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5 May 2016

Re: AM2014/231 AWU reply submissions on the Exposure Draft for the *Horticulture Award 2016*

Background

1. On 23 March 2016 the President, Justice Ross published a Statement which requires reply submissions on drafting and technical issues for Group 3 exposure drafts to be filed by 5 May 2016.

2. The AWU's submissions in reply to the following employer group submissions regarding the Exposure Draft for the *Horticulture Award 2016* (Exposure Draft) as published on 15 January 2016 appear below:

   - National Farmers' Federation (NFF);
   - Voice of Horticulture;
   - Australian Business Industrial and The NSW Business Chamber Ltd (ABI);
   - Australian Industry Group (AIG);
   - Australian Federation of Employers and Industries (AFEI); and
   - Business SA.

NFF

GENERAL POINTS

Commencement clause

3. Clause 1: There does appear to be some merit in the NFF's submission that the proposed wording could indicate that variations operate retrospectively and we are not opposed to the suggested amendment.

Definitions

4. Location of definitions: We are satisfied with the approach of including the definitions as a Schedule to the Exposure Drafts and don't believe any amendments are necessary.

5. All-purpose allowances and the ordinary hourly rate: The definitions of "all-purpose allowance" and the "ordinary hourly rate" have been extensively considered during the award review[1] and do not require amendment. In particular, the approach to calculating the casual loading in awards which contain an all purpose allowance has already been determined by the Commission following extensive debate.[2]

6. Horticulture industry: We agree that the definition of "horticulture industry" does not need to be repeated in the Schedule given it already appears in clause 3.2.

7. Exclusions: We submit there is merit in linking exclusions from coverage, such as for the "wine industry", to the coverage definition in other relevant awards such as the *Wine Industry Award 2010* as opposed to including generic references to the "wine industry" or "silviculture and afforestation". These undefined terms could be interpreted in a number of different ways.

8. Standard rate: The NFF's point is not entirely clear because references to a percentage of the "standard rate" have been replaced with dollar amounts throughout the Exposure Draft. It appears sensible to retain the definition of the "standard rate" as a historical benchmark regarding how the amounts have been calculated.

NES

9. Clause 2: These provisions have already been debated and determined by the Full Bench on a general level.[3] We are particularly concerned at the NFF's proposal that the Exposure Draft be amended to state: "The NES and this award contain the minimum conditions that **apply** to the employment of employees covered by this award". This amendment would conflate the

[1] *4 yearly review of modern awards* [2015] FWCFB 4658 at [47]
[2] *4 yearly review of modern awards* [2015] FWCFB 6656 at [110]
[3] *4 yearly review of modern awards* [2014] FWCFB 9412 at [21] to [29]

concept of an award "covering" employees and an award "applying" to employees. There is an important distinction between these terms because an award will often "cover" an employee but will not "apply" because an enterprise agreement is in operation.[4] The provisions in the Exposure Draft should not be amended.

Coverage

10. Clause 3: There is some merit to the amendments suggested by the NFF but it is not clear that they will make the Exposure Draft any clearer than the existing provisions. The full coverage of an Exposure Draft has generally been included in clause 3 of the various Exposure Drafts and we see no need to depart from this approach.

Facilitative provisions

11. Clause 5: The inclusion of a facilitative provisions clause is another matter that has been debated and determined on a general level in earlier proceedings.[5] We see no need to depart from the general approach in this Exposure Draft.

12. We are not opposed to the inclusion of reference to clauses 15.2 (b) (i), 16.7 and 20.2 in the table in clause 5.2.

13. However, we do not consider it appropriate to refer to the Award Flexibility clause because this operates independently to the facilitative provisions and on different terms. We also do not think it is helpful to refer to the dispute resolution clause.

AWARD SPECIFIC ISSUES

14. Clause 6.5 (c) (i): We agree with the NFF's proposal to delete the word "ordinary" so the start of clause reads: "For each hour worked…" This is consistent with clause 10.4 (b) of the *Horticulture Award 2010* (the Award).

15. However, the term "ordinary hourly rate" in clause 6.5 (c) (i) should not be replaced with the term "minimum hourly rate". This amendment would be directly inconsistent with the Full Bench's Decision on 30 September 2016 to the effect that the term "ordinary hourly rate" will be used in Exposure Drafts

[4] See s 57 of the *Fair Work Act 2009*
[5] *4 yearly review of modern awards* [2014] FWCFB 9412 at [37] to [43]

which contain all-purpose allowances. This Exposure Draft contains three all-purpose allowances.

16. Clause 6.5 (c) (ii): We are opposed to the insertion of reference to casual employees not receiving entitlements of permanent employees under the NES. This reference does not appear in clause 10.4 (c) of the Award and will create confusion because the entitlements of casual and permanent employees can overlap under the NES – for example, in relation to parental leave and requests for flexible working arrangements etc.

17. Clause 9.2: The NFF submission is largely consistent with the one we made at paragraph [9] of our submission dated 17 April 2016. We maintain our proposed variation will rectify the issue.

18. Clause 10.2: We maintain that the current provisions regarding paid leave for pieceworkers should be made clearer as part of the award review process and prefer the approach suggested at paragraph [13] of our submission dated 17 April 2016.

19. Clause 10.3 (b): We support consistent rounding rules in awards.

20. Clause 11.2: We accepted at paragraph [16] of our 17 April 2016 submission that the tool and travelling allowances cannot properly operate on an all-purpose basis.

21. Clause 11.3: We don't agree with the amendment proposed by the NFF. The amendment would be problematic in a labour hire context, which is prevalent in this industry, whereby the farmer may require an employee to provide tools but they are not the employer. An employee should still be reimbursed in this situation.

22. Clause 12: We require further information about this submission because clause 12 appears to be precisely the clause the Commission determined to insert into the Award during the accident pay proceedings.

23. Clause 15.1: We disagree with the NFF's submission. The suggestion that it is "very clear" that casuals are not entitled to overtime rates under the Award beggars belief in circumstances whereby:

    - Clause 10.4 (a) of the Award prescribes ordinary hours for casual employees:
    - Casual employees are not excluded from the overtime entitlements in clause 24.1; and

- There is no conceivable argument regarding why casual shift workers would not receive overtime rates under clause 22.2.

24. In any event, this issue is before the Casual and Part-time Employment Full Bench so it does not need to be dealt with as a technical and drafting issue.

25. Clause 15.4: We have agreed that clause 15.4 should be deleted at paragraph [22] of our submission dated 17 April 2016.

26. Clause 20.3: We accept there is merit in the NFF's point. However, the operation of the clause may be clearer if it is amended to read:

> *All work performed on public holidays will be paid for at the rate of 200% of the ordinary hourly rate or 200% of the piecework rate for a pieceworker.*

Voice of Horticulture

27. Schedule G – Definitions: We have agreed above that the tool and equipment and travelling allowances cannot operate as all-purpose allowances. We don't agree definitions of "shift" and "day shift" should be included in Schedule G.

28. Clause 5: We disagree that the award flexibility term should be included in the table of facilitative provisions. The award flexibility term allows for unspecified agreements about designated topics subject to a number of safeguards. This is distinct from a facilitative provision which operates in the manner specified in the instrument.

29. However, we agree reference to clause 10.2 (a) should be deleted because the piecework terms are unique and operate with different rules to other facilitative provisions in the Exposure Draft.

30. Clause 11.3 (a): We agree with the proposal to delete clause 11.3 (a) (iii) and insert words at the end of clause 11.3 (a) (ii). However, the following sentence may be clearer: "Reimbursement is not required if the employer provides the employee with suitable accommodation free of charge".

31. Clause 11.3 (b): We don't think any amendment to this sub-clause is required.

32. Clause 14: We think the definitions of "afternoon shift" and "night shift" should remain in this clause as opposed to Schedule G.

33. We are opposed to the proposal to insert a definition of "day shift". This is clearly a substantive change as opposed to a technical and drafting issue.

This amendment would nullify the Monday to Friday working week for day workers in clause 8.1.

34. Clause 15.2: We rely upon paragraphs [18] to [21] of our submission dated 17 April 2016. The current provisions are contrary to s 340 of the *Fair Work Act 2009* because they contemplate an employer refusing to provide overtime if an employee elects to be paid overtime rates as opposed to taking time off in lieu. This arrangement is contrary to the intended operation of TOIL provisions which is to provide flexible conditions for employees as opposed to simply reducing expenses for an employer. The Exposure Draft should prescribe payment for overtime as the default condition with the model TOIL term, or an agreed modification of it to suit the industry, inserted.

35. Clause 15.3 (c): This is another claim for a substantive variation as opposed to a technical or drafting issue. The word "elect" is used in clause 24.2 (c) and this term should be retained unless a case is run for a variation on a merit level.

36. Clause 15.4: We refer to our submission above – we have agreed clause 15.4 can be deleted given there is already a meal allowance provision in clause 11.3 (c).

37. Clause 9.2: We disagree with this submission – it appears to conflate the meal break with the rest break. The issue should be addressed as proposed in paragraph [9] of our submission dated 17 April 2016.

38. Clause 10.2: Our experience has also been that pieceworkers are employed on a casual basis and we note only casual employees could be paid piecework rates under clause 4.6 of the *Horticultural Industry (AWU) Award 2000*. In these circumstances, it would be appropriate for the Commission to reconsider whether the piecework provisions should apply to permanent employees.

ABI

39. Clause 15.1: We accept this clause will be affected by the Casual and Part-time Employment proceedings.

AIG

40. Clause 5.2: We agree reference to clause 8.1 (a) (i) should be inserted. As stated above, we don't think the piecework provisions should be identified as a facilitative provision because they are unique and a range of different rules apply to piecework agreements.

41. Clause 6.4 (b): AIG's submission that the term "minimum hourly rate" should be used is contrary to previous a previous Full Bench Decision[6]. The current drafting is clear: a part-time employee is entitled to receive the "ordinary hourly rate" as defined for the classification identified in clause 10.

42. Clause 6.5 (c) (i): It is an inappropriate abuse of process for AIG to persist arguing this issue when it has already been conclusively determined by the Full Bench.[7] This exact same argument was made by AIG in those proceedings. Their approach would be akin to the AWU continuing to submit that overtime rates should be expressed as double time as opposed to 200% of the ordinary/minimum hourly rate.

43. Clause 8: We are not opposed to the amendment suggested by AIG.

44. Clause 8.1: We don't agree this amendment should be made. The clause will look unwieldly without the sub-heading.

45. Clause 8.1 (a) (iv): We accept these words don't appear in clause 22.1 (d) or 22.2 (h) of the Award and agree to their deletion pending the determination of the broader issue regarding whether a default TOIL arrangement should apply.

46. Clause 9.1 (a): We don't agree that a break of 30 minutes or one hour is not permitted by this clause. No amendment is required.

47. Clause 9.1 (c): Contrary to AIG's submission, a reference to the "appropriate minimum wage" would clearly include all-purpose allowances. An employer is not paying the full appropriate minimum wage if they are not paying all-purpose allowances.

48. We note an erroneous reference to clause 9.2 (c) appears at paragraph [8] of our submission dated 17 April 2016. This should read "Clause 9.1 (c)". We rely upon those submissions - the reference should be to the "applicable rate of pay".

49. Clause 9.2: This is a typically ungenerous submission from AIG. As pointed out at paragraph [9] of our submission dated 17 April 2016, a literal interpretation of this provision would entitle shift workers to a paid 10 minute break regardless of whether they are at work. Common sense should prevail and the provision amended in the terms we propose at the end of paragraph 9 of our 17 April 2016 submission.

[6] *4 yearly review of modern awards* [2015] FWCFB 4658 at [43]
[7] *4 yearly review of modern awards* [2015] FWCFB 6656 at [110]

50. Clause 11.3 (b) (i): As stated above, we don't agree any amendment is necessary.

51. Clause 14.1 (h): This is the same issue identified for clause 8.1 (a) (iv) above – we agree to the deletion of the additional words pending the determination of whether a default TOIL provision should apply.

52. Clause 15.1: We have accepted above that the final form of this provision will be affected by the Casual and Part-time Employment proceedings.

53. Schedule B: Contrary to AIG's submission, the approach used in the Exposure Draft is the most appropriate. Schedule B.1.1 and B.1.2 clearly articulate how the provisions work. The use of the term "minimum hourly rate" in the rate schedules would be more problematic because there would be no obvious indication that additional amounts may need to be included. It would also mean that the body of the Exposure Draft refers to a percentage of the "ordinary hourly rate" and the Schedules to the "minimum hourly rate". We also note that the rate tables do actually contain the minimum "ordinary hourly rate" payable under the Exposure Draft – this is the amount due to employees who do not receive an all-purpose allowance.

54. Schedule B.2.3: We disagree with AIG's submission. Clause 15.3 (d) of the Exposure Draft refers to the rate of 200% being paid where work "in excess of five hours on a Sunday" is performed. These words do not fit well with the concept of, for example, paying the first 3 hours of overtime in a week on a Sunday at the rate of 200% and then reducing an employee to the 150% rate.

55. Schedule G: We are not opposed to the reference to "clause 10.1 (a)" being amended to "clause 10".

AFEI

56. Clause 9.2: We agree with this submission but think the better method of resolving the issue is as outlined in paragraph [9] of our submission dated 17 April 2016.

57. Clause 10.2: The position of AFEI appears to be that a pieceworker reverts to the minimum rates of pay during periods of annual leave. The divergent views on this issue make it clear that the wording in the Exposure Draft needs to be improved. We have suggested an alternative at paragraph [13] of our submission dated 17 April 2016.

58. Clause 10.3 and 11.2: We have agreed above in relation to these matters.

Business SA

59. Clause 3.2: We consider it preferable to have the full definition in clause 3 and delete the repeated material in Schedule G.

60. Clause 9.2: We agree with this submission but propose that the issue be rectified in accordance with paragraph [9] of our submission dated 17 April 2016.

61. Clause 10.2: The approach proposed by Business SA appears generally consistent with the amendments we proposed at paragraph [13] of our submission dated 17 April 2016. Business SA's response also confirms that if the ability for permanent employees to receive piecework rates is to be retained in the Exposure Draft going forward, some amendments to the existing provisions are required given the approach suggested by members of Business SA is not clearly reflected in the current terms.

62. Clause 10.3: We support consistent rounding rules across awards and are not opposed to the amendment suggested.

63. Clause 11.2: We have agreed above that the travelling and tool and equipment allowances cannot apply for all purposes.

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