IN THE FAIR WORK COMMISSION

4 yearly review of modern awards – Silviculture Award

Matter No. AM2014/244

SUBMISSIONS ON EXPOSURE DRAFT

NATIONAL FARMERS' FEDERATION

Date: 9 June 2016

1. On 6 June 2016, a hearing was held on the technical and drafting issues related to the Exposure Draft of the Silviculture Award 2016 (**the Exposure Draft**).

2. During the course of the hearing, the National Farmers' Federation (**NFF**) undertook to file a submission relating to the Exposure Draft.

3. This submission sets out the comments of the NFF in relation to the Exposure Draft. It adopts the approach taken by the Fair Work Commission (**the Commission**) in a statement issued on 5 December 2014[1], that the exposure drafts are not intended to 'incorporate any substantive changes.'

Clause 1 - Title and commencement

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

> 'this modern award, as varied, commenced operation on 1 January 2010'

5. 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'.

6. We note that this approach has been agreed by the parties in relation to the exposure drafts of the Horticulture Award 2016, the Wine Industry Award 2016 and the Sugar Industry Award 2016.

7. The definition of 'silviculture and afforestation' is found at both Schedule F and clause 3.2. Our preference would be for the definition to be spelt out in full only once in the award, and preferably in the coverage clause (clause 3.2).

Clause 2 –The National Employment Standards and this award

[1] FWCFB 6188 [2014].

8. We propose an alternative form of words for clause 2.3, to accommodate the situation where there is no noticeboard (for example, because the employee works from a vehicle) and limited or no internet coverage:

   'The employer must ensure that copies of the award and the NES are available to all employees to whom they apply. *This may be achieved by making them available electronically, on a noticeboard which is conveniently located at or near the workplace, or through some other reasonable accessible means*.

9. We note that the proposed form of wording has been agreed between parties in relation to the Horticulture Award 2016, the Wine Industry Award 2016 and the Sugar Industry Award 2016.

Clause 3 - Coverage

10. Clause 3.3 could be amended to replace generic references to industry with specific references to the silviculture and afforestation industry for simplicity and ease of understanding, noting that 'silviculture and afforestation' is a defined term:

    'This award covers any employer which supplies labour on an on-hire basis in the *silviculture and afforestation* 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.

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

    'This award covers employers which provide group training services for trainees engaged in the *silviculture and afforestation* industry and/or parts of *that* 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.

Clause 5.2 – Facilitative provisions

12. We note the submission of the Australian Workers' Union (**AWU**) that clause 11.4(i) should be added to the list of facilitative provisions. We do not agree that clause 11.4(i) is a facilitative provision – if the AWU was actually referring to clause 11.6(i), we agree that it could be included in the table in clause 5.2.

Clause 6.3 – Full time employees

13. The AWU has suggested that the word "ordinary" be included in clause 6.3. In our view, the change is not necessary as the term is not dealing with the rate of pay for full time employees but rather their maximum weekly hours. Division 3 of Part 2-2 of the *Fair Work Act 2009* (**the Act**) also deals with maximum weekly hours and does not prescribe a maximum number of 'ordinary' hours of work.

14. Inserting the word 'ordinary' would have the effect of changing the type of employment for full time employees whose regular hours fall outside the span of ordinary hours. For example, under the Exposure Draft, the span of ordinary hours is from 5.00am until 5.00pm. An employee working five days a week from 10.00am to 6.00pm would be employed to work 8 hours each day, but only 7 ordinary hours (or 35 ordinary hours each week). In this case, the strange result would be that the employee could not be defined as either a full time, part-time or casual employee under the award.

Clause 6.4 – Part-time employees

15. Clause 6.4(a)(i) of the Exposure Draft appears to be missing the word "hours" after the number "38".

16. For reasons similar to those set out above, we do not agree that the hours referred to in clause 6.4(a)(i) should be limited to "ordinary" hours.

17. However, we agree with the AWU submission that clause 6.4(b) should be amended by deleting the last sentence of that clause.

Clause 6.5(b) – Casual employees

18. We agree with the AWU submission that the word "ordinary" should be removed from the first line of clause 6.5(b). This clause sets out the rate of pay for casual employees. It provides that a casual employee must be paid an amount plus a casual loading for each *ordinary* hour worked. This would mean that casual employees were not entitled to the casual loading for any overtime hours worked.

Clause 8.2 – Ordinary hours of work and rostering

19. We note the AWU submission that this clause should be varied to add new words that do not currently appear in the award. In our view the clause is sufficiently clear and does not need to be changed.

Clause 9.2 – Delayed meal breaks

20. We do not agree to the adoption of a new concept in the award of "applicable rate of pay" and note that this has not been agreed in the context of other agricultural award exposure drafts.

21. The provision appears to have been altered in the transition to modern awards in 2010. As the AMOD team have noted, the pre-reform award provided for 'single time' in addition to the appropriate rate'.

22. To give effect to this entitlement, and to address the concerns raised by the AWU, in our view the entitlement could be expressed as an allowance and the clause rewritten as follows:

"An employee who is required to defer a meal break prescribed by clause 9.1 must be paid an allowance of 100% of the ordinary hourly rate until their meal break is taken.

Clause 9.3 – Overtime crib breaks

23. Our reading of clause 9.3(b) is that it provides for a 20 minute crib break before overtime commences, and the crib break as treated as ordinary time rather than overtime for payroll purposes. To address the AWU's concerns, the clause could be revised as follows:

    "An employee working at least one and a half hours of overtime must be allowed a *paid* crib break of 20 minutes before starting overtime after working ordinary hours (inclusive of time worked for accrual purposes in clause 8 – ordinary hours of work and rostering and clause 13.6). *The crib break will be treated as time worked during ordinary hours.*"

Clause 10.2 and 10.3 – Actual weekly rate

24. Clauses 10.2 and 10.3 deal with the calculation of what is effectively the ordinary rate of pay under the award. Unlike many other awards, this award has a concept of "actual weekly rate" which is the minimum weekly rate plus an industry allowance and special allowance, multiplied by 52 and divided by 50.4.

25. In our view, a single approach to the ordinary rate of pay should be adopted for the purposes of the award. There are two options: either using the "actual weekly rate" and "actual hourly rate" concept throughout the award or replacing those terms with the terms "ordinary weekly rate" and "ordinary hourly rate" (using the definition in clause 10.3 as the starting point).

26. For example, clauses 10.2 and 10.3 could be replaced with the following form of words (with consequential changes to the table in clause 10.1 to delete the second and third columns):

    "10.2 Ordinary weekly rate

    The ordinary weekly rate will be calculated by:

    - *Adding the amounts prescribed by clauses 10.1, 11.2 and 11.3(a); then*
    - *Multiplying this amount by 52; then*
    - *Dividing this amount by 50.4, rounded to the nearest 10 cents.*

    10.3 Ordinary hourly rate

    The ordinary hourly rate is calculated by dividing the ordinary weekly rate by 38."

27. Alternatively, clauses 10.2 and 10.3 could be deleted and replaced with the following definitions in the Definitions clause of the award:

*"**Ordinary weekly rate** is calculated by adding the minimum weekly wage rate in clause 10.1, the special allowance in clause 11.2 and the industry allowance in clause 11.3(a), then multiplying that amount by 52 and then dividing by 50.4, rounded to the nearest 10 cents.*

***Ordinary hourly rate** means the ordinary weekly rate divided by 38."*

28. We do not have a particular preference – on the one hand, the "actual weekly rate" concept is likely to be well understood in the industry. On the other hand, the Commission may prefer a consistency of approach across all modern awards through the use of the "ordinary hourly rate" terminology.

Clause 10.4(a) – Pieceworkers

29. The AWU has proposed a change of wording to clause 10.4(a) to insert a new 'in writing' requirement into the award. Such a change would be a substantive change which is not appropriate in the context of these proceedings.

30. The current wording of clause 10.4(a) in the Exposure Draft departs from the wording in the current award quite substantially, resulting in a change in meaning which undermines the utility of piecework arrangements. We propose the following alternate form of words, which builds on the proposal above to adopt 'ordinary hourly rate' as a defined term which includes both the special allowance and industry allowance:

"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."

Clause 10.4(d) and (e) – Pieceworker leave entitlements

31. These clauses are included in the award for the purpose of identifying how leave and other accrued entitlements are calculated for pieceworkers under the National Employment Standards.

32. We agree that a revised approach is required, as the current terms are circular in effect and do not make clear how accrued entitlements are calculated. However, we do not agree with the AWU proposal, which is not clear and could increase substantive entitlements.

33. We propose the following alternative approach, which is based on Regulation 1.09 of the *Fair Work Regulations 2009*, modified to reflect the fact that pieceworkers are paid on an incentive basis rather than time worked basis.

"For the purpose of the NES, the full rate of pay for a pieceworker is calculated by dividing the total amount earned by the employee during the 12 months immediately preceding the taking of the NES entitlement by the total hours worked by the employee in that period.

For the purpose of the NES, the base rate of pay for a pieceworker is calculated in the same way as the full rate of pay for a pieceworker, except that the total amount earned by the employee over the preceding 12 month period must be reduced by any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts paid in that period."

Clause 10.5(c)(i) – Payment on termination

34. We suggest adding the words "of termination" after the word "notice".

Clause 11.3 – Leading hand allowance

35. We do not agree with the change proposed by the AWU in relation to this clause. In our view, the intention of the provision is 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.

36. The reference in clause 11.3(b) to the "weekly wage rate" should identify which wage rate it is (that is, the ordinary weekly rate or the actual weekly rate, depending on the approach adopted in relation to clauses 10.2 and 10.3 above).

Clause 11.4(d) – Fares and travelling time

37. We agree with the wording change suggested by the AWU in clause 11.4(d)(i).

38. The Exposure Draft has varied clauses 11.4(a), 11.4(b), 11.4(c) and 11.4(d) in a bid to simplify the text. To avoid unintended changes in meaning, we suggest the following further changes:

"11.4(b) Distant jobs

An employee must be paid $11.94 per day when working on a distant job as defined by clause 11.6(a) and employed on work *away from, and* located within 30km of the place where, with the employer's approval, the employee is accommodated for the distant job.

11.4(c) Country radial areas

(i) An employee who is engaged ~~at~~ *on work for* a business, branch or section established…

11.4(d) Travelling outside radial areas

…

(i) the time outside ordinary working hours reasonably spent in such travel, calculated at the ordinary hourly rate to the next quarter of an hour with a minimum payment of one half an *hour* per day for each return journey;"

Clause 11.4(f) – Provision of transport

39. 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.

40. The AWU has proposed an additional cross reference to clause 11.6(d) because that clause also prescribes a travelling time entitlement. We have not been able to identify the relevant travelling entitlement: clause 11.6(d) deals with 'camping out'. While clause 11.6(e) deals with travelling entitlements, it operates in substitution for clause 11.4 rather than in addition to it.

Clause 11.4(i) – transfer during ordinary working hours

41. The current award seems to deal with the entitlements now found in clauses 11.4(i)(i) and (ii) on an 'either/or' basis. Removing the words "Provided that" at the commencement of item (ii) has the effect of making the allowances cumulative, rather than separately payable. This could significantly increase the cost to employers of travel during working hours.

Clause 11.4(l)(iii)

42. This clause seems to replicate clause 11.4(f)(ii) and could be deleted.

Clause 11.6 – Living away from home allowance

43. This clause has been modified in a bid to simplify the text. To avoid an unintended change of meaning, we suggest retaining the existing wording in the award. The first dot point in clause 11.6(a)(i) should read:

    - "the employee is maintaining a separate place of residence *to which it is not reasonable to expect them to return each night; and*

    while clause 11.6(a)(ii) should read:

    > "Subject to clause 11.6(b), an employee will be regarded as bound by the statement of their address and no entitlement will exist if they willfully and without duress make a false statement in relation to their ~~usual~~ place of residence."

44. Clause 11.6(c)(iv) should be amended to remove the last sentence, which provides for disagreements to be referred to the Commission for determination. This is adequately dealt with in the dispute resolution clause (clause 24).

45. Clause 11.6(d) deals with camping out. Clause 11.6(d)(i) should be redrafted to reflect the current terms of the award, where the various conditions that apply to the construction and maintenance of a camp are each separate (as currently drafted, the word "because" makes the necessity of a camp dependent on each of the other three criteria). We suggest the following form of words:

    "Camp accommodation will be constructed and maintained if:

- the employee is engaged on projects which are located in areas where reasonable board and lodging *is not available; or*
- the size of the workforce is in excess of the available accommodation; or
- the project or the working of shifts necessitate camp accommodation; *and*
- *it is necessary to have employees in a camp.*

46. Clause 11.6(d)(iv) deals with camp meal charges. We suggest making clear that agreement on the fee is a matter for agreement between either 'the parties' or 'the employer and the employee'.

47. Clause 11.6(e) deals with travelling expenses. We suggest the following changes:

    a. 11.6(e)(i) – first dot point: add "per day of travel, calculated as the time taken by rail or other usual travel method" after hours

    b. 11.6(e)(ii) – add "the wages of" after the word "from"

    c. 11.6(e)(ii) – add "on" after the word "commencing"

    d. 11.6(e)(iv) – replace the cross reference to "11.6(e)(i)" with a reference to "11.6(e)(i)-(iii)".

Clause 13.3(a) Rest period after overtime duty

48. We do not agree that this clause needs to change from the wording in the Exposure Draft.

Clause 13.5 – Weekend and public holiday work

49. In clause 13.5(a)(ii), we suggest replacing the words "the Saturday following Good Friday" with "Easter Saturday".

Clause 13.6(a) Call-outs: Monday to Friday

50. The Exposure Draft includes a question about how to interpret clause 13.6(a)(i) and (ii).

51. We agree with the AWU's interpretation that clause 13.6(a)(i) provides for a minimum engagement of three hours for employees who have completed their work and left for the day and are then recalled to work. Clause 13.6(a)(ii) extends the minimum engagement period to four hours if the actual time worked during the call out is two hours or more.

Clause 14.11 – Saturdays (shiftworkers)

52. We agree with the AWU's comment that the Exposure Draft should reflect the wording in the current award.

Clause 15.7 – Monday to Friday payment (bushfire fighting)

53. As noted above in relation to clause 9.2, we do not support the use of the new 'applicable rate of pay' concept being used in the award and note that this approach has been opposed in the context of other agricultural award exposure drafts.

54. It is not clear to us that the shiftwork provisions of the award operate in situations where a fire is burning out of control requiring emergency attendance. In our view, clause 15 (or current clause 27) contains special provisions dealing with bushfire fighting that operate to the exclusion of other hours of work and penalty provisions and only for a limited time, after which an employee returns to normal duties (see for example clause 15.14).

Clause 15.11 – Stand-by

55. Clause 15.11(f) should be expressed as operating "Despite clause 15.11(e)".

Clause 15.14(a) – Resumption of normal duties

56. The last word of this clause "hours" should be replaced with "time that occurs during the break" to align with the current award term.

Clause 16.4 – Requirement to take annual leave

57. This clause is likely to be varied following the recent decision in *AM2014/47 - Annual leave common issue proceedings*.

Clause 16.5 – Payment of annual leave

58. The words "of the ordinary hourly rate" should be varied to reflect the current award entitlement of 17.5% loading on the minimum rate.

Schedule A.1

59. We agree with the AWU suggestion to remove the word "all".

Schedule A.2.3

60. As discussed above in relation to clause 15, in our view the bushfire fighting provisions are stand alone provisions. If they are to be included in the Schedule, they should be in a separate table that applies generally to bushfire fighting (without reference to whether a person is a shiftworker or not).

61. We agree that the column heading "5 successive shifts" should be "less than 5 consecutive shifts".

62. 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).

    e. Clause 13.5(b)(i) does not apply to shiftworkers;

    f. 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.

63. It may be useful for the AMOD team to review the historical development of Sunday shiftwork provisions in this award to inform further discussion between the parties.

Schedule A.3.1 – Rates of pay

64. As discussed above, we suggest that bushfire provisions are 'stand alone' provisions in the Schedule. These appear to have independent operation to other hours of work and penalty provisions which apply once normal duties have resumed.

Schedule A.3.2 – Sunday rates for casual shiftworkers

65. See our comments above in relation to Schedule A.2.3.

Schedule A.3 – overtime rates

66. We seek an opportunity to comment on any revised tables of rates.

Schedule D – National Training Wage

67. Changes to the Commonwealth vocational education and training model necessitate updating of language in relation to training packages.

68. 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.

69. 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.

70. In relation to the question at D.3.3, we are not aware of any training program which "applies to the same occupation and achieves essentially the same training outcome as an existing apprenticeship in an award as at 25 June 1997" that should be covered by this Schedule.

Schedule D.7.3 – Allocation of Traineeships to Wage Levels

71. The Agri-Food, Amenity Horticulture, Conservation and Land Management and Rural Production training packages are each listed in the exposure drafts as separate training packages under Wage Level C.

72. These training packages have now been consolidated into one training package titled 'Agriculture, Horticulture and Conservation and Land Management'.

Schedule E – Part-day public holidays

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

Schedule F – Definitions

74. We agree that the definition of "silviculture and afforestation" only needs to appear once in the Exposure Draft, preferably in the coverage clause.

75. Our preference would be for the definitions to remain in the body of the award so that the document is easier to navigate.

Sarah McKinnon
General Manager, Workplace Relations and Legal Affairs

9 June 2016