4 yearly review of modern awards

Matter No. AM2014/244

Exposure Draft of the Silviculture Award 2016

NATIONAL FARMERS' FEDERATION

FURTHER SUBMISSION

Date: 20 January 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 Directions issued on 14 December 2016 requiring written submissions and evidence in support of outstanding claims to be filed by 20 January 2017.

NFF Claims

Item 15 – Clause 10.2 – Minimum wages

3. On 18 January 2017, the Australian Workers Union (**AWU**) filed a submission in this matter confirming their agreement to the deletion of proposed clause 10.2 of the Exposure Draft – Silviculture Award 2016.

4. The NFF agrees that clause 10.2 can be deleted from the Exposure Draft.

Item 16: Clause 10.4(a) – Pieceworkers

5. Clause 10.4 of the Exposure Draft is derived from clause 15 of the current modern award:

> **15 Pieceworkers**
>
> 15.1 Employees may work on piecework rates. Provided that where an employee works on piecework rates, that employee must be paid at least the hourly equivalent for the relevant classification in clause 14.1 and applicable allowances/loadings in clauses 14.2, 14.3 and 18.2.

6. This clause has been revised in the exposure draft as follows:

> **10.4 Pieceworkers**
>
> (a) Employees may work on piecework rates. Provided that where any employee works on piecework rates, that employee must be paid at least the ordinary hourly rate.

7. The NFF no longer opposes proposed clause 10.4(a) of the Exposure Draft, as contained in the Exposure Draft of 29 July 2016.

Item 17: Clause 10.4(d) and (e) – Pieceworkers

8. Proposed clauses 10.4(d) and (e) are derived from clauses 15.1(d) and (e) of the current award. The purpose of these terms is to identify how leave and other accrued entitlements are calculated for pieceworkers under the National Employment Standards (**NES**), as required by section 148 of the *Fair Work Act 2009* (**FW Act**).

9. Clauses 10.4(d) and (e) provide as follows:

> "(d) For the purposes of the NES, the base rate of pay for a pieceworker is the base rate of pay as defined in the NES.
>
> (e) For the purposes of the NES, the full rate of pay for a pieceworker is the full rate of pay as defined in the NES."

10. Under section 16 of the FW Act, "base rate of pay" is defined for the purposes of the NES. Relevantly, it provides as follows:

> "(1) The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;
>
> (e) any other separately identifiable amounts.
>
> (2) Despite subsection (1), if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***base rate of pay***, in relation to entitlements under the National Employment Standards, is the base rate of pay referred to in that paragraph:
>
> (a) A modern award applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;.."

11. Section 18 of the FW Act defines "full rate of pay". Relevantly, it provides as follows:

> "(1) The ***full rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, including all the following:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;

(e) any other separately identifiable amounts.

(2) However, if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***full rate of pay***, in relation to entitlements under the National Employment Standards, is the full rate of pay referred to in that paragraph:

(a) A modern award applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;.."

12. Having regard to sections 16 and 18 of the FW Act, it is clear that clauses 10.4(d) and (e) of the award are circular in effect. The 'base rate of pay' for pieceworkers defined in the FW Act is the base rate of pay specified in the award. However, the 'base rate of pay' for a pieceworker employed under the award is the 'base rate of pay' as defined in the FW Act.

13. To address this anomaly, the NFF proposes that clauses 10.4(d) and (e) of the Exposure Draft be replaced with the following terms:

"(d) 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.

(e) 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."

14. This approach is based on Regulation 1.09 of the *Fair Work Regulations 2009*, which prescribes a formula for calculating the base rate of pay for pieceworkers who are award/agreement free employees. However, it is modified to make it simpler and easier to understand, and to reflect the fact that pieceworkers are employed on an incentive-basis, rather than on the basis of time worked.

<u>Item 23: Clause 11.4(f)(i) and (v) - Provision of transport</u>

15. The cross references in clause 11.4(f)(i) and (v) of the Exposure Draft are incorrect.

16. Clause 11.4(f) deals with the Provision of transport. It provides as follows:

"Subject to clauses 18.1(d)(i) and (ii)…"

17. Clauses 18.1(d)(i) and (ii) are provisions dealing with "Travelling outside radial areas". These provisions were translated across to the Exposure Draft as clauses 11.4(d)(i) and (ii) (with some modification).

18. Accordingly, and to preserve the status quo, the opening words of clause 11.4(f)(i) of the Exposure Draft should read as follows:

> "Subject to clause 11.4(d)…"

Item 25: Clause 11.4(l)(iii) – Transport from employer's location

19. The NFF agrees that proposed clause 11.4(l)(iii) would have the same effect as proposed clause 11.4(f)(ii). To avoid duplication of terms, proposed clause 11.4(l)(iii) can be deleted.

Item 26: Clause 11.6 – Living away from home allowances

20. Clause 11.6 of the Exposure Draft is derived from clause 18.5 of the current award:

> **"18.5 Living away from home allowances**
>
> **(a) Qualification for payment**
>
> An employee will be entitled to the provisions of this clause when employed on a job such a distance from their usual place of residence that they cannot reasonably return to that place each night, subject to the following conditions:
>
> (i) the employee is maintaining a separate place of residence to which it is not reasonable to expect them to return each night; and
> (ii) the employee, on being requested by the employer, informs the employer at the time of engagement, that they maintain a separate place of residence from the address recorded on the job application."

21. Clause 11.6 has been revised as follows:

> **"(a) Eligibility for payment**
>
> **(i)** An employee will be entitled to the provisions of clause 11.6 when employed on a job such a distance from their usual place of residence that they cannot reasonably return to that place each night, provided that:
>
> - the employee is maintaining a separate place of residence; and
> - on being requested by the employer, the employee informs the employer at the time of engagement that they maintain a separate place of residence and no entitlement will exist if they wilfully and without duress make a false statement in relation to their usual place of residence."

22. The removal of the words "*to which it is not reasonable to expect them to return each night*" from the first dot point in clause 11.6(a)(i) of the exposure draft broadens the scope of the term. As a result, employers will no longer be able to assert that an employee can reasonably return home after work and is thus not entitled to living away from home allowance.

23. Clause 11.6(a)(ii) inserts a reference to '*usual*' place of residence. This limits the scope of the rule regarding 'false statements'. Under the current award, no allowance is payable if a false statement is made about a separate place of residence other than the address recorded on the job application.

24. For consistency with the current award, the proposed clause 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."

Item 27: Clause 11.6(c)(iv) – Expense related allowances

25. Clause 11.6(c)(iv) of the Exposure Draft provides as follows:

> "(iv) The board and lodging allowance will be increased if the employee satisfies the employer that they reasonably incurred expenses greater than the allowance prescribed. In the event of disagreement, the matter may be referred to the Fair Work Commission for determination."

26. The last sentence duplicates provisions of the dispute resolution term in the Exposure Draft (proposed clause 24), which relevantly provides that:

    a. disputes may be referred to the Fair Work Commission (clause 24.2);

    b. the parties may agree on the process to be used to resolve the dispute (clause 24.3); and

    c. the Fair Work Commission may use any method of dispute resolution permitted by the FW Act to ensure settlement of the dispute (clause 24.4).

27. To avoid duplication and promote a simple and easy to understand modern award, the last sentence of proposed clause 11.6(c)(iv) should be deleted from the Exposure Draft.

Item 28: Clause 11.6(d)(i) – Camp accommodation

28. Clause 18.5(d)(i) of the current award deals with camp accommodation and provides as follows:

> **"18.5(d)(i) Camp accommodation**
>
> Where an employee is engaged on projects which are located in areas where suitable board and lodging as defined in clause 18.5(c) is not available, or where the size of the workforce is in excess of the available accommodation, or where the project or the working of shifts necessitate camp accommodation, and where it is necessary to house the employees in a camp, such camp will be constructed and maintained."

29. Under this provision, each of the conditions that must exist before an entitlement to camp accommodation arises (distance, lack of accommodation or type of work/roster) are separate conditions. If one of these condition is present, and it is necessary to house employees in a camp, an employer must arrange for the construction and maintenance of camp accommodation.

30. In the Exposure Draft, the clause has been redrafted as follows:

"11.6(d)(i) Camp accommodation

Camp accommodation will be constructed and maintained where it is necessary to house an employee in a camp because:

- the employee is engaged on projects which are located in areas where reasonable board and lodging as defined in clause 11.6(c)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."

31. Use of the word 'because' before each of the dot points in proposed clause 11.6(d)(i) changes the effect of the term. It makes the condition that it must be 'necessary to house an employee in a camp' contingent on at least one of the other three criteria.

32. In our submission, whether it is "necessary to house the employees in a camp" is a separate and stand-alone consideration. It is a criteria that must be met in addition to at least one of the other three criteria.

33. To ensure that the status quo is preserved, proposed clause 11.6(d)(i) should be redrafted as follows:

"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.*"

Item 29: Clause 11.6(d)(iv) – Camp accommodation

34. Clause 18.5(d)(iii) deals with camp meal charges when employees are camping out. It provides as follows:

"Where a charge is made for meals in a camp, such charge will be fixed by agreement between the parties."

35. Clause 11.6(d)(iv) of the Exposure Draft revises current clause 18.5(d)(iii) as follows:

"Where a fee is charged for meals in a camp, such the fee will be fixed by agreement."

36. The words "between the parties" have been omitted.

37. To preserve the status quo and make clear that agreement is between the employer and the employee(s) camping out, these words should be retained or replaced with the words "between the employer and employee(s)."

Item 30: Clause 11.6(e)(i)-(iv) – travelling expenses

38. Proposed clause 11.6(e)(i) of the Exposure Draft deals with travelling expenses, and makes a number of minor changes that make the term less clear.

39. In our submission, the proposed clause should be revised to reduce the scope for disputes over the meaning of the clause, as follows:

    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)".

Item 35: Clause 15.7 - Payment for bushfire fighting

40. Proposed clause 15 of the Exposure Draft deals with bushfire fighting. It is derived from clause 27 of the current award.

41. Clause 15 applies in a limited circumstance, as the opening words of the clause make clear:

> "This clause applies to situations where a fire is burning out of control requiring emergency attendance. It does not apply to regeneration burns and the mopping up operations associated with regeneration burns or wildfires."

42. The clause goes on to prescribe a range of conditions that would otherwise be regulated by other terms in the Exposure Draft, as set out in the following table:

Subject matter	**Mainstream award terms**	**Bushfire fighting award terms**
Hours of work	Clauses 8.2; 14.3	Clause 15.2
Work periods	Clauses 13.5(c)(ii); 13.6(a)(ii); 13.6(b); 13.6(c); 13.6(d)	Clause 15.3
Rest periods	Clause 13.3	Clauses 15.4-15.5, 15.14
Meal breaks	Clause 9	Clause 15.6
Rates of pay (Monday to Friday)	Clauses 10; 13.1; 14.10	Clause 15.7
Rates of pay (weekends and holidays)	Clauses 10; 13.5; 14.11-14.12	Clauses 15.8-15.10
Stand by / call outs	Clauses 13.6; 14.14	Clause 15.11-15.12
Travelling time	Clauses 11.4 and 11.6	Clause 15.13
Provision of meals	Clauses 11.6	Clause 15.15

43. As the table demonstrates, the award deals with a range of entitlements in more than one context. They invariably deal with the same (or similar) subject matter, but they do not apply in a cumulative way.

44. Rather, the terms apply separately depending on which circumstance is relevant. If an employee is employed on shift work, the shift work provisions of the award apply. If an employee is required to fight bushfires, the employee is paid under the bushfire fighting terms of the award. If neither shift work nor bushfire fighting applies, the general terms of the award dealing with rates of pay, breaks and allowances apply.

45. Proposed clause 15 of the Exposure Draft deals specifically with bushfire fighting and operates to the exclusion of other hours of work and penalty provisions in the award, for a limited time while an employee is engaged in bushfire fighting activities.

46. Once bushfire fighting activities cease, an employee "resumes normal duties" as clause 15.14 makes clear.

47. For these reasons, the shift work provisions in both the current award and the Exposure Draft – insofar as they deal with rates of pay, breaks and allowances - do not apply when an employee is fighting bushfires.

Item 45: Schedule A.3.1 – Casual employees – rates of pay

48. For the reasons set out above in relation to item 35, provisions dealing with rates of pay for employees fighting bushfires should be reflected as 'stand alone' provisions in the Schedule.

Sarah McKinnon
General Manager, Workplace Relations and Legal Affairs

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