 10.4(d) and (e) – Pieceworker leave entitlements

22. The NFF agrees that the meanings of 'full rate of pay' and 'base rate of pay' need to be reviewed. However, we do not support the AWU proposal in relation to proposed clauses 10.4(d)-(e), as it would create new substantive entitlements.
23. The NFF has proposed an alternative approach in our submission of 20 January 2017. We rely on that submission in relation to pieceworker definitions.

Item 19: Clause 11.3(b) – Leading Hand Allowance

24. As set out in our submission of 9 June 2016, the NFF does not support the change proposed by the AWU. An ordinary reading of both the current award and the Exposure Draft provision confirms that an employee appointed as leading hand whose own rate of pay is greater than that provided for under clause 11.3(b)(i) is not entitled to receive the additional leading hand allowance.
25. This reflects the common position of employees who are employed at a rate of pay which recognises, and compensates for, their supervisory status.

Item 24: Clause 11.4(f)(iv) – Expense related allowances – fares and travelling time – Provision of transport

26. The cross references in clause 11.4(f)(i) and (v) appear to be incorrect. The reference should be to clause 11.4(d) and 11.4(l)(i) respectively.
27. The AWU propose to insert an additional reference to clause 11.6(d) into clause 11.4(f)(iv). The NFF maintains that clause 11.6(d) does not prescribe a travel entitlements but rather deals with 'camping out'. Clause 11.6(e) deals with travelling entitlements but operates in substitution for clause 11.4. The reference in clause 11.4(f)(iv) would not be appropriate.

Item 26: Clause 11.6(a)(i) – Expense related allowances – living away from home allowances.

28. As outlined in our submission dated 20 January 2017, the wording in the Exposure Draft would have the effect of unintentionally changing the meaning of the provision. The NFF relies on its earlier submission (in paragraphs 20-24) which proposes a form of words intended to preserve the status quo.

Item 31: Clause 13.3(a) – Overtime and penalty rates – Rest period after overtime duty

29. The NFF does not oppose the AWU's proposed form of wording in relation to proposed clause 13.3(a) of the Exposure Draft as follows:

“Overtime will be arranged so that employees have at least 10 consecutive hours off duty after completing the overtime”.

Item 35: Clause 15.7 – Bushfire fighting – Monday to Friday payment

30. The NFF submission dated 20 January 2017 outlines our position in relation to the bushfire fighting provisions of the award and we rely on that submission.
31. The NFF does not agree with the insertion of the term “applicable rate of pay” as this term is not defined and increases uncertainty. The term “ordinary hourly rate” is well understood and will provide certainty for parties. In that way, it is more likely to achieve the modern awards objective than the “applicable rate of pay” concept, which is inherently arguable.

Item 39: Clause 16.5(b) – Annual leave – Payment of annual leave

32. Proposed clause 16.5(b) of the exposure draft is derived from clause 29.5(b) of the current award. The current award term provides as follows:

“**29.5(b)** an additional loading of 17.5% of the minimum rate prescribed in clause 14 – Minimum wages.”

33. Clause 16.5(b) replaces the words “minimum rate” with the words “ordinary hourly rate”. “Minimum rate” does not include all purpose allowances, while “ordinary hourly rate” does. As a result, the change represents an increase in the rate payable for annual leave loading.

34. The NFF position is that the wording of the current award should be retained.

Item 41: Schedule A.2.3 – Summary of Hourly Rates of Pay – Full-time and part-time shiftworkers – ordinary penalty rates and overtime

35. For the reasons outlined at paragraphs 41 to 48 of our submission dated 20 January 2017, the bushfire fighting provisions are stand-alone provisions. To the extent that they are also referenced in the Schedule, they should be located in a separate table that applies only to bushfire fighting.

Item 43: Schedule A.2.3 – Summary of Hourly Rates of Pay – Full-time and part-time shiftworkers – ordinary, penalty rates and overtime

36. As set out in our submission dated 9 June 2016, the current award does not specify a loading for Sunday work for Shiftworkers. This reflects the terms of the pre-reform *Silviculture and Afforestation Award* (Tas).
- a. Clause 13.5(b)(i) does not apply to shiftworkers;
  - b. While clause 14.12 includes new cross-references to shiftwork rates of pay on Sundays and public holidays, there is no such cross reference in the current award.

Item 44: Schedule A.3 – Summary of Hourly Rates of Pay – Casual employees

37. The NFF seeks the opportunity to comment on any inclusion of overtime rights for casuals in the final version of the table at Schedule A.3 once published.

Item 46: Schedule A.3.2 – Summary of Hourly Rates of Pay – Casual employees – Casual shiftworkers – ordinary and penalty rates.

38. As outlined above at paragraph 35, the current award does not specify a loading for Sunday work for shiftworkers.

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**7 February 2017**