



DECISION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Review of C14 and C13 rates in modern awards

(C2019/5259)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
COMMISSIONER DURHAM

SYDNEY, 19 NOVEMBER 2024

Review of C14 and C13 rates in modern awards – introductory rates – final determinations issued.

[1] On 30 August 2024, a statement¹ was issued in this matter together with draft determinations setting out proposed variations to 47 modern awards (including some modern enterprise awards). The statement explained some slight departures in the draft determinations from the *provisional* views expressed in the earlier decision² of 16 April 2024 (April 2024 decision). Interested parties were directed to file any submissions in relation to the *provisional* views in the April 2024 decision and the terms of the draft determinations by 27 September 2024.

[2] The following parties filed submissions in response to our statement and the draft determinations by 27 September 2024:

- Australian Fresh Produce Alliance (AFPA);
- Australian Industry Group (Ai Group); and
- National Farmers' Federation (NFF).

[3] All the submissions received related to the *Horticulture Award 2020*³ (Horticulture Award) or the *Pastoral Award 2020*⁴ (Pastoral Award). The United Workers' Union (UWU) and the Australian Workers' Union (AWU) sought permission to reply to the above submissions. We granted the UWU and the AWU leave to file reply submissions by 25 October 2024, and submissions were filed by them pursuant to this grant of leave. The UWU also filed a witness statement. The AFPA subsequently sought and received permission to file submissions replying to the UWU and AWU's submissions. It did so on 5 November 2024.

[4] In respect of the draft determinations for the other 45 modern awards about which no submissions were received, we make final determinations in the same terms as the draft determinations, subject to the following corrections to address minor errors and omissions which have been identified:

Electrical, Electronic and Communications Contracting Award 2020 [[MA000025](#)]

- In this award, the Electrical Worker Grade 1 rate will be increased. Pursuant to clause 16.4(b)(v), the 2nd, 3rd and 4th year adult apprentice rates are calculated using the Electrical Worker Grade 1 rate. These apprentice rates have now been updated in line with the increase to the Electrical Worker Grade 1 rate.

Air Pilots Award 2020 [[MA000046](#)]

- An asterisk has been added to the table in clause C.9.1 drawing attention to the new clause C.9.2. This is simply to make it clear that the 0–1000 hours rate in the table is subject to new clause C.9.2.
- The casual hourly rates for the ‘Single engine aircraft — UTBNI 1360 kg’ and ‘Single engine aircraft — 1360 kg – 3359 kg’ First Officer/Second Pilot classifications in clause F.2.1 have been updated in line with the annual salary increase for this classification. This change was missing from the draft determination.

Travelling Shows Award 2020 [[MA000102](#)]

- There has been a correction to the wording of new clause 12.3(a) to indicate that employees at Grade 2 have ‘at least 3 months’ experience’, and not ‘less than 3 months’ experience’.

Horticulture Award 2020

Submissions

[5] The AFPA submitted that the draft determination for the Horticulture Award went further than necessary to implement the ‘confirmed view’ identified at [7] and [30] of the April 2024 decision and did not take into account the considerations pertaining to the Horticulture Award set out at [126] and [130]–[132] of the April 2024 decision. The AFPA’s primary position was that seasonal workers engaged on a temporary basis to primarily perform fruit and vegetable picking tasks should remain at the Level 1 classification (that is, at the C14 rate) indefinitely because the majority of such employees are not in ongoing employment but are generally short-term employees engaged seasonally or at peak periods and are casuals. In the alternative, the AFPA submitted that progression from Level 1 to Level 2 should not be based on industry experience but, rather, should occur either after three months’ experience in a particular task or three months’ experience with the employer. The AFPA also submitted that it should be clarified that ‘industry experience’ means experience within the horticulture industry and that the requisite three months’ experience must have been obtained in the last 12 months. As for the operative date for the variations, the AFPA submitted that this should be 1 July 2025 given that the period of time between the final decision and 1 January 2025 would be minimal. It said this would allow for an easier administrative process for employers within the industry.

[6] The Ai Group submitted in response to the *provisional* view stated at [132] of the April 2024 decision and the draft determination that, first, the proposed requirement for progression from Level 1 to Level 2 after three months’ industry experience should be amended so that the experience should relate to the same type of crop and, second, the experience should have been acquired within the last 12 months.

[7] The NFF submitted that, having regard to the diversity of crops to which the Horticulture Award applies, the requirement for industry experience to progress from Level 1 to Level 2 should be divided into two categories: tree-crop farming enterprises and ground-crop farming enterprises. For progression to occur in either category of enterprise, it would be necessary for the requisite experience to have been acquired in that category. The NFF also submitted that the requirement for three months' experience should be equivalised to 494 hours in respect of casual or part-time workers and that the experience should have been gained within the preceding three years.

[8] In response to these submissions, the UWU submitted that the AFPA's proposal to exclude temporary or seasonal workers from progression from Level 1 to Level 2 was contrary to the confirmed view in the April 2024 decision and the modern awards objective, and would result in the confirmed view not applying to the large majority of workers under the Horticulture Award. The evidence of Mr Carl Phillips of Costa Group Holdings Ltd (Costa) filed by the AFPA in the proceedings indicated that Costa aimed to have 80 per cent of its Pacific Australia Labour Mobility scheme (PALM) workers return to work for the company each season. The effect of the AFPA proposal would be that employers such as Costa would reap the productivity benefits of having skilled and experienced return workers (as well as saving on training and other turnover costs), but the workers would be prevented from progressing to Level 2. The UWU also opposed the AFPA's proposal that the requisite industry experience for progression must have occurred within the preceding 12 months, since it would give a perverse incentive to employers to avoid re-employing PALM workers until 12 months had passed. The UWU submitted that a worker with picking experience which occurred 13 months ago was not in any material way less productive or experienced than a worker with picking experience which occurred nine or 10 months ago.

[9] In response to the NFF proposal that the requisite industry experience must have occurred within the preceding three years, the UWU submitted that this was not unreasonable but might add unnecessary complication and disputation. In relation to the NFF's proposal that relevant industry experience be broken down into two relevant categories of crops, the UWU submitted that this would pose an unnecessary evidentiary burden for employees given that payslips would generally not indicate work in relation to a particular crop type. As to the NFF proposal to equivalise three months' experience to 494 hours, the UWU submitted that while it was not 'steadfast' against this, the number of hours was excessive given the likelihood that, in most weeks horticultural workers will not receive at least 38 hours' work and the number of hours is likely to vary from week to week. The UWU also submitted that the Ai Group's proposal that industry experience be limited to picking a particular crop would create even more uncertainty and disputation than NFF's proposal and would add unnecessary complication.

[10] The AWU similarly opposed the AFPA's proposal for the exclusion of temporary and seasonal workers from progression above Level 1 on the basis that this would fail to acknowledge the proficiency and previous experience of such workers and was contrary to the confirmed view in the April 2024 decision. The AWU also opposed the AFPA's proposal concerning progression based on experience at a particular task, with a particular employer or within a period of time. The AWU also opposed the NFF's proposal that experience be required in either tree crops or ground and field crops, since it considered that three months' experience in the industry would be sufficient to acquire a 'solid, albeit basic understanding of the job'.⁵ The AWU submitted that the proposal to express three months' experience as 494 hours would likely place an unjustifiably significant practical and administrative burden on employees to demonstrate the performance of the requisite hours. The AWU opposed the NFF's proposal

requiring industry experience to have been acquired within the last three years on the basis that this would only devalue the skills and knowledge obtained by employees in previous experience and ultimately undermine the capacity of the Award to provide an effective safety net. It opposed the Ai Group's proposals for similar reasons.

[11] In its further reply, the AFPA rejected the UWU and AWU's contention that its primary position was inconsistent with the confirmed view and the modern awards objective, emphasising that the confirmed view required the C13 rate of pay to be the lowest rate applicable to *ongoing* employment and identifying seasonal workers' entitlements to minimum rates of pay, penalty rates, allowances, overtime rates and piece rates as a sufficient safety net. It submitted that parts of the AWU's and UWU's submissions, as well as the UWU's witness statement, should not be accepted because they were stated without basis. It finally noted the Commission's comment that selection of the timeframe after which progression from an entry-level classification occurs is 'necessarily arbitrary'⁶ and that while its proposed limitation that relevant experience must have been gained in the last 12 months may also be characterised as such, this was necessary for the experience to be 'relevant , proximate and applicable'.⁷

Consideration

[12] We reject the AFPA's primary position that progression to Level 2 should be closed to seasonal employees engaged on a temporary basis since this would vitiate the confirmed view stated in the April 2024 decision. The evidence before us indicates that the large majority of workers covered by the Horticulture Award are temporary and seasonal workers, and nothing before us provides a rationale as to why workers in this category who regularly return to work in the industry should be denied the opportunity for progression on the basis of their skill and productivity acquired through experience. Such employees form a significant proportion of the industry's workforce: the evidence of Mr Phillips was that about 40 per cent of Costa's workforce have been employed by or worked for Costa previously, and that Costa aims to increase this to 80 per cent.

[13] We likewise reject the proposition that the requirement for three months' industry experience should attach to a particular type or category of crop. In the April 2024 decision at [131], reference was made to the difficulty associated with 'the diversity of skills that might be required to pick different types of crop', and the decision said:

... The AWU relied on the Piece Rates Decision to support the proposition that the operation of Level 1 should be confined to the first 76 hours of employment because this was all that was found to be necessary to gain the requisite level of proficiency. However, it is important to note that the approach taken in the Piece Rates Decision was based on acquired proficiency in a particular task. This is now reflected in clause 15.2(a)(iv), which defines the expression 'piecemaker competent at the piecework task' to mean 'a piecemaker who has at least 76 hours' experience performing the task (for example, picking apples, picking strawberries or pruning grape vines)'. It does not necessarily apply to all the tasks (whether under Level 1 or 2) which an employee might be required to perform under the award.

[14] Thus, the *provisional* view that three months' industry experience was the appropriate qualifying criterion for progression to Level 2 took into account the diversity of skills that might be required in the industry but also that basic competency in picking a particular crop might be acquired in a comparatively short period of time. The proposal now advanced by the AFPA and the NFF that the requisite industry experience must be for the particular crop types or categories required by the employer would appear to us to be practically unworkable since it would

presumably require the employee to evidence not only previous employment exceeding three months in the industry but also employment picking particular types of crops. For similar reasons, we consider it would be unnecessarily complex to require the employee to evidence that the previous industry experience was acquired within a certain timeframe. We also note that, while asserted, there was no evidence to suggest that horticultural skills, once acquired, become out-of-date within 12 months (as proposed by the AFPA and the Ai Group) or three years (as proposed by the NFF).

[15] The AFPA's alternative proposal that the requirement for industry experience be changed to experience with the employer would obviously be unworkable in an industry so dependent upon temporary seasonal labour. Its likely result would be that, upon being engaged each season for a particular crop, the employee would have to start again at Level 1 and would likely not qualify to progress to Level 2 until near or after the end of the picking season. This would defeat the purpose of the confirmed view.

[16] We also do not consider the proposal to express three months' experience as 494 hours is workable in the context of an industry which relies on temporary seasonal employment. It would require an employee to retain a record of previous hours worked in order to substantiate the requisite experience with a new employer. Nor do we consider that the proposal would have much practical utility. While the large majority of employees under the Horticulture Award are casually employed, such employees typically seek to maximise their hours of work whilst employed. Whilst they might not regularly reach 38 hours per week, they would rarely work so few hours as to make the difference between three months' service and 494 hours' service of any real significance in terms of the skills and proficiency acquired.

[17] Therefore, as to the above matters, we confirm the *provisional* views stated at [132] of the April 2024 decision and the terms of the draft determination. In relation to the operative date, we consider that employers covered by the Horticulture Award have had ample notice of the pending changes, in that they were identified at least provisionally more than eight months before the proposed operative date of 1 January 2025. However, we accept that the implementation of the confirmed view in the Horticulture Award is likely to have greater ramifications than for most other awards because of the high proportion of employees currently employed at the C14 rate. Consequently, for this award, the operative date will be 1 April 2025.

Pastoral Award 2020

Submissions

[18] In relation to this award, the NFF submitted that:

- (1) In respect of the expression 'experience in the industry' where used in any classification descriptor, this should be clarified 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',⁸ and a three-year time limit should apply to 'experience' for the purpose of transitioning between classifications.
- (2) The draft determination does not, in respect of Broadacre Farming and Livestock Operations classifications in clause 31, vary the FLH2 classification to include

- (a) station hands with six to 12 months' industry experience;
- (b) station cooks and station cooks' offsiders with more than six months' experience; and
- (c) dairy operators grade 1A with six to 12 months experience;

as contemplated at [159] of the April 2024 decision.

- (3) The FLH2 classification should also include the role of Cattle farm worker grade A with more than six months' experience.
- (4) The three-month limit proposed in [163] of the April 2024 decision for a piggery attendant at the PA1 classification should be increased to six months. Six months would be a more appropriate transition period since it would align with the typical introductions and onboarding processes required in piggery enterprises, which were described in the witness statement of Andree Rowntree dated 5 December 2023. It would be consistent with other agricultural industries and achieve greater consistency within the Pastoral Award.
- (5) The weekly rate for the PA2 classification should be increased from \$915.40 to \$915.90 consistent with [160] of the April 2024 decision.
- (6) The operative date of the variations should be 1 July 2025 to take into account the wages cost for many farms and the need to make changes to administrative processes and to be consistent with the statutory presumption of wage increases operating from 1 July in s 166(1)(a) of the FW Act.

[19] In response to the NFF submissions above, the AWU opposed the changes sought above except for (5). In respect of the first change, the AWU submitted that the proposed amendment would fundamentally and unhelpfully revise references to 'industry' elsewhere in the Pastoral Award, not just those in the classification provisions, and that the proposed three-year time limit on experience would devalue the skills and experience obtained by employees over their work history. In respect of the second and third proposed amendments, the AWU submitted that they were inconsistent with the 'confirmed view' in the April 2024 decision and with the three-month transition currently applicable for a feedlot employee Level 1 and a piggery attendant Level 2. As for the fourth amendment, the AWU submitted that there was no reason why employers could not complete the 'typical introductions and on-boarding processes' within three months. Finally, as to the operative date, the AWU submitted that any delay in the variations would deny the entitlement of employees under the Pastoral Award to a fair and relevant minimum safety net of terms and conditions at the earliest opportunity, and would be completely inconsistent with the timing of the application of the Review outcomes to other awards.

Consideration

[20] We accept that, in respect of matters (2) and (5) raised by the NFF, the draft determination did not give effect to the April 2024 decision. This will be corrected in the final determination.

[21] As to matter (1), this raises an issue which goes beyond the scope of the classifications under consideration in this Review. The expression 'experience in the industry' which appears

in the draft determination is the same as that currently used in clause 31 in respect of the Broadacre Farming and Livestock Operations classifications definitions for FLH1, FLH2, FLH3, FLH4 and FLH5, and there is no current requirement for such experience to have been acquired within any particular time period. Any departure from the current approach would require a wider consideration of the classification definitions in clause 31. We consider that if the NFF wishes to pursue this issue, it should do so by a separate award variation application under s 158 of the FW Act.

[22] In relation to matter (3), we do not consider it would be logical or consistent with our intention in the April 2024 decision to have a Cattle farm worker grade A with more than six months' experience classified at FLH2, since this would give them the same wage rate as a Cattle farm worker grade B who is defined as 'perform[ing] work above and beyond the skills of a cattle farm worker grade A...'. Our intention was that an employee would only remain as a Cattle farm worker grade A at FLH1 for a period of up to six months, and then progress to Cattle farm worker grade B at FLH2. To more accurately express our intention, clause 31.1(d) will be varied to define a Cattle farm worker grade A as follows:

- (d) Cattle farm worker grade A who:
- works under direct supervision either individually or in a team environment;
 - understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations/faults;
 - understands and utilises basic statistical process control procedures; and
 - has less than 6 months' experience in the industry (after which the employee will progress to Cattle farm worker grade B).

Indicative of the tasks which an employee at this grade may perform are the following:

- routine mustering;
- routine fence repairs;
- aerial stock sighting;
- repetitive packing and/or unpacking; and
- kitchen/cooking assistance not involving food preparation.

(variation underlined)

[23] In relation to piggery attendants at the PA1 classification (matter (4)), we do not consider that the three-month period to qualify for progression to PA2 should be extended to six months, as proposed by the NFF. The *provisional* view stated in [163] of the April 2024 decision took into account the evidence of Mr Rowntree given in his witness statement dated 5 December 2023. We note that Mr Rowntree's evidence was principally concerned with rebutting the proposition then advanced by the AWU that piggery attendants should progress to PA2 immediately after completing 38 hours of induction training. Mr Rowntree's witness statement described the nature of the training and supervised duties undertaken by new employees upon engagement. Although he said that 'we ideally need a 6 month window' to assess whether an employee is suitable to progress to PA2, in our view what is described in his statement need not take any longer than three months.

[24] Finally, in respect of the operative date (matter (6)), we have determined to depart from our *provisional* view and extend the operative date for variation to this award to 1 April 2025. Because the terms of the final determination which will be published for the Pastoral Award are significantly different to those of the draft determination, we consider that a longer period before the operative date is necessary to allow employers sufficient time to make the necessary administrative implementation arrangements.

Conclusion

[25] We confirm the provisional view expressed in the April 2024 decision⁹ that the variations effected by the determinations to be issued as a result of this decision are necessary to achieve the modern awards objective and the minimum wages objective. We further confirm the provisional view that, to the extent the variations increase modern award minimum wages, we are satisfied the increases are justified by work value reasons¹⁰ and our consideration has been free of assumptions based on gender.¹¹

[26] This concludes the review of C14 and C13 rates in the above awards. The final determination for all 47 awards are published with this decision. In accordance with s 166(2) of the FW Act, we are satisfied that it is appropriate to specify a date other than 1 July on which the determinations are to come into operation. The determinations will come into operation on the dates specified therein.



PRESIDENT

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<PR781398>

¹ [\[2024\] FWCFB 359](#).

² [\[2024\] FWCFB 213](#).

³ MA000028.

⁴ MA000035.

⁵ National Farmers' Federation submissions, 27 September 2024 [11]; The Australian Workers' Union submissions, 25 October 2024 [11].

⁶ [\[2024\] FWCFB 213](#) [29].

⁷ Australian Fresh Produce Alliance reply submissions, 5 November 2024 [11].

⁸ National Farmers' Federation submissions, 27 September 2023 [35].

⁹ Ibid [230]–[231].

¹⁰ Ibid [232].

¹¹ Ibid [233].