IN THE FAIR WORK COMMISSION

4 yearly review of modern awards – Sugar Industry Award

Matter No. AM2014/247

NATIONAL FARMERS' FEDERATION

SUBMISSIONS ON EXPOSURE DRAFT – SUGAR INDUSTRY AWARD 2016

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 responds to those directions in relation to the Sugar Industry Award. It deals with terms and conditions of employment for field sector employees, commonly employed by cane growers in harvesting and haulout operations.

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:

    - relative living standards and the needs of the low paid (subsection 134(1)(a));
    - the need to encourage collective bargaining (subsection 134(1)(b));
    - the need to promote social inclusion through increased workforce participation (subsection 134(1)(c));
    - the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d));
    - 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));
    - the principle of equal remuneration for work of equal or comparable value (subsection 134(1)(e));

- 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));
- 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
- 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:
   - Subdivision B of Part 2-3 (terms that may be included in modern awards)
   - Subdivision C of Part 2-3 (terms that must be included in modern awards)
   - Section 55 (interaction between the National Employment Standards (**NES**) and modern awards or enterprise agreements); or
   - 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 submission adopts that same approach.

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].

Definitions

12. Moving the definitions section to Schedule I - Definitions has the effect of making the award even more complex than it already is 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 definitions should remain in the body of the award.

14. Comments on Schedule I - Definitions are as follows:

    a. Definitions for 'nominal crushing season' and 'nominal slack season' have been selectively included in Schedule I - Definitions where other defined terms in the award have not. It is not clear why these definitions in particular require different treatment. For example, 'apprenticeship authority' is a defined term in clause 7.2 of the exposure draft, and 'eligible employee representative' is a defined term in clause 36.2 of the exposure draft, but neither of these terms are listed in the definitions section of the award. A consistent approach should be adopted throughout the award.

    b. 'minimum hourly wage' is a defined term, but the term 'minimum hourly rate' is also used frequently throughout the award. It would assist in understanding if common language was used throughout the award.

    c. The standard rate appears to be of limited relevance under exposure drafts published in this review. In our view, the standard rate concept overcomplicates the award and should be replaced with fixed dollar amounts where possible. Ideally, it would be removed from use throughout the award (including in the definitions).

Clause 2 –The National Employment Standards and this award

15. 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.

16. 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.

17. To give effect to these changes, we suggest the following change to proposed clause 2.1:

    'The ~~National Employment Standards~~ (NES) and this award contain the minimum conditions *that apply to the* ~~of~~ employment ~~for~~ of employees covered by this award.

18. 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 limited or no 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

19. The NFF endorses the comments of the Australian Sugar Milling Council (ASMC) in relation to consistent use of terminology in Clause 3.2 and Schedule I – Definitions.

20. The term 'Cane Production and Productivity Boards' should be replaced with the term 'Productivity Services'.

21. The term 'Bureau of Sugar Experiment Stations' should be replaced with the term 'Sugar Research Australia'.

22. Proposed clause 3.4 should be moved to a subsection of proposed clause 3.7, which deals with persons who are not covered by the award.

23. Proposed clause 3.5 should be amended with a reference to the sugar industry for simplicity and ease of understanding, noting that 'sugar industry' is a defined term:

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

24. A similar change could be made to clause 3.6:

    'This award covers employers which provide group training services for trainees engaged in the *sugar* 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.

25. 'Act' is a defined term in the award. Clause 3.7(b) does not need to spell out the name of the FW Act in full. We suggest the following change:

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

26. Clause 3.3 and clause 3.8 appear to be in conflict. This conflict should be resolved so that clause 3.8 (the general rule) operates subject to clause 3.3 (an industry specific rule).

Clause 5 – Facilitative provisions

27. It is not clear to the NFF why such a term is necessary in modern awards is in our view, the terms of the award speak for themselves and only need to be set out once.

28. If the Commission chooses to include a term of this kind in the award, the clause should list all terms of the award that permit parties to agree on award variations. For example, the Award Flexibility term is not included in the list as currently worded and nor is clause 6.4(g), which deals with casual conversion rights in relation to individual employees.

Clause 6.2 – Part time employment

29. The Commission has asked for comment on whether a provision that limits the maximum number of hours of a part-time employee to less than 38 is permissible.

30. In our view, restrictions on hours of work are not about permitted matters under section 139 of the FW Act.

31. Subsection 139(1)(b) permits modern awards to deal with type of employment, including part-time employment.

32. Subsection 139(1)(c) permits modern awards to deal with arrangement for when work is performed. The question of *when* work is performed is quite separate to the question of *how much* work is performed. The former pertains to the day or time that work is undertaken. The latter pertains to the quantity of work undertaken.

33. It is desirable that the FW Act be construed so as not to limit the hours of work an employee is entitled to perform. Such an outcome is consistent with the modern awards objective of promoting social inclusion through increased workforce participation (subsection 134(1)(a)).

Clause 6.3 – Casual employment

34. We note that the issue of whether the casual loading applies to piecework rates, as raised by the Fair Work Ombudsman, has been referred for consideration of the Casual Employment Full Bench in AM2014/197.

35. To the extent that it remains relevant to these proceedings, in our view the loadings payable to a casual pieceworker are separate and distinct amounts. Both the 25 % casual loading and the 20% piecework loading are calculated on the minimum hourly rate and added to any other penalty payable (for example, overtime) but are not compounded.

Clause 7.4 – Apprentices

36. The language in clause 7.4 dealing with approved training packages requires updating having regard to reform of the vocational education and training delivery model in 2015.

37. We suggest the following revised wording:

"An apprentice may be engaged under a training contract approved by the relevant apprenticeship authority, provided the qualification outcome specified in the training contract is consistent with that established for the vocation in the *relevant industry* training package *endorsed by the Ministerial Council for Tertiary Education and*

Employment ~~determined from time to time by Manufacturing Skills Australia or its successors and endorsed by the National Skills Standards Council or its successor~~. Such apprenticeships include but are not limited to the following trades: *etc*

38. The reference in proposed clause 7.5 to the 'National Skills Standards Council' should also be changed to the 'Ministerial Council for Tertiary Education and Employment'.

Clause 10.2 – Field sector hours of work

39. See comments in relation to proposed clause 25 below.

Clause 10.3 – Hours of work

40. Proposed clause 10.3(d)(iii) should be amended so that the second dot point becomes two separate dot points:

    "• a failure or shortage of electric power; or

    • to meet the requirements of the business (including the necessity to work shifts so as to provide continuity of operations; and..."

Clause 11.5 – Meal breaks on overtime

41. The NFF does not oppose the insertion of a meal allowance in lieu of the provision of a meal where the entitlement arises for a field sector employee engaged on overtime.

Clause 14 – Payment of wages

42. Noting the duplication of clauses 14.1-2, 17.1-2 and 20.1-2, it may be sensible to avoid duplication by inserting a single version of the terms in an appropriate place (for example, Part 7).

43. We suggest replacing the word "highest" with the word "higher" wherever used in proposed clause 14.3, for consistency with the term 'higher rate' in that clause.

Clause 25 – Field Sector

44. The overtime provisions in clause 25 do not apply until an employee has worked 152 hours over a 4 week period (see proposed clauses 10.2(a) and (b) and 25.1(a)).

45. Ordinary time worked on Saturday and Sunday is paid in accordance with proposed clause 10.2(c) (that is, at 150% of the minimum hourly rate).

46. Overtime worked on Saturday and Sunday is paid in accordance with proposed clause 25.2.

47. In our view, field sector employees are paid under clause 10.2(c) for all time worked on Saturday and Sunday until they have worked 152 hours over 4 weeks. From this time on, they are entitled to be paid according to clause 25 and time worked on Sunday is paid according to clause 25.2(b).

48. This interpretation is the only one that allows both clauses 10.2 and 25.2 some work to do. Any other interpretation will have the outcome that one must give way to the other. In our view, it is a matter of clarifying the operation of clause 25.2(b) rather than removing a substantive provision from the award.

49. To clarify this position, proposed clause 25.2 should be amended as follows:

'All *overtime* work ~~done~~ commencing on a Sunday must be paid at 200% of the minimum hourly rate with a minimum of three hours' work or payment provided the employee is available to work for three hours'.

50. We note the reference to the award flexibility proceedings (AM2014/300 and 301) in relation to proposed clause 25.6.

51. The time off in lieu provisions in the Sugar Industry Award 2010 are similarly worded to those in the Pastoral Award 2010. Employees have the choice whether or not to take time off in lieu of payment. The provision is necessarily flexible insofar as it relates to field sector employees, because of the unpredictability of hours in the agriculture sector of which the cane industry is a part.

52. In our submission, any change to proposed clause 25.6 should mirror the approach finally taken by the Commission in relation to other agriculture sector awards – specifically, the Pastoral Award 2010 and the Horticulture Award 2010.

Clause 35.6 – Dispute resolution

53. NFF supports an approach where no change is made to the wording of the award if a change would alter the meaning of the term.

Schedule D – Summary of Hourly Rates of Pay

54. Schedule D includes a number of tables that suggest that overtime rates are payable for weekend work without making it clear that this only applies after 152 hours have been worked in a four week period.

55. Columns dealing with Saturday and Sunday overtime rates should be deleted. Alternatively, they should be amended to make clear that the rates only apply after the 152 hours in 4 weeks has been exceeded. For example:

D.1.2 Full-time and part-time field work employees other than shiftworkers — overtime rates

	Overtime: Hours in excess of 152 hours worked over a 4 week period	
	Monday to Saturday – Overtime hours	**Sunday – Overtime hours**

Schedule E.2.2 – Adjustment of expense related allowances

56. As noted above, references to the 'standard rate' appear to be obsolete and could be removed.

Schedule H – National Training Wage

57. As noted earlier, changes to the Commonwealth vocational education and training model necessitate updating of language in relation to training packages.

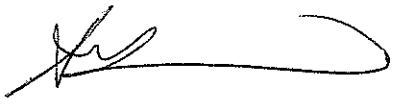
58. The definition of 'traineeship' should be amended as follows:

'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.

59. 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.

60. We understand that the training packages listed in Schedule H.7 are complete and up to date.



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