

From: Sarah McKinnon [mailto:SMcKinnon@nff.org.au]
Sent: Thursday, 25 September 2014 5:08 PM
To: AMOD
Subject: Modern award review: NES inconsistencies

Dear Sir or Madam,

Please find enclosed a submission on an inconsistency between the National Employment Standards and certain modern awards, in accordance with Statement of the Full Bench of 13 August 2014 [2014] FWCFB 5537.

Yours sincerely,

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4 yearly review of modern awards – National Employment Standards

NATIONAL FARMERS' FEDERATION

OUTLINE OF SUBMISSIONS

Date: 26 September 2014

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 deals 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 Fair Work 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. Section 134 of the FW Act contains the modern awards objective. The Fair Work 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. Part 2-2 of the FW Act deals with the NES and Division 6 of Part 2-2 deals with annual leave (from sections 86 – 94).
7. Section 55 deals with the interaction between the NES and modern awards. Under subsection 55(1), modern awards must not exclude the NES or any provision of the NES.
8. Modern award terms that contravene section 55 have no effect (sections 56 and 137 of the FW Act).

9. Section 91 deals with the right of an employer to choose not to recognize an employee's service with another employer following a transfer of business.
 - a. Under subsection 91(1), if there is a 'transfer of employment' between non-associated entities and one employer chooses not to recognize an employee's service with another employer for the purposes of annual leave, subsection 22(5) of the FW Act does not apply.
 - b. A transfer of employment between non-associated entities occurs 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. If there is a transfer of employment, service with the first employer counts as service with the second employer (subsection 22(5)).
10. In other words, subsection 22(5) maintains continuity of service for employees under the FW Act in connection with a transfer of business.
11. However, an employer can choose not to recognize an employee's service with a former employer for the purposes of annual leave (subsection 91(1)). In that case, continuity of service is broken and the former employer must pay out the employee's accrued entitlements (subsection 90(2)).

Inconsistent terms under the Pastoral Award 2010, Horticulture Award 2010 and Wine Industry Award 2010

12. Annual leave terms in the Pastoral Award 2010, Horticulture Award 2010 and Wine Industry Award 2010 all provide that continuous service with an old employer must be deemed to be service with a new employer in a transfer of business situation.
13. 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.

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

15. 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.

16. In each case, the modern award clause excludes the provision in the NES that confers a right on employers to choose not to recognize continuity of service for the purposes of annual leave in a transfer of business scenario.

17. A provision that excludes the NES contravenes section 55 of the FW Act and is of no effect to that extent.

18. 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 also promotes the objective of ensuring that the modern award system is simple and easy to understand (subsection 134(1)(g)).

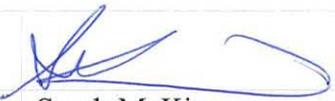
19. Employers and employees covered by modern awards are entitled to assume that the terms of those awards are legally binding.

20. Terms that have no effect because they exclude the NES are likely to result in employers and employees being denied rights conferred on them by the NES.

21. Such an outcome would undermine the NES and would be inconsistent with the scheme of the FW Act.

22. Such terms should be removed from modern awards.

Signature

Signature	
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Position	Manager, Workplace Relations and Legal Affairs
Date	26 September 2014