

FAIR WORK COMMISSION

C2019/5259

REVIEW OF CERTAIN C14 RATES IN MODERN AWARDS

NATIONAL FARMERS' FEDERATION

INTRODUCTION.

1. We refer to the above matter and the decision of the Fair Work Commission (**the Commission**) which was published on 16 April 2024 (**the Decision**).
2. On 30 August 2024 the Commission published draft determinations (**the Draft Determinations**) giving effect to the Decision, together with a statement of the President (**the Statement**) which invited interested parties to file submissions in relation to the Draft Determinations by 27 September 2024.
3. The National Farmers Federation has an interest in the Pastoral Award 2020 (**the Pastoral Award**) and the Horticulture Award 2020 (**the Horticulture Award**), and accordingly these submissions respond to the President's invitation in relation to those two Awards.

HORTICULTURE AWARD.

4. To give effect to the Decision in relation to the Horticulture Award, the Draft Determination will vary the classification descriptors of the award as follows:
 - (a) The General Description of Level 1 will specify that an employee will: "progress to Level 2 after no more than 3 months' industry experience";
 - (b) The General Description of Level 2 will provide that the employee has: "3 months' industry experience to enable the performance of work within the scope of this level"; and
 - (c) Reproduce a range of the Level 1 indicative duties at Level 2.

How is “industry” experience determined for the new provisions of the Horticulture Award?

5. The first matter to be resolved is the question of what constitutes “industry experience” for the purposes of assessing the right/obligation to transition from Level 1 to Level 2.
6. The expression “Horticulture industry” is defined at clause 2 and clause 4.2 of the Horticulture Award to mean:
 - (a) *the sowing, planting, raising, cultivation, harvesting, picking, washing, packing, storing, grading, forwarding or treating of horticultural crops in connection with a horticultural enterprise; or*
 - (b) *clearing, fencing, trenching, draining or otherwise preparing or treating land or property in connection with the activities listed at 4.2(a).*¹
7. This definition is presumably the starting point for an understanding of what is meant by “industry experience” in the variations to clause A.1.2.
8. However, it should also be recognised that there is a vast range of activities covered by that definition, each with their own growing requirements, nuances and production systems. There are many different kinds of crops covered by the Horticulture Award, and working with those different crops may engage many different skill sets. Experience working on a farm which grows table grapes will be quite different, for example, to working on a farm growing bananas, citrus, broccoli, and/or watermelon.
9. This is recognised in the Decision where the Commission observed that there is some difficulty applying the confirmed view having regard to (inter alia) “the diversity of skills that might be required to pick different types of crop.”²
10. It is also apparent that one of the fundamental drivers for the Decision is the notion that Level 1 should be an ‘introductory’ classification, where the worker’s time is spent acquiring the basic skills and understandings necessary to perform the fundamental tasks of Level 2 (and indeed all) roles.
 - (a) The Decision clearly articulates that Level 1 is “an entry-level classification in which employees without qualifications or experience may be placed until they have a sufficient level of training to perform at higher classification levels.”³

¹ And expressly excluded from the definition is “(a) the wine industry; (b) silviculture and afforestation; (c) sugar farming or sugar cane growing, sugar milling, sugar refining, sugar distilleries and/or sugar terminals; (d) any work in or in connection with cotton growing or harvesting; cotton ginneries and associated depots; cotton oil mills and the extraction of oil from seed; or (e) plant nurseries.”

² Decision at [131].

³ Decision at [24]. Emphasis added.

- (b) The Draft Determination will vary the description of a Level 2 worker at clause A.2.2 to be someone who “has 3 months’ industry experience to enable the performance of work within the scope of this level”.⁴
11. As such, at the time they transition from Level 1 to Level 2, the employee should have a solid, albeit basic, understanding of the job. They may not have experienced all aspects of the role. However, they should have a grounding in the basics of the business⁵ and the type of work at which they are expected to be competent, and they should be able to draw on that grounding in the performance of their duties. It follows that the type of experience acquired at Level 1 should clearly *link* to the core competencies required at Level 2. As such, the definition of experience which is required for the automatic transition from Level 1 to Level 2 cannot be drawn too loosely: it should enable — indeed require — that link.
12. That is not to suggest that the worker must have experience in the specific Level 1 role (‘planting’ as opposed to ‘picking’ as opposed to ‘packing’) or particular variety (apples as opposed to mushrooms as opposed to mandarins). However, there must be some deeper connection than simply 3 months working on any fruit or vegetable farm for the worker to have acquired “experience to enable the performance of the work”.
13. In our submission, a convenient approach, and a categorisation which is generally accepted by industry, would be to distinguish between experience working with:
- (a) Tree crops, which would include but may not be limited to citrus, stone fruits, tropical fruits, and pomes; and
 - (b) Ground and field, including vegetables, tubers, melons, legumes, and vine crops (table grapes and passionfruit).

Divided in this way, the “industries” each have *relatively* similar operations and business systems which will allow the worker to acquire experience enabling them to work competently at Level 2 across a variety of farms.

14. Consistent with these submissions, the following could be inserted after the list at clause A.1.2:

For the purposes of determining the classification for an employee under this clause A.1.2:

- (i) *Where the employee is employed in a tree-crop farming enterprise, the expression “industry experience” means experience working at a tree crop farm; and*

⁴ Draft Determination at [3]. Emphasis added.

⁵ Including the crops which are grown.

- (ii) *Where the employee is employed in a ground-crop farming enterprise, the expression “industry experience” means experience working at a ground-crop farm.*

How is the duration of experience calculated under the new provisions of the Horticulture Award?

15. The Decision and Draft Determinations provide for the transition from Level 1 to Level 2 to occur if and when the worker has attained 3 months experience. However, they do not specify the way in which that “3 months” is to be calculated. This leaves a significant element of uncertainty. Three months may be, for example, March, April and May, or another series of calendar months whether contiguous or not, or it could mean the equivalent to three months in weeks, days, workdays, hours, work hours, etcetera.
16. This may not be a difficult problem to solve when making the assessment for the purposes of classifying a full-time, permanent employee, although there may be difficulties where that fulltime employee has changed jobs — within the “horticulture industry” — before having worked the “three months” period. It becomes more problematic, however, where the employee works different part-time hours for one or more farm, simultaneously or not. Furthermore, it becomes extremely difficult where the worker is casual and works irregular hours, perhaps across multiple farms and/or businesses, as is frequently the case with Level 1 workers in the Horticulture Industry.
17. As noted above, a significant portion (perhaps the majority) of Level 1 workers under the Horticulture Award will be casual and transient, moving jobs as they work through the various harvest periods. Furthermore, hours of work are driven by the needs of the crops rather than traditional schedules. Employees work at odd times, for odd hours, frequently longer but occasionally shorter than the standard 7.6 hours/day to meet harvest needs. The timing and regularity of the work may also be subject to the weather, pests, market demands, the requirements of the crops and other factors which are largely beyond the control of either the worker or the employer.
18. It follows that, within the horticultural context, it may be very difficult to identify when a worker has worked 3 months unless the time requirements are broken down into smaller and more manageable units. Indeed, a break-down of the requirement into “weeks” or even “days” will not be adequate when the expectation and requirements of the work are so variable. Again, this problem is apparently acknowledged by the Decision at [131]:

there is some difficulty associated with the application of the confirmed view having regard to ... the seasonal and itinerant nature of fruit and vegetable picking work.

19. The other problematic aspect of leaving the unit of time as “3 months” is that it is somewhat ambiguous whether the intention is to be 3 months of work or, alternatively, a flat 3 months (since the start date) of employment. The requirement for 3 months of “industry experience” makes it relatively clear that something more is required than a simple lapsing of the 3 months of time since the start of engagement or the first day of work. Nonetheless, it would be clearer and less ambiguous if the provisions were to express the requirement in more precise units.
20. For this reason, in our submission the units of time should be more specifically defined in hours.
21. A useful precedent may be the *Social, Community, Home Care and Disability Services Industry Award 2010*, which specifies that the employee must progress from pay point 1 to pay point 2:

*on completion of 12 months’ industry experience, or if part-time, on completion of 1976 hours of industry experience.*⁶
22. Using 1976 as the measure of working hours which equates to a 12-month period, there would be 494 hours for a 3-month period⁷ which, in our submission, should be included with the variations, at least where the quantity of experience is being assessed in relation to casual or part-time workers.
23. In addition, the Determination does not specify whether the work experience must be continuous, or if timelapses between periods of work may affect the calculations. While clearly a short lapse of, for example, a few weeks or months would have a negligible impact, a number of years will have greater ramifications. For example, if a person had worked in the industry for 4 months in 2020 but had not worked in the industry since in the intervening 5 years then it may be surprising for that person to be automatically assigned a Level 2 classification in 2025.
24. Putting aside the obvious difficulties in verifying claims of work which are many years in the past, in our submission, the more distant the work the less likely that the employee will have retained the understanding and skills associated with that work. Memory, knowledge, and familiarity fades, and work which was at a relatively distant point in an employee’s history is unlikely to remain with them. The notion of “experience” requires something more than time spent doing a thing; it also entails the acquisition and retention of utilizable knowledge, understanding, and skills. Part of the rationale for the ‘automatic’ progression

⁶ *Social, Community, Home Care and Disability Services Industry Award 2010*, schedule B, clause B.1.3(d)

⁷ i.e. 1976 divided by 4.

- is that an employee who has worked for 3 months at Level 1 will have “gained basic proficiency in their duties”⁸, and a retention of the relevant knowledge and skills is essential to maintaining that “basic proficiency”.
25. Furthermore, the greater the amount of time that has passed since a period of work, the more likely it is that the working systems and business practices will have evolved, and technology and tools will have changed, such that the work which was performed in the “old” job bears little resemblance to the work which will be performed in the “new” job, despite the fact that they are notionally in the same ‘industry’.
26. As such, in our submission, it is reasonable that a cap be placed on how far back in time the “experience” was acquired.
27. We note that clause B.1.3(d) in the *Social, Community, Home Care and Disability Services Industry Award 2010* (cited above) specifies that work must have been performed — i.e. the “relevant experience gained” — within the previous 3 years to progress from pay point 1 to 2. It would be reasonable to place a similar cap on the time for acquiring experience for automatic progression from Level 1 to Level 2 under the Horticulture Award.
28. In our submission,
- (a) the new bullet point appearing at the end of clause A.1.2, should read as follows:
- *will progress to Level 2 after no more than 494 hours ~~3-months’~~ industry experience within the proceeding 3 years.*
- (b) a new bullet point appearing at the end of clause A.2.2, should read as follows:
- *has ~~3-months’~~ 494 hours industry experience to enable the performance of work within the scope of this level within the proceeding 3 years.*

PASTORAL AWARD.

29. The Draft Determinations will make the following changes to the Pastoral Award:
- (a) Amend clause 31.1 so that the farm hand level 1 (FLH1) classification -- as it applies to station hands, station cooks and cooks’ offsidiers, cattle farm workers, and dairy operators -- will only apply to workers with 6 months or less experience;
- (b) Amend clause 36.2 so that the piggery attendant level 1 (PA1) will only apply to piggery attendants with 3 months or less experience; and

⁸ Decision at [131]

- (c) Amend clause 46.2 so that the poultry farm worker level 1 (PW1) only applies to poultry farm workers with 6 months or less experience.

What is meant by “industry experience” in the context of the Pastoral Award?

30. With respect to the meaning of “industry” within the phrase “experience in the industry”, we note that “pastoral industry” is defined broadly at clauses 2 and 4.2 as follows:

Pastoral industry means all employers and employees who are engaged in or in connection with:

- (a) the management, breeding, rearing or grazing of livestock or poultry;*
- (b) the shearing and crutching of sheep and the classing and pressing of wool on farms;*
- (c) dairying;*
- (d) hatchery work;*
- (e) the sowing, raising or harvesting of broadacre field crops and other crops grown as part of a broadacre mixed farming enterprise;*
- (f) the treatment of land for any of these purposes; or*
- (g) clearing, fencing, well sinking, dam sinking or trenching on such farms or properties.*

31. This broad definition supports the broad coverage of the Award, which applies to a significant proportion of the range of agricultural production, including (but not limited to) dairy, cotton, grains, wool, sheep, cattle, chicken and pork meat. While similar in one sense (sharing similar outputs) each of these (sub)industries covered by the Pastoral Award have their own systems and labour needs and manage their workforces in different ways.
32. To accommodate this range of different industries, the classifications of the Pastoral Award are distributed across four separate and distinct Parts, which are dedicated to subsets of agricultural production: *Part 6 — Broadacre Farming and Livestock Operations*; *Part 7 — Pig Breeding and Raising*; *Part 8 — Poultry Farming*; and *Part 9 — Shearing Operations*. Furthermore, *Part 6 — Broadacre Farming and Livestock Operations*, covers six different ‘streams’ of employment: station hands, station cooks, cattle farm workers, feedlot employees, and dairy operators ⁹.
33. As noted above at paragraphs [10] and [11], the Decision is premised on the notion that the time spent working at Level 1 will enable the worker to gain “basic proficiency in their duties”.¹⁰ It follows, in our submission, that work in one type of farming operation or commodity should qualify for the purposes of an employee’s progression within that same

⁹ Six if cooks and cooks’ offsidiers are seen as different streams.

¹⁰ Decision at [131]

type of operation/commodity e.g. working 6 months on a dairy farming operation would qualify for the purposes of the transition of a dairy operator grade 1A. However, it does not appear to support the notion that work in one type of farming operation (broadacre cropping) should mandate progression in another type (dairy farming) which has different production and work systems and generates different produce.

34. Our concern is that, given the broad definition of “pastoral industry” at Clause 2 and the wide scope and coverage of the Award¹¹, the new provisions may be read to allow the relevant experience to be with *any type* of operation/commodity which the Pastoral Award covers. Broadacre farming, for example, should not qualify for the purposes of assessing an employee’s classifications in a dairy operation.
35. To address these concerns, without wishing to overcomplicate the issue, in our submission the Determination could make it clear that the term “industry” is to be applied relatively tightly, so that its use is context dependant with reference to the type of operation and role in which that worker obtained the experience. A suitable approach would be for the variation to include a Note of clarification to that effect, at the beginning of the relevant clauses:

NOTE: For the purposes of clauses 31, 36, and 45, wherever the expression “experience in the industry” is used in a classification descriptor, the expression will be read as referring to the kind of industry, at the level of commodity produced, in which an employee with the corresponding classification and position/role typically works.

36. It may also be observed that the expression “experience in the industry” is currently used throughout the classification provisions (clauses 31, 36, and 45) and those uses occasionally specify the type of (sub) industry to which they refer (e.g. “the feedlot industry”¹², “the pig industry”¹³). This divergence confuses the issue somewhat. Any direction as to the meaning of the expression must be mindful of these existing uses and the way any variations may affect their interpretation or understanding. A Note would seem to be the best way to avoid any such unintended consequences.
37. In addition, as noted above at paragraphs [23] to [26], the Draft Determination does not specify a time period within which the employee must have performed the work in order for it to qualify as “experience” for the purposes of these new transition provisions. As we observe, the passage of time affects the retention of memories and knowledge, along with the business practices and technologies which apply. As such, it would be appropriate to

¹¹

¹² Clause 31.4(a) — first bullet point.

¹³ Clause 36.3(a) — first bullet point.

limit the amount of time which may lapse between the performance of the work and the assessment for the purposes of the transition arrangements.

38. Following the precedent set by the *Social, Community, Home Care and Disability Services Industry Award 2010*, we submit that a three-year time limit should apply to the working ‘experience’ for the purposes of the transition arrangements.

Transition between FLH1, FLH2 and FLH3 – Part 6 — Broadacre and Livestock Operations.

39. Under the existing provisions, most employees¹⁴ working under Part 6 of the Award (Broadacre and Livestock Operations) must transition from FLH1 to FLH3 where they have acquired 12 months experience. The Decision and Draft Determination would vary these provisions to stipulate that an employee may only be classified at FLH1 where they have “less than 6 months experience”.
40. However, the variations do not alter the FLH2 or FLH3 classification. As such, it is not expressly stated which classification should apply where the employee has more than 6 months but less than 12 months experience. This is despite the fact that the Decision states that station hands with 6 - 12 months experience and dairy operators with 6 – 12 months experience should be added to FLH2.¹⁵
41. The implication is that after 6 months the worker should transition from FLH1 to FLH2. The FLH2 classification attracts a pay rate equivalent to C13, and so transitioning to that rate would be consistent with the Decision. In addition, this approach does not disturb the existing FLH3 provisions, which triggers the transition when the employee acquires 12 months experience.
42. As such, in our submission the Draft Determination would benefit from additional changes to clarify that those workers with experience between 6 and 12 months would fall within FLH 2.
43. Furthermore, the Draft Determination stipulates that station cooks and station cooks offsiders may only be classified at FLH1 where they have less than 6 months experience. However, it does not specify what classification those employees will transition to, despite the fact that the Decision states that station cooks and station cook offsiders should be

¹⁴ Except for feedlot employees who currently transition after 3 months

¹⁵ The Decision at [159].

added to FLH2.¹⁶ While the progression from FLH1 to FLH2 is implied, in our submission, the Draft Determination should specify that arrangement.

44. We would recommend the following be inserted at clause 31.2 after the “(a)” and before the words “Cattle farm worker grade B”

... Station hand with 6 to 12 months’ experience in the industry;

(b) Station cook with more than 6 months’ experience in the industry;

(c) Station cook’s offsider with more than 6 experience in the industry;

(d) Dairy operator grade 1A with 6 to 12 months’ experience in the industry;

(e) Cattle farm worker grade A with more than 6 months’ experience in the industry;

and

(f)

How is industry experience determined for the PA1 - Part 7 Pig Breeding and Rasing?

45. The Commission has provisionally decided to introduce a limit of 3 months in relation to the transition to the Piggery Attendant PA1 to PA2 roles.
46. The rationale for the 3-month period is that the language used in the Piggery Attendant classifications of the Pastoral Award reflects language in the Manufacturing and other Awards, and so for consistency the transition period in the Manufacturing Award should be replicated.¹⁷
47. With respect, we submit that 6 months would be a more appropriate transition period. That time period would align with the typical introductions and ‘on-boarding’ processes required in piggery enterprises, including three-months or more of formal training, along with introduction to other business requirements. As the statement provided by Andree Rowntree indicates¹⁸, this would include WHS training (including understanding hazards and procedures, contingency plans), farm hygiene and cleaning, basic introduction to biosecurity requirements, basic animal husbandry, basic animal health and welfare checks, understanding pig behaviour and good pig stockmanship, basic record keeping procedures and an introduction to farm quality assurance requirements. It would also allow time to introduce a new starter to the different ‘units’ of the enterprise, including the farrowing shed, mating unit, different pig herds, different breeding programs, feeding programs, etc.

¹⁶ The Decision at [159]

¹⁷ Decision at [163]

¹⁸ Statement of Andree Roundtree made on 5 December 2023, paragraphs 9 to 13.

48. Furthermore, a 6-month transition would be consistent with the other agricultural industries and achieve greater consistency¹⁹ across the one award (the Pastoral Award). In our submission that is an outcome which is much more desirable and logically coherent than an outcome which results in consistency with a number of different awards in different industries²⁰ which are followed simply because they adopted similar language approximately 20 years ago for reasons which are unclear and without (apparently) any other historical basis. In short, the other types of farm businesses covered by the Pastoral Award bear a much closer relation to piggeries in terms of industrial needs and operations and workplace functioning, than the manufacturing, airline, etc, industries.
49. We would also note that the proposed addition to clause 36.2(a) does not follow from the chapeau at 36.2(a) and as such could be redrafted to read more clearly.
50. In place of the variation proposed by the Determination we would recommend:
- (a) the variation to clause 36.2(a) be as follows
 - has less than 6 months experience in the industry.
 - (b) the variation to clause 36.3(b) be as follows
 - *an employee appointed by the employer to this level who has completed up to 3 months' structured training 6 months employment in the industry so as to enable the employee to work within the scope of this level.*
51. In addition, the Draft Determination omits to address the fact that PA2 is currently paid \$24.09/hour, which is lower than the C13 (FLH2) rate and therefore inconsistent with the confirmed view and the Decision. It would be consistent with the Decision (and aim for consistency across the Pastoral Award) for the rate to be increased to the FLH2 (C13) equivalent to \$24.10/hour.

TIME OF COMMENCEMENT

52. The Decision and the new provisions will increase the wage bill of many farms, which have already been budgeted through this year until the end of the 2024/25 financial year. Although not possible to quantify with accuracy, it is safe to say that an increase in the wage bill will have a significant impact on the farm business.

¹⁹ We note that the FLH 1 Feedlot employee provision still feature a 3-month transition period. While it would be ideal for that provision to also be brought into line with rest of the Award, they are not the subject of these proceedings.

²⁰ Manufacturing, Airline Operation, Vehicle Repairs, Joinery, and Graphic Arts.

53. In addition, a related concern is that to adjust to and correctly implement the new provisions, farms will have to adopt changes to their administrative processes. This will potentially require changes to personnel management practices and changes to payroll systems to ensure the relevant workers' pay rates transition at the appropriate times.
54. We note that farm businesses are generally administratively prepared to make these changes in accordance with Annual Wage Review decisions, the next of which takes effect on 1 July 2025. It is submitted that it would be sensible and convenient for this Decision to take effect at the same time.
55. In addition, s 166(1)(a) of the Fair Work Act 2009 establishes a presumption that a determination which sets or varies a minimum wage should come into operation on 1 July in the next financial year after the determination is made. While subs 166(2) enables the Commission to determine that the new wage should take effect on another day if "appropriate to do so", it is our submission that for the reasons given above it would not be appropriate to do so.
56. Accordingly in our submission there should come into operation on 1 July 2025.

DATED 27 September 2024

Ben Rogers

National Farmers Federation