

IN THE FAIR WORK COMMISSION

**4 yearly review of modern awards  
Inconsistencies with the National Employment Standards  
AM2014/1**

**NATIONAL FARMERS' FEDERATION**

**FURTHER OUTLINE OF SUBMISSIONS**

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 builds on the submission filed in the Fair Work Commission (Commission) on 26 September 2014, dealing with an inconsistency between the National Employment Standards (NES) and three modern awards: the Pastoral Award 2010, Horticulture Award 2010 and Wine Industry Award 2010.

**The legislative context**

3. 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.
4. A modern award may only include terms to the extent necessary to achieve the modern awards objective (section 138).
5. The modern awards objective is found in section 134 of the FW Act. Under that section, the Commission must "ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions", taking into account criteria including:
  - i. 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)); and
  - ii. 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)).
6. The NES is contained in Part 2-2 of the FW Act. Division 6 of Part 2-2 deals with annual leave (from sections 86 – 94).
7. Other provisions of the FW Act set out how the NES interacts with modern awards.
  - a. Subsection 55(1) provides that modern awards must not exclude the NES or any provision of the NES.
  - b. Modern award terms that contravene section 55 have no effect (sections 56 and 137 of the FW Act).
8. Under the NES, employers have the right to choose not to recognize an employee's service with another employer where there is a transfer of business.

- a. Ordinarily under the FW Act, service with the first employer counts as service with the second employer where there is a ‘transfer of employment’ (subsection 22(5)).
- b. Relevantly, there is a ‘transfer of employment’ if:
  - i. a national system employee is a transferring employee in relation to a transfer of business; and
  - ii. the transfer of business occurs between two employers that are not associated entities (subsection 22(7)).
- c. Despite subsection 22(5), an employer can decide not to recognize the service of a transferring employee for the purposes of annual leave under the NES.
- d. Subsection 91(1) provides as follows:

*“Subsection 22(5) of the FW Act does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to recognize the employee’s service with the first employer (for the purpose of this Division).”*

### **Terms that exclude the NES**

- 9. Annual leave for employees covered by the Pastoral Award 2010, Horticulture Award 2010 and Wine Industry Award 2010 is provided for in the NES.<sup>1</sup>
- 10. In addition, each modern award provides that for the purpose of calculating an employee’s entitlement to annual leave under the NES, continuous service with an old employer must be deemed to be service with a new employer in a transfer of business situation.
- 11. Clause 23.7(a) of the Pastoral Award 2010 provides as follows:

#### **Annual leave - transfer of business**

- (a) Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for.

- 12. Clause 25.9 of the Horticulture Award 2010 provides as follows:

#### **Annual leave - transfer of business**

Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an

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<sup>1</sup> See clause 23.1 of the Pastoral Award 2010, clause 25.1 of the Horticulture Award 2010 and clause 30.1 of the Wine Industry Award 2010.

employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for.

13. Clause 30.9 of the Wine Industry Award 2010 provides as follows:

#### **Transfer of business**

Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for.

14. In each case, the modern award clause excludes the provision in the NES that confers a right on employers to decide not to recognize a transferring employee's prior service for the purposes of annual leave under the NES.
15. A provision that excludes the NES contravenes section 55 of the FW Act and is of no effect to that extent.
16. While the provisions may be of no effect, there is a public interest in ensuring that modern awards do not contain inconsistent NES terms. Removing such terms from modern awards promotes the objective of ensuring that the modern award system is simple and easy to understand (subsection 134(1)(g)).

#### **Terms that exclude the NES are not supplementary terms**

17. The FW Act permits modern awards to supplement the NES (subsection 55(4)) but not in a way that excludes the NES.
18. The NES sets "minimum standards that apply to the employment of employees which cannot be displaced" (subsection 61(1)). These standards apply both to employers and employees.
19. Employers have rights under the FW Act in the same way that employees have rights under the FW Act.<sup>2</sup>
20. A modern award term that takes away the right of employers to decide not to recognize a transferring employee's prior service for the purpose of annual leave under the NES excludes the provision of the NES conferring that right.
21. Such a term offends the statutory prohibition in subsection 55(1) of the FW Act. It does not matter whether the result is a more beneficial entitlement for employees.



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<sup>2</sup> *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 at paragraph 92.