FAIR WORK COMMISSION

4 yearly review of modern awards – Casual employment

Matter No. AM2014/197

NATIONAL FARMERS' FEDERATION SUBMISSIONS

Date: 11 October 2018

Introduction

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. These submissions are filed in accordance with the invitation made by the Full Bench on 09 August 2018 and respond to the Commission's decisions regarding ordinary hours of work and overtime for casual employees under the *Horticulture Award 2010* (**the Award**)

3. They are made on behalf of both the NFF membership, and the members of the NFF Horticulture Council: NFF, Northern Territory Farmers, Australian Blueberry Growers' Association, AUSVEG, Growcom, Apple and Pear Australia Ltd, Dried Fruits Australia, NSW Farmers Association, Victorian Farmers Federation, the Voice of Horticulture, Summerfruit Australia Limited, and Vegetables WA.

Background

4. On 5 July 2017[1] the Commission published a decision in this matter which provided that casual employees under the Award should receive overtime, and expressed provisional views regarding the circumstances when that overtime should be payable.

5. The Full Bench sets out 5 propositions which informed its decision:

> ***[749]*** *We consider that evidence adduced by the NFF and ABI convincingly demonstrates at least the following propositions:*
>
> *(1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.*
>
> *(2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on*

[1] [2017] FWCFB 354

particular days must be made up in subsequent days, regardless of which day of the week it is.

(3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.

(4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence. Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry. The alternatives mentioned were to move to less labour intensive crops or reduce output.

***[750]** Additionally the evidence of the AWU demonstrated what we, from our collective experience, already know to be the case, namely that award non-compliance in the horticultural industry is widespread. Therefore the addition of further significant labour costs on award-compliant employers is likely to increase their competitive disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance.*

6. The Full Bench then set out[2] a number of views in relation to ordinary hours of work and the circumstances in which overtime penalties should be payable to casual employees under the Award:

- Indicating that the ordinary hours for causal employees should be limited to 12 per day and that overtime penalty rates should be payable for work performed in excess of 12 hours.
- Querying 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.
- Stating the provisional view that the weekly ordinary hours should be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period.

7. In response to the Commission 5 July 2017 decision, the NFF filed submissions on 16 August 2017 which raised the following arguments.

- A 6 month averaging period without any daily span of ordinary hours is appropriate given:
  i. the length of peak seasons (before, during, and after harvest) vary between commodities, but may last for in excess of 6 (and up to 9) months; and
  ii. that during peak season a growers' labour demands are exponentially much greater, and much longer hours of work are required of employees.
- A span of ordinary hours which are limited to, for example, 6am to 6pm could prevent employers from scheduling work to avoid hostile work conditions — such as the hottest times of the day, during rain or extreme cold, and where risk of chemical exposure or other hazards[3] is greater — and/or may force the grower to

[2] At [752] to [755]

[3] e.g. bee sting

harvest produce during hours when it is at the greatest risk of spoilage or least suitable for picking.

- Many of the casual employees in the sector are "itinerant workers" and temporary migrants on visas — e.g. the seasonal worker programs and the 'backpacker' visas — which are structured around 6 month working periods. Those employees tend to want to do as much work as they can within their 6 month stays. However, the 'price-taking' nature of the industry means that growers will have limited capacity to absorb any increases in labour costs, and so will be forced to limit the hours of employees to avoid paying overtime[4]. It follows that a 6 months averaging period would suit the needs of those employees.

- It also follows that if they are unable to absorb increased labour costs associated with overtime and — as is frequently the case for employers in the horticultural sector — are experiencing difficulty finding a sufficient number of workers, they may be forced to leave produce unpicked, allowing it to spoil and become unfit for sale or consumption.

- Finally, a 6 month averaging period with no daily spread of hours is consistent with the Modern Award Objective.

8. A subsequent conciliation process conducted by Deputy President Kovacic, resulted in a proposal to resolve this matter:

    - Ordinary hours of casual employees can be worked at any time of the day and on any day of the week, but may not exceed 12 hours in a day or 304 hours over 8 weeks

    - Ordinary hours worked between 5.00am and 8.30pm (**the daily span**) would be paid at the employee's minimum hourly wage plus the casual loading of 25%;

    - Ordinary hours worked outside of the daily span would attract a penalty rate of 15% (**the night loading**) plus the 25% casual loading;

    - All times worked in excess of 12 hours per day or 304 hours over 8 weeks is overtime and attracts an overtime payment of 50% in addition to the 25% casual loading; and

    - Any hours worked by a casual employee on a public holiday (whether ordinary hours or overtime) will be paid at the rate of 225% of the employee's ordinary hourly rate for his or her classification (inclusive of the casual loading).

9. The Ai Group subsequently suggested a modification to this proposal which would allow employers and a majority of employees in States and Territories that do not observe daylight saving time to agree to move the daily span forward an hour while daylight saving time is in operation in the other States and Territories;

[4] And either engage more employees working fewer hours or if — as is frequently the case — they are experiencing serious labour shortages, may be forced to leave produce unpicked, allowing it to spoil and become unfit for sale or consumption.

10. On 21 March 2018 the NFF indicated to the Commission that:

> *Although the NFF's members have expressed very strong reservations, on balance the NFF will not oppose [the] proposal outlined in the Commission's statement if it were amended to incorporate the facilitative provision proposed by the AiG.*
>
> *For abundant caution, I note that the NFF's takes this position on the basis that the changes will not affect piecework rates.*
>
> *Nevertheless, hopefully the Commission can accept that this would be a very significant change for growers. As such, if the Commission decides to amend the Horticulture Award according to this proposal, the NFF requests that the Commission allow a reasonable transition period for farmers to be informed of the change and to make necessary adjustments.*

11. On 09 August 2018 the Commission provisionally decided to accept that conciliated proposal, and on 30 August 2018 the Commission published a draft determination which would put the proposal into effect but allowed interested parties 21 days to make further submissions in relation to it.

12. On 17 September 2018 the Commission granted the NFF an extension until 11 October 2018 to make its submissions.

NFF position

13. Despite concerns expressed in its various submissions and above, the NFF agrees to the proposed outcome, subject to clarification regarding the effect of this decision on piecework agreements[5], and the potential for 'double dipping' the night loading and overtime payments.[6]

14. In addition, the NFF makes submissions regarding the language of the proposed draft determination[7] and transitional arrangements.[8]

Clarification – changes not to affect piecework rates

15. Clause 15 of the Horticulture Award provides that employers and their employees may enter into a piecework agreements which would enable:

> *the average competent employee to earn at least 15% more per hour than the minimum hourly rate prescribed in this award for the type of employment and the classification level of the employee.*

16. Where an employee is on a piecework agreement then, pursuant to sub-clause 15.5, the clauses of the award which relate to "ordinary hours of work and rostering" (clause 22) and "overtime" (clause 24) have no application.

17. It is the NFF's position that this 'carve-out' provision at clause 15.5. means that:

[5] See paragraphs [] to [] below.

[6] See paragraphs [] to [] below.

[7] See paragraphs [] to [] below.

[8] See paragraphs [] to [] below.

- Casual employees who are on a piecework agreements will not earn the "night loading" or the "overtime loading", whatever hours they work; and
- Critically, the piecework rate which the agreement sets does not have to account for those loadings; i.e. the "the minimum hourly rate" will not have to account for the night loading or overtime payments irrespective of when the employee works.

18. This appears to be consistent with the Commission's understanding as expressed at [747] of [2017] FWCFB 3541, where the Full Bench observed that "the AWU's overtime claim would have no effect on casual employees on piecework rates and their employers." It is also consistent with the AWU's submissions in these proceedings.[9]

19. Nevertheless, for abundant caution the NFF confirms that its agreement to the "conciliated proposal" is based on the understanding that the "minimum hourly rate" which is used as a baseline for piecework rate calculation will not have to account for overtime or the 15% night loading.

20. In our submission, for clarity and to avoid future dispute the Award should include a note at clauses 15.2, 22.2, and 24.2 confirming this position. The NFF suggests the following language for the Note:

> *Note: pursuant to clause 15.5, employees working under piecework rate agreements will not be paid overtime penalties pursuant to clause 24.3 or the 15% loading payable pursuant to clause 22.2(d) for hours worked between 8.31 pm and 4.59 am (or 7.31 pm and 3.59 am), and the "minimum hourly rate" established for the purposes of clause 15.5 will not include those amounts.*

Clarification – employees are not entitled to both overtime and night loading

21. The draft clauses make clear that 'ordinary hours of work' are the first 12 hours worked in any one engagement or per day, or the first 304 hours worked over an eight week period. *Ordinary hours* can be worked at any time of the day, however those *ordinary hours* that are worked outside of the 5.00am to 8.30pm span of hours will attract the 15% night loading.

22. Overtime hours, for which workers are paid 150% their minimum hourly rate (plus casual loading), are NOT 'ordinary hours of work'. It follows that work during overtime hours cannot attract the 15% night loading (regardless of what time of day the hours were worked). In other words, the employee cannot 'double dip' to receive the 15% night loading in addition to the 50% overtime loading (and the 25% casual loading); i.e. for a total amount to 190% minimum hourly rate.

23. Nevertheless, for abundant caution the NFF confirms that its position on the "proposal" is contingent on the draft clause operating in this way.

24. Furthermore, for the avoidance of future dispute the NFF's submission is that the clause should include a note which confirms this position. The NFF suggests the following language for that note:

[9] See for example [21] of the AWU's submission dated 21 August 2017, where it is observed that "[u]nder 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."

Note: The 15% loading payable pursuant to clause 22.2(d) for hours worked between 8.31 pm and 4.59 am (or 7.31 pm and 3.59 am) is payable for work during 'ordinary hours' and is not payable for work during hours which are overtime.

Consistency of language of new clause 22 with current 'ordinary hours' provisions

25. Clause 22.2 of the draft determination states that:

*The ordinary hours of work for casual employees other than shiftworkers will not exceed 304 ordinary hours **averaged** over an eight week period provided that…..*

26. The word "averaged" is not used in the 'ordinary hours" provisions relating to full and part-time employees found at the current clause 22.1 of the Award, or relating to shift workers found at the current clause 22.2 of the Award. [10]

27. In the NFF's submission, for consistency and to avoid confusion and potential dispute the language of the new clause 22.2 should follow those provisions and use the same language. As such, the word "average" should be removed:

The ordinary hours of work for casual employees other than shiftworkers will not exceed 304 hours ~~averaged~~ over an eight week period provided that…."

Transitional arrangements

28. As the NFF's evidence and various submissions demonstrate, the Commission's decision in this matter will have a very significant financial impact on growers.

29. That conclusion is supported by the following:

- "Expenditure on labour … accounts for a relatively high proportion of total expenditure in the vegetable and horticulture industries"; [11] ABARES estimates roughly a third of total cash costs.[12]
- Casual employees represent a significant portion of the horticultural workforce:

Casual employment is predominant in the vegetable industry. When growers were asked about the form of employment for most of their pickers, packers and graders, 73% said on a casual basis, 14% on a part-time permanent basis and 12% on a full-time permanent basis.[13]

[10] And clause 32.2 of the Pastoral Award.

[11] Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), *Labour Force Survey*, May 2017, pg 6.

[12] Ibid at pg 6, but see also Exhibit 154 (Chapman) at [3], Exhibit 156 (Cranny) at [7], Exhibit [168] (Turnbull) at [6].

[13] Howe et al & University of Adelaide (issuing body). *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry.* 2017. Page 33.

- The number/preponderance of casual employees increases significantly during the labour intensive periods[14] when the requirement to pay night loading and overtime will most often come into effect.

30. It is difficult to place a precise figure on the increase in cost to individual farms which the Commission's decision will make. Nevertheless — although the conclusion appears to be premised on the assumption that casual employees would be paid overtime in the same circumstances as full and part-time employees — Dr Alice De Jong reported that "the average estimated annual % increase to labour costs incurred in the event of having to pay casuals overtime and weekend penalty rates is 29.3%."[15]

31. Furthermore, as the Commission has recognized, growers are "price takers" who will be unable to pass these additional costs onto their customers.[16]

32. In short, the new arrangements will have a very significant financial impact on farm businesses.

33. As such, growers will need time to prepare for, manage, and find ways to absorb this financial impact.

34. Furthermore, given that there is currently no requirement for growers to pay casual employees overtime, there will need to be a period for:

- Industry bodies such as the NFF and its affiliates to disseminate the outcome of this matter and educate growers as to its requirements; and
- Growers to adjust their business, accounting, payroll, HR, and other systems to accommodate the new arrangements.

35. All of this will take additional time and money, and could lead to compliance issues.

36. It follows, in the NFF's submission, that the Commission should allow growers a reasonable period of time to adjust to this new arrangement and develop appropriate processes to manage it.

37. Ideally this would mean a transitional process like that adopted by the Commission during award modernisation; that is, a staggered introduction over a course of years. However, at a minimum the NFF submits that a transitional period of not less than 6 months, commencing at the time of the Commission's final decision, would be reasonable.

38. This may also help address the concerns which the Commission expressed regarding the potential for overtime requirements to result in compliance issues and "competitive

[14] To a greater or lesser degree all of the witness statement filed by NFF supports this contention, but see Exhibit 154 (Chapman) at [2]; Exhibit 155 (Collins) at [7]; Exhibit 159 (Forsyth) at [3]; Exhibit 162 (Leitch) at [2]; Exhibit 165 (Pace) at [5]; Exhibit 184 (Edwards) at [2].

[15] Exhibit 191 at page 6 of Attachment A.

[16] [2017] FWCFB 3541 at [749](1)

disadvantage vis-a-vis non-compliant employers, or to lead to greater non-compliance."[17]

39. In addition, we wish to confirm that the 8 week "averaging" period will be calculated from the time the variations take effect, irrespective of the duration of employment prior to the effective date.

Conclusion

40. In summary, the NFF accepts the provincial view expressed in the Commission's decision of 09 August 2018, provided that its effect is consistent with the NFF's understanding that it will not affect piecework arrangements or entitle casual employees to be paid the night loading when working overtime.

41. Furthermore, to avoid confusion the NFF submits that any new clause should not use the word "averaged", but should use the same language as current clause 22.1 (overtime for full-time and part-time employees) and clause 22.2 (overtime for shiftworkers).

42. Finally, in order to allow growers to adjust to the new provisions and their significant cost implications, the Commission should allow a reasonable transition period of at least 6 months from the date of the Commission's final decision on this matter.

Ben Rogers
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11 October 2018

[17] Ibid at [750]