From: Andrew Crabb [mailto:andrew.crabb@nat.awu.net.au]
Sent: Monday, 21 August 2017 6:25 PM
To: AMOD; Chambers - Hatcher VP
Subject: AM2016/196 and AM2016/197 - AWU submissions - Horticulture Industry - ordinary hours of work and penalty rates

Dear Associate

AM2016/196 and AM2016/197 - AWU submissions - Horticulture Industry - ordinary hours of work and penalty rates

We refer to the above.

Attach by way of filing is a copy (word doc and pdf) of the submission of the AWU in response to issues identified by the Casual and Part-time Full Bench relevant to casual employment under the Horticulture Award 2010.

We apologise for the late filing. The delay was caused by unforeseen circumstances.

A copy of our submissions will be forwarded to representatives for the relevant parties shortly.

Please do not hesitate to contact our office if required or if the Commission requires us to make application for leave to file our submissions late.

Yours sincerely

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THE AUSTRALIAN WORKERS' UNION

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Fair Work Commission
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21 August 2017

Re: AM2016/196 and AM2016/197 – Part-time and Casual Employment – Horticulture Award – Submissions of the Australian Workers' Union

1. The Casual and Part-time Full Bench issued a Decision on 5 July 2017 ("the Decision") including directions to interested parties to file further evidence or submissions in relation to a number of matters identified regarding ordinary hours of work for casual employees under the Horticulture Award 2010 ("the Award").

2. These submissions respond to those directions.

The Full Bench Decision

3. As set out at [748] of the Decision the Full Bench accepted the submission that the Award does not properly prescribe the ordinary hours of employment for causal employees and therefore the Award does not comply with s. 147 of the *Fair Work Act 2009* ("the Act").

4. The Full Bench went on to state that to achieve the modern awards objective of a fair and relevant safety net in respect of a modern award which prescribes overtime penalty rates for weekly employees, an award must also prescribe overtime penalty rates to casual employees.

5. At [752] the Full Bench noted that it considered ordinary hours of casual employees should be no more than 12 hours per day, and that overtime penalty rates should be payable for work performed in excess of 12 hours. The Full Bench invited submissions in

relation to a proposed 12 hour maximum per day for casual employees ("**Issue 1: 12 hour day maximum**").

6. The Full Bench then pointed out that a 12 hour day is consistent with the facilitative maximum daily hours permitted for full-time employees under clause 22.1(c) and the Full Bench think a 12 hour maximum is reasonable having regards to the physical demands of harvesting work and the work requirements of employers.

7. The Full Bench went on to note there is an additional question to be answered as to whether the ordinary daily hours of casual employees should be limited to the period of 6.00 am to 6.00 pm as it is for full-time and part-time employees under clause 22.1(b), with any work performed outside these hours to be paid at overtime rates. The Full Bench invited submissions from the parties in relation to the scope of hours for casual employees ("**Issue 2: scope of hours**").

8. At [753] of the Decision the Full Bench then identified 2 remaining critical issues in relation to ordinary hours and penalty rates to be resolved:
   - first, over what period may the 38 weekly hours of casual employees be averaged ("**Issue 3: ordinary weekly hours**"); and
   - second, should overtime penalty rates be payable for work in excess of those hours? ("**Issue 4: overtime penalty rates**")

9. The Full Bench considered that the 2 remaining critical issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal causal employees who are required, and want, to work large amounts of hours in a short period of time, and invited submissions on each of the two issues.

10. These submissions address each of the Issues under separate heading below:

Legislative framework

11. In exercising its power in the four-yearly review the Fair Work Commission must ensure that the awards together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account the matters listed in s. 134(1)(a)-(h) of the Act.

12. In order to support the stability of the award process, which also forms part of the modern awards objective, Full Bench decisions setting principles with general application and findings relating to statutory purpose should be followed by subsequent decisions. In the *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 ("Preliminary Issues Decision"), the Full Bench noted at [27] that "previous Full Bench decision should generally be followed, in the absence of cogent reasons for not doing so" and the need for a "stable" modern award system requires the formulation of a merit case supported by submissions addressing the legislative provisions with the addition of probative evidence.

13. As such, in order to further the modern awards objective and support the stability of the award process, variations to awards should only be made where there is sufficiently probative evidence justifying the need to vary the award.

14. The Act is very limited and restrictive as to what is and what is not permitted as a clause of a modern award. When considering a prposed term of a modern award therefore, careful consideration must be given to the purpose and function of the clause. To be sufficiently probative to justify a variation of an award evidence therefore must be directly relevant to the purpose of the clause in question.

15. When considering a similar question as to whether overtime penalty rates should apply to casual employment, the Full Bench in *Australian Municipal, Administrative, Clerical and Services Union* [2014] FWCFB 379 at [39] ("ASU FB Decision") stated:

> We do not consider there is any sound rationale for casual employees to be excluded from overtime penalty rates in circumstances whereby they apply to full-time and part-time employees. No such rationale was advanced by any party before us. The result of this exclusion is or will be twofold. Firstly, it will result in a reduction in the rate of pay for those casual employees who regularly perform overtime work, without any apparent industrial justification for this occurring. Secondly, it means that it will be cheaper to utilise casual employees to perform overtime work rather than full-time or part-time employees. No party was able to advance any reason why the SCHCDS Award should contain a bias in favour of casual employment and against full-time and part-time employment.

16. The purpose of casual employment is to provide an alternative to full or part time employment to cater for variable and short notice labour demand. There is no justification why casual employees should not be entitled to penalty rates and be treated differently to part time and full time employees. Justification that the removal of penalty rates would reduce labour costs would be equally applicable to part time and full time employees.

17. It is therefore submitted any departure to the general principle, that casual employees should receive the same entitlement to overtime penalties, applying to the Issues idenditied by the Full Bench (addressed below) must be significantly limited.

Pieceworker evidence in the Horticulture Industry

18. As appears to be overlooked by the Full Bench, significant parts of the horticulture industry use casual pieceworkers employees and not normal casual labour.

19. The AWU refers to the evidence of Mr Peter McPherson, from Costa Exchange trading as Berry Exchange (part of Australia's biggest horticulture company) as filed as part of these proceedings. Mr McPherson gave evidence that approximately 3,250 of their 4,258 (76%) horticultural employees were casual pieceworkers. See witness Statement of Peter John McPherson dated 22 February 2016.

20. The AWU also refers to the evidence of Mr Richard Roberts, Divisional Manager at AgriExchange also filed as part of these proceedings. Mr Roberts gave evidence that that the AgriExchange has approximately 1200 employees (this figure includes 100-200 packhouse workers). Of the approximately 1000 workers who were engaged under the Horticultural Award 2010 approximately 800 (80%) were casual pieceworkers. In addition the AgriExchange also used the services of an extra 100-200 casual packhouse workers supplied to the Company through labour hire companies.

21. Under the Award, penalty rates for casual employees do not apply to casual pieceworker employees. The introduction of penalty rates for casual employees will not therefore affect those employers who employ pieceworkers.

22. As supported by the evidence of Mr McPherson and Mr Roberts, a significant number (up to 76% in a part of Australia's biggest horticulture company) and part of the industry

are pieceworkers and will not be affected by the introduction of penalty rates for casual employees.

23. The AWU submit therefore a significant part of the industry will not be affected by the introduction of penalty rates for casual employees and any impact on employment costs will be significantly limited.

Issue 1: 12 hour day maximum

24. The AWU submit that consistent with [752] of the Decision and consistent with the maximum daily hours permitted for full-time and part-time workers under clause 22.1(c) the Commission should adopt the same terms and effect of 22.1(c) with respect to causal workers. We submit the clause should read as follows:

> *The ordinary hours of work for casual workers will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.*

25. In support of the above at [18] the AWU submit the following:
    (a) Casuals can still work up to 12 hours a day before penalty rates apply;
    (b) A clause that permits working up to 12 hours a day is consistent with the Full Bench's general aim to permit casual employees to work large amounts of hours in a short period of time if they agree (see [753]).
    (c) Casual employee's do not have to work more than 8 hours in a day if they choose not to.
    (d) A clause that permits an employee to work from 8 hours to 12 hours a day by agreement promotes flexible work practices and the ability to have employees work more hours in a day to meet high demands (for example during harvest).

Issue 2: scope of hours

26. As to the daily scope of hours, the AWU submit that the scope of hours for casuals should remain 6:00am and 6:00 pm, consistent with the scope of hours for part-time and full-time employees.

27. The AWU submit that to vary the award to change the scope of hours there must be sufficiently probative evidence justifying a need to vary the hours. The AWU submit there is no evidence or reason to justify why the scope of hours should varied.

28. The scope of hours should be the same for casual employees as it is for part-time and full-time employees.

29. The AWU also submit that expanding the scope of hours for casual employees would significantly affect current shift workers to their detriment. It is submitted that increasing the scope of hours per day for casuals would:
    (a) Reduce the need and work for shift workers (shift workers may lose employment);
    (b) Mean casual employees working beyond the current scope of hours would not be compensated for working unsociable hours.
    (c) Mean casual employees will not receive the same remuneration as shiftworkers and therefore will not receive equal remuneration for work of equal value;

30. It is further submitted that any short term emergency that might require additional work performed outside of the normal scope of hours, could easily be filled without the need to expand the scope of ordinary hours.

Issue 3: ordinary weekly hours

31. As to the first remaining critical issue and to what period the 38 weekly hours of casual employees should be averaged, the AWU submit that the period should not be averaged over longer than a four week period.

32. Having regard to the considerations set out in section 134 of the Act, in support of a four week period, the AWU submit the following:
    (a) A four week period promotes flexible work practice and the efficient and productive performance of work;
    (b) A period any longer than 4 weeks will have a negative impact on workforce participation and will result in a reduction in number of workers employed;
    (c) A period any longer than 4 weeks will be difficult to manage especially with a large and changing workforce;

(d) A four week period is consistent and fair with the period applicable to part-time and full-time workers and in accordance with s. 134(1) of the Act and the modern awards objective with the period;
(e) Averaging the weekly hours over 4 weeks will promote employment growth in accordance with s. 134(1)(h) as more workers will need to be employed;
(f) A four week period is consistent with the principle of equal remuneration for work of equal value;
(g) Business already get the benefit of the increased flexibility to meet varying demands by using casual employees;
(h) Modern Awards should promote part time and full time employment, but a longer period puts part time and full time employees at a cost comparative disadvantage to casual employees.
(i) An averaging period longer than four weeks, which will lead to an increased period of long hours, and as a result could cause unreasonable and unexceptable risk to employee health and safety.
(j) Averaging 38 weekly hours over a four week period helps reduce employment costs and is consistent wth the Full Bench' s goal to facilitate the working of long hours over a short period when an employee wants to.

33. If the Commission, however, considers a longer period is necessary, the AWU submit that any additional weeks over 8 cannot be justified.

34. In addition casuals have no guaranteed hours of work. As a result, longer averaging periods may also result in excessively long periods where casuals are not given hours (when employers try to avoid having to pay penalty rates). For example if the averaging period is 12 weeks, a casual employee may work all hours within an eight week period, and then not receive work for the next four weeks because the employer wants to avoid paying them penalty rates.

35. Long periods without work may also affect working holiday visas employees who need to accure days worked/ not hours worked.

Issue 4: overtime penalty rates

36. The AWU submit that in accordance with s.134 of the Act and the modern awards objective, casual employees must receive penalty rates for hours worked in addition to the ordinary weekly hours worked as averaged.

37. Having regard to the considerations set out in s.134 of the Act, the AWU submit the following:
    (a) There is no reason why casual employees should be treated differently to part time and full time employees and not receive penalty rates for hours worked in addition to the ordinary weekly hours worked as averaged;
    (b) Casual employee's should be entitled to receive the same entitelmet to penalty hours as part-time and full-time employees (equal remuneration for work of equal value).
    (c) There is no reason why casual employees should not receive additional remuneration for working overtime and working unsociable irregular or unpredictable hours.
    (d) Horticulture employees are often on minimum wages and penalty rates have a significant role to play in total remuneration and role in increasing living standards and meeting the needs of the low paid;
    (e) A reduction in labour costs is not evidence with sufficient probative value to justify different treatment to part time and full time employees when casual labour already provides employers with a significant benefit assisting business and productivity;
    (f) Removing penalty rates will ineffect make weekly ordinary hours irrelevant.
    (g) There is no reason to depart from the Full Bench's general finding at [748] that to achieve the modern awards objective of a fair and relevant safety net in respect of a modern award which prescribes overtime penalty rates for weekly employees, that it must also prescribe overtime penalty rates to casual employees.

38. It is further submitted that as evidence by the significant number and percentage of pieceworkers in the industry, the introduction of penalty rates for casual employees will only apply to a limited number of employees in the industry and will have only limited impact on labour costs.

Summary

39. In summary, in relation to the matters identified by the Full Bench above, the AWU therefore submits the following:
    (a) As consistent with part time and full time employees, ordinary hours for casual employees should not exceed eight hours per day except by agreement, in which case ordinary hours should not exceed 12 hours on any day.
    (b) As consistent with part time and full time employees, the ordinary hours for casual employees should be worked between 6.00am and 6.00 pm.
    (c) As consistent with part time and full time employees, the ordinary hours of work for all casual employees other than shiftworkers should not exceed 152 hours over a four week period.
    (d) There is no justification why casual employees should be treated differently to part time or full time employees and not receive penalty rates for work performed in excess of weekly ordinary hours as averaged and why the Full Bench's finding at [748] should not be followed in relation to hours worked in excess of averaged weekly hours.
    (e) The introduction of penalty rates for casual employees will only have limited impact on labour costs as they do not apply to pieceworkers.

Yours faithfully,

Andrew Crabb
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The Australian Workers' Union