

4 yearly review of modern awards – Casual employment and Part-time employment

Matter No. AM2014/196 and AM2014/197

**NATIONAL FARMERS' FEDERATION AND
VOICE OF HORTICULTURE
JOINT SUPPLEMENTARY SUBMISSION**

Date: 2 September 2016

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. Voice of Horticulture represents 35 horticulture industry groups across the fruit, vegetables, nuts, mushrooms, turf, nursery plants and cut flowers industries.
2. This supplementary submission is filed in accordance with the Direction issued on 10 August 2016. It deals with the:
 - a. Australian Workers Union (AWU) claim for overtime and weekend penalties in the horticulture industry; and
 - b. National Union of Workers (NUW) claim for changes to the meaning of casual and part-time employee in the Horticulture Award 2010 (**Horticulture Award**).

The AWU Claim

3. The AWU seek a variation to subclause 22.1 of the Horticulture Award, to 'clarify' that casual employees are entitled to overtime under clause 24 of the Horticulture Award when they work outside the span of ordinary hours. The effect of the claim would be to extend both overtime and weekend penalty rates to work performed by casual employees outside of the hours of 6am to 6pm, Monday to Friday.

4. A detailed history of the current hours of work and overtime provisions in the Horticulture Award was set out in our submission of 22 February 2016. Similar submissions, including from Australian Business Industrial, confirm the particular history of the provisions which evolved from the pre-reform award, the award modernisation process and Ministerial direction in 2010 via the Consolidated Award Modernisation Request.
5. There can be no doubt that currently under the Horticulture Award, casual employees do not currently have an entitlement to overtime or weekend penalty rates. Certainly, the AWU did not seek to demonstrate that the entitlement currently exists, and nor did they put that proposition during their conduct of their case.
6. The evidence of AWU witness, Adam Algate, describes his experience of the horticulture industry¹, which directly corresponds with the position that casual employees are not entitled to overtime under the Horticulture Award.
7. The evidence of AWU witness, Ron Cowdrey, confirms current industry practice under the Horticulture Award:

“most employees work more than 38 hours per week and overtime rates are not paid to the members I have spoken with.”²

8. The evidence of AWU witness and union official, Keith Ballin, confirms his lack of familiarity with the horticulture industry and limited understanding of the Horticulture Award, which has been operative since 2010:

“I was shocked to hear that an Industrial award may not have overtime entitlements in it and used within Australia in 2015.’

In our submission this evidence should be given little weight.

9. Even the AWU advocate, Mr Crawford, confirmed during cross-examination that the AWU claim would extend overtime to casual employees:

“Your Honour, to be frank, given we're talking about this now, our current proposed variation would, as I recall, extend the span of ordinary hours, which is Monday to Friday for permanent workers, to casual employees. Which would mean any hours on the weekend would be overtime.”³

¹ Exhibit 173, at paragraphs 30 to 16.

² Exhibit 175, at paragraph 8.

³ Stephen Crawford, Transcript 11 July 2016 at PN1089.

10. The evidence filed in the proceedings is a complete answer to the AWU claim. It confirms that overtime and weekend penalties do not currently apply to casual employees under the Horticulture Award.

Should penalty rates be extended to casual employees?

11. Changing the current approach to payment of casual employees in the Horticulture Award will have significant adverse consequences for the industry as a whole. This much was clear from the evidence of all horticultural employer witnesses in these proceedings outlining the impact of imposing overtime costs on casual employment under the Horticulture Award, where such costs currently do not apply.

12. Although only seeking to clarify the position in relation to overtime and weekend penalties, the AWU sought the imposition of new penalty rates for casual employees in the horticulture industry for work outside of the span of hours from Monday to Friday, 6am to 6pm, regardless of the legal position.

13. Two main arguments were made in support of this position:

- a. other modern awards provide for overtime outside the span of ordinary hours for casual employees, and the same approach should apply in the Horticulture Award; and
- b. the horticultural industry seemingly stands to benefit significantly from recent free trade agreements negotiated by the Australian government.

14. In this review, the Commission is required to consider each modern award in its own right. While standardization across industries may be considered appropriate in some contexts, in other contexts it will not be. In the same way, just because certain terms are found in one modern award does not mean they should be found in all modern awards. In this case, the Commission should avoid departing from established precedent⁴ and from award terms that reflect the unique nature of the horticulture industry.

15. In a submission dated 5 August 2016, the AWU relied on the fact that overtime entitlements previously applied to casual employees in the Queensland horticulture industry to argue that the impact of overtime entitlements for casual employees will

⁴ See for example, *Application by Fanoka Pty Ltd t/as Fairview Orchards & Anor* [2010] FWA 2139.

not have the effect claimed by the NFF. This is contrary to evidence to findings of the Commission at that time.⁵

16. In *Application by Fanoka Pty Ltd & Anor*⁶(Fanoka), Senior Deputy President

Richards considered detailed evidence from both employers and employees about the capacity of the Queensland horticulture industry to absorb overtime costs:

“I have before me sworn, representative evidence (derived from what I believe to be a representative sample of growers and employees, across a range of growing regions and crops, such as melons, strawberries, watermelons, broccoli, avocados, apples, pumpkins etc) to the following effect:

- The growers’ margins are modest and they are price takers who supply the likes of Coles and Woolworths;
- The prices paid for crops do not contemplate any other than ordinary rates of pay as farm cost or production costs inputs;
- The labour cost impact of making overtime paid at 150% and 200% penalties in order to complete harvesting within the narrow time frame before the fruit loses its marketable value is commercially untenable;
- Consequently, overtime paid at penalty rates is uncommon;
- The availability of hours is affected by climate and harvest conditions (product size and ripeness) that directly impact upon the commercial value of the relevant crop along with increased spoilage rates;
- Consequently, crops must be harvested and packed and delivered within small windows of opportunity by intensive efforts (sometimes within two days); but
- When the maximum number of ordinary hours are reached, production (both harvesting and packing) is shut down and employees are required to sit out the remainder of the working week, or else move to other properties to work or leave the industry;
- There are also productivity issues for the growers’ as new employees are employed to continue the harvesting duties and require training in picking techniques, familiarisation with machinery and wider acculturation.

17. On balance, Richards SDP found that it was in the interests of both parties to accommodate arrangements where employers could offer work in excess of 38 hours per week, and employees could agree to additional work at the ordinary rate of pay.

18. The following passage is relevant:

“On the evidence before me, and not as a matter of speculation, I am satisfied that the inclusion of the voluntary additional hours clause represents a tangible benefit for the employees to be covered by the agreement. This is because:

- The provision will permit an employee to elect voluntarily to earn more than they would otherwise have earned (if their employment was regulated by the reference instrument) for reason that as a matter of evidence there

⁵ Paragraphs [19] – [28].

⁶ [2010] FWA 2139.

are no or negligible hours available that could be paid at overtime rates of pay;

- It appears that the employees electing to work additional hours at their ordinary rate of pay will have the benefit of earning additional income to offset periods when their hours (and consequently income) are decreased due to factors outside the employees control (for example weather, harvesting periods etc)⁷
- Reduce the transactions and other costs arising from having to move to new employers to work additional hours at ordinary rates of pay;
- Allow for greater flexibility in hours of work than would otherwise be available; and
- The agreements provide for overtime to be paid at penalty rates (which accord with the reference instrument) where the employer requests or directs such overtime to be worked.”

19. The AWU also argued that there is ‘no sound rationale for casual employees to be excluded from overtime penalty rates’ in the horticulture industry, citing the decision of a Full Bench of the Commission in relation to the *Social, Home Care and Disability Services Industry Award 2010*⁷ to argue

20. The social, home care and disability services industry is completely different to the horticulture industry and the two cannot reasonably be compared. For example:

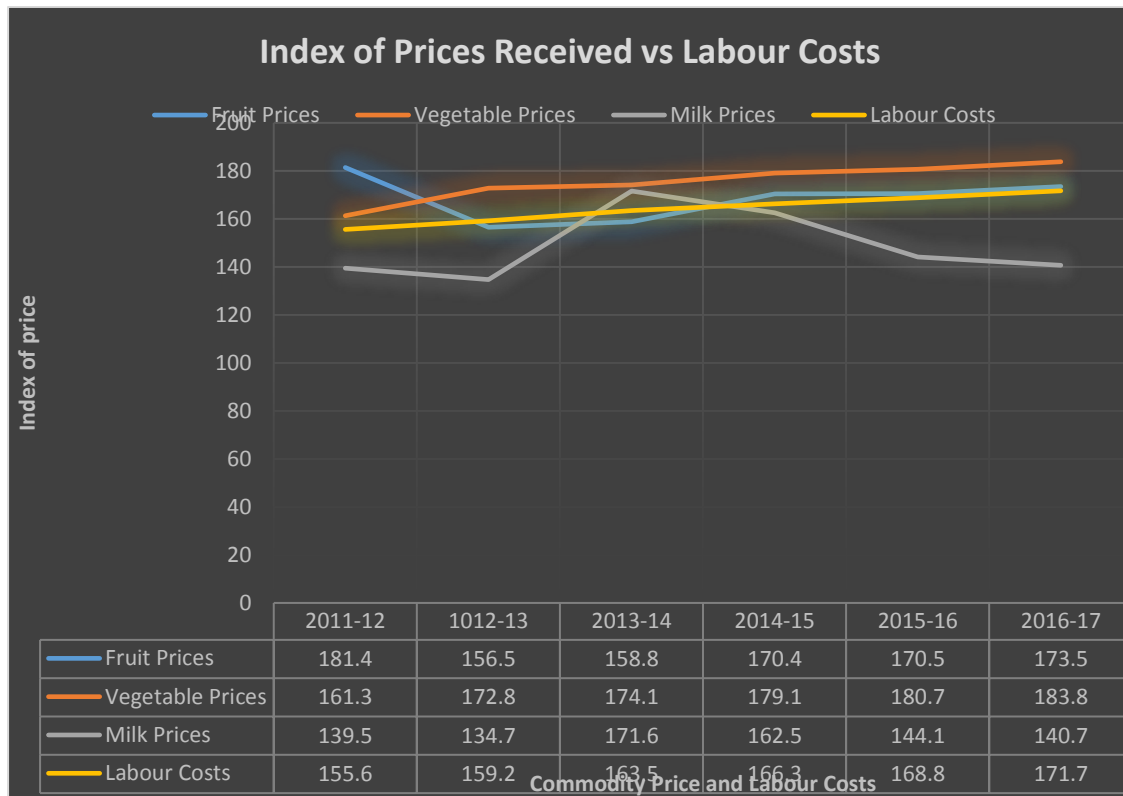
- a. The social, home care and disability services industry operates in a largely controlled environment where activities are not reliant on, and subject to, the weather; and
- b. Very different funding arrangements apply in each case: the social, home care and disability services industry is heavily reliant on government funds for its operation; in contrast, the horticulture industry is a ‘price taking’ industry, operating within an agriculture sector which is one of the least subsidized in the world.⁸

15. The AWU in its final submission made reference to the overall economic performance of the agricultural industry. This evidence does not present a full picture of the industry and the factors underpinning economic performance as demonstrated at paragraphs 5 – 18 and 139 - 151 of our submission dated 5 August 2016.

⁷ *Australian Municipal, Administrative, Clerical and Services Union* [2014] FWCFB 379 at [39], referred to in AWU Submission, 14 October 2015 at [31].

⁸ OECD (2013) *Agricultural Policy Monitoring and Evaluation: Countries and Emerging Economies* OECD Publishing http://dx.doi.org/10.1787/agr_pol-2013-en.

16. A detailed analysis of this same evidence shows that agricultural labour cost increases over the past five years have kept pace with the rising price of vegetables, while the price that farmers receive for fruit and milk has decreased. This is set out in the graph below, also filed in the NFF submission dated 5 August 2016.



Source: Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) ‘Agricultural Commodities – Vol 6 no 2 June quarter 2016.’⁹

17. The growth potential of the horticulture sector can only be achieved with the right regulatory settings in place. Open and fair markets and flexible labour regulation are key to achieving this projected growth potential.

18. At paragraph 14 - 15 of its submission,¹⁰ the AWU referred to comments of John Dollisson about the level of industry protection from international competition. In his evidence, Mr Dollisson explained that, while there is currently some protection for Australian produce in the form of consumer choice, this could be removed at any time, particularly under the influence of rising costs of production for Australian produce:

⁹ See Tab 3, page 148 and 149 of Exhibit 186 (AWU bundle).

¹⁰ AWU Submission, 5 August 2016.

“It has been our protection through Woolworths and Coles, by saying buy Australia, we only supply and support Australian farmers, that’s been our greatest protection. But we could – Coles or Woolies could import apples, oranges and a range of other fruit from New Zealand tomorrow, if they decided to, or if the costs of production in Australia rose to a significant level that it make economic sense for them to bring in cheaper fruit from overseas.”¹¹

19. In response to paragraph 17 of the AWU submission:¹²

- a. At PN885, Mr Dollisson agrees that the data presented to him during cross examination is inconsistent with the proposition that labour costs have been rising at a faster rate than the price received by farmers for fruit and vegetables. As Mr Dollisson explains, “in the horticulture industry, data is very poor. You will notice that they only cover a small percentage of horticulture.”¹³ As we set out in our submission dated 5 August 2016, data collected by ABARES only reflects a limited number of better performing horticultural commodities.
- b. Mr Dollisson explains that it is hard to attract workers to the industry for reasons such as the physical nature of the work and the unpredictable nature of harvesting perishable goods.¹⁴ However, as he also explains, “you’re rewarded if you work hard and that’s why the backpacker commitment has been such an important one for harvesting Australian crops”.¹⁵ Where Mr Dollisson later states “It’s quite attractive to workers” he is not referring to the general work conditions as he was in his previous comments, rather he is referring to the short bursts of long hours of work.¹⁶ This is what many casual harvest workers want – short periods during which they can make as much money as they can before moving on.
- c. While, Alice De Jong may have agreed that the Voice of Horticulture survey was not intended to “give a complete economic picture of the horticulture industry”,¹⁷ she also gave evidence that the survey provided some evidence about the relationship between labour costs and profit:

¹¹ Transcript, 11 July, PN1033.

¹² AWU Submission, 5 August 2016.

¹³ Ibid, PN887.

¹⁴ Ibid, PN1062.

¹⁵ Ibid.

¹⁶ Ibid, PN1067.

¹⁷ Ibid, PN1409.

“responses indicate that if certain labour costs increase the farm would be below viability, and that would seem to suggest that profits are not more than somewhat small.”¹⁸

- d. On Clint Edwards’ farm, the one to two weeks that employees generally work over 38 hours is a period when input costs are extremely high. Growers are generally not paid until after the completion of harvest and delivery of their produce to the customer. It is also important that farm businesses employ high numbers of employees at this time of the year, which increases their input costs dramatically for short periods. The number of employees will generally be in proportion to the amount of produce that needs to be harvested, assuming of course that there is an adequate labour pool to draw from.
- e. Mr Sutton gave evidence that overtime and penalty rates for casual employees would push Australian farming businesses into employing less local workers¹⁹ as there will be an overall reduction in demand for workers where growers are forced to decrease on-farm production in response to rising labour costs. This evidence was not directed at any specific distinction between local and overseas workers and was in no way contradictory to his other evidence.²⁰

20. Contrary to the AWU submission, the weight of evidence in the proceedings supports a continuation of the longstanding and flexible approach to payment of casual employees under the Horticulture Award.

21. There is a sound rationale for this approach, particularly due to the price-taking nature of the industry, the volatility of global markets, the perishable nature of goods harvested and the outdoor, unpredictable environment which dictates work rosters:

- a. At paragraph 12 of her statement, Kylie Collins describes the highly perishable nature of mangoes and the fine line between waiting until the fruit is ready to harvest and finishing harvest before rain prevents it. She describes the rush to get fruit off the tree before it ripens or rains, as ripened fruit cannot be sold to market. Long hours and weekend work is essential – not all year round, but for an intense period during the year. As she notes, “it would be nice to ‘order’ the rain for the weekend to fit in with regular business hours but

¹⁸ Transcript, 11 July, PN1409.

¹⁹ Ibid, PN1152.

²⁰ Ibid, 1156.

this is not possible.”²¹ Growers cannot control the weather, even if they are able to predict it. All they can do is arrange their work around it as best they can.

b. At paragraphs 2 and 6 of his statement, Mick Dudgeon explains:

“we only have 2-4 days to pick the cherries once they become ripe because they quickly become over ripe, reducing their value.”
...“this puts enormous pressure on growers to pick their cherries on the days when they are ripe – which may be on a weekend or a public holiday.”²²

c. John Dollisson gave evidence that cherries split if it rains, increasing the urgency of harvest:

“Growers are trying to complete harvest while the weather is right and there is no way of controlling when rain will arrive.”²³

d. Increased costs in the horticulture industry make it less competitive on a global scale. Rhonda Jurgens emphasised this in her statement:

“We are trying to be globally competitive, but an increase in the wage cost for no increase in productivity will make us uncompetitive. It limits our options for expanding and developing export markets and therefore, for increasing jobs.”²⁴

22. The same views resonate throughout the evidence of NFF witnesses. Farmers simply cannot provide certainty of hours or work rosters to casual employees, as work requirements can change from day to day and from hour to hour.

23. Two core principles underpin the rationale for payment of penalty rates: firstly, to discourage employers from rostering work outside the Monday to Friday ‘standard’ working week, and secondly, to compensate employees for working outside those times.

24. Farmers do not operate in a standard business environment where work can be limited to preconceived notions of standard hours. It is the environment dictates the work roster, not the employer. Retailers and wholesalers determine the price paid for horticultural produce, not the farmer. For these reasons, the principles underpinning the payment of penalty rates do not sit easily in the agriculture sector.

²¹ Ibid.

²² Exhibit 157.

²³ Transcript, 11 July, PN1061.

²⁴ INSERT REFERENCE

25. Increasing the cost of labour will not discourage work outside the span of 6am to 6pm, Monday to Friday – work will continue to be done when conditions demand it. All it will do is penalize farmers who are unable to pass on the increased costs.
26. Working long hours at peak times of the year is characteristic of the agriculture sector, and it always will be. Seasonal workers can work hard for a short period, and earn enough money to move on, either when they have had enough or at the end of the season.
27. As Brendan Miller confirmed, his casual employees often work 6 days per week during harvest.²⁵ Kylie Collins agreed that in her business, it was often necessary to harvest on weekends.²⁶
28. Mick Dudgeon put it this way:
- “Hours of work vary at our business. At times, we have a couple of days off while we wait for cherries to ripen; at other times we work part days because there are not enough cherries ripe. Sometimes we work at our maximum capacity to get the cherries picked and packed as quickly as possible.”²⁷
29. Working on a farm means working in rural, regional and/or remote Australia, often living on or near the property where work is performed. Going home after work does not have the same meaning as it does for someone working in the city. Having made the effort to travel to a rural area for work, the priority of employees is to work and earn as much as they can while they are there.
30. NFF witnesses confirmed this position in their evidence:
- a. At paragraph 15 of her statement, Kylie Collins said:
- “In my experience, our employees want as much work as they possibly can get during the harvest season as they know it only goes for a short period of time. They don’t want to have Saturday and Sunday off because in regional Australia there are no shops, banks, post offices, doctors etc open for business. They would much prefer to have a week day off so that they can get food and attend to other business if needed.”²⁸
- b. As Susan Finger indicated:
- “Many seasonal workers undertake this type of employment because they can earn a lot of money in a short period without resettling in

²⁵ Exhibit 164 at paragraph 13.

²⁶ Exhibit 155 at paragraph 12.

²⁷ Exhibit 157 at paragraph 7.

²⁸ Exhibit 155.

another harvest area. Some take annual leave from their main employment and do harvest work instead of taking holidays.”²⁹

31. In the submission dated 5 August 2016, the AWU draws attention at paragraphs 34 to 35 to allegations of mistreatment of workers in the industry. We note our objections to similar comments in the witness statements of Ron Cowdrey and Keith Ballin. Allegations of mistreatment are not in any way relevant to these proceedings and nor should they be given any weight.
32. At paragraphs 36 and 46 to 48 of the AWU submission of 5 August 2016, reference is made to the fact that most casual employees in the horticulture industry are paid at the Level 1 classification rate and accordingly, they fall below the National Minimum Wage rate when employees working more than 38 hours per week at ordinary hourly rates.
33. This argument is nonsensical. The Commission determines the level of what it considers to be a fair minimum wage. Current award rates of pay are set at or above this level, including for casual employees with limited experience in the horticulture industry. Time worked in excess of 38 hours attracts additional payment, thereby increasing earnings above the level of the National Minimum Wage. There is no requirement in the *Fair Work Act 2009* (FW Act) that hours worked in excess of 38 hours per week must be paid at overtime rates of pay. As a Full Bench of the Commission has previously confirmed, the FW Act does not mandate penalty rates and nor does it dictate a particular result that must flow from the fact that an employee works long hours on certain days or on weekends.³⁰

Consequences of imposing new penalty rates on the horticulture industry

14. Departing from the approach taken during award modernization to limit overtime and weekend penalty rates to permanent employees in the horticulture industry will have consequences for the industry as a whole.
15. As the evidence suggests, it is likely to limit availability of work for casual employees to 38 hours per week. This will significantly reduce the earnings capacity of casual

²⁹ Exhibit 158.

³⁰ *Annual Wage Review 2013-14* [2014] FWCFB 3500

employees during harvest and will exacerbate existing workforce shortages in the agriculture sector.

16. Brock Sutton gave evidence about what the consequences of imposing a new overtime regime on his business:

“Due to our financial restrictions in average margins we would probably limit the amount of work that they were able to work to the 38 hours length. ... it would limit it. I think we would find it difficult to keep some of our existing employees.”³¹

Pennie Patane similarly said:

“If we had to pay overtime we would be forced to employ additional staff and work shifts, leading to all casual staff working less hours.”³²

Susan Finger said:

“Our business cannot afford to pay overtime as we are unable to recoup the additional expense paid due to market driven supply chains. ...our solution to mandated overtime would be to employ more casual workers so that we don't have to roster overtime. Casual workers may end up earning less in season as their seasonal work will be limited to 'office hours' ...this could lead to problems in sourcing seasonal workers.”

Steve Chapman agreed:

“Already there is a significant shortage of harvest labour. If pickers are limited to 38 hours per week there will be insufficient labour available to meet the harvest needs of many crops.”³³

17. Other consequences include:

a. a serious threat to financial viability if only able to access the frozen berry market where the cost of harvest labour exceeds the price received for the product:

“berries must be picked daily or they will become overripe and unsuitable for fresh market. Overripe berries are only good for the frozen produce market. ...for frozen berries, the cost of harvest labour alone exceeds the price we receive for the product, which is why there is no significant frozen berry industry in Australia. Nearly all frozen berry product is imported”.³⁴

c. prices that do not cover operating costs. As Susan Finger observes:

³¹ Transcript, 11 July 2016, PN1180-1181.

³² Exhibit 166 at paragraph 11.

³³ Exhibit 154.

³⁴ Exhibit 154, Statement of Steve Chapman at paragraph 4.

“once apples are ready to pick there is a short operating window to hand pick them and place them in cold storage or send them to the relevant pack house. Fruit picked outside this window will not meet specifications and will have to be sold to processing which does not cover costs of growing and harvest.”³⁵

d. increased risk of revenue and crop losses:

“New penalty rates for weekend work, picking or packing cherries will mean we will not be able to work on weekends. This will greatly increase the risk of revenue loss due to a decrease in cherry quality and therefore price. Crop loss due to weather events is also significantly increased. Every day that the cherries hang on the tree increases risk.”³⁶

e. Loss of crop to pests, disease, weather and overripening:

“the longer the fruit is left, the more chance there is of losing a larger percentage of the crop to pests, disease, weather and natural ripening of the fruit. We cannot sell ripened fruit.”³⁷

The Modern Awards Objective

18. We rely on our submissions of 22 February 2016 and 5 August 2016 and in addition, make the following response to the AWU submission of 5 August 2016 on the modern awards objective.

Relative living standards and the needs of the low paid (subsection 134(1)(a))

19. As noted above, the Level 1 rate in the Horticulture Award is equivalent to the National Minimum Wage. This classification applies to many casual employees who do not have the requisite skills and experience for work at a higher classification. An employee working more than 38 hours of work will earn more than an employee who is limited to 38 hours, and accordingly, will earn a wage that is higher than the National Minimum Wage.

The need to encourage collective bargaining (subsection 134(a)(b))

20. While employers may consider collective bargaining to overcome concerns about the impact of higher casual rates of pay in the horticulture industry, few are likely to follow that path to conclusion as to do so, they would be required to demonstrate that their enterprise agreement passed the better off overall test. This would increase

³⁵ Exhibit 158.

³⁶ Exhibit 157 at paragraph 12.

³⁷ Exhibit 167 at paragraph 11.

labour costs even more than cost increases imposed under the Horticulture Award if the AWU claim were to succeed.

The need to promote social inclusion through increased workforce participation (subsection 134(1)(c)) and the need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d))

21. The introduction of overtime and weekend penalty rates for casual employees will have the effect of limiting employee participation to 38 hours per week. While at face value, this should increase the number of available jobs, the reality is that it will only heighten existing and chronic labour shortages in the industry. Growers will face the choice of paying more than they can afford or planting less area under crop knowing they will not have enough labour to maximize their harvest.
22. As Susan Finger noted, best practice in the industry generally depends on harvesting the produce in a timely manner.³⁸ Growers are already under pressure to produce more with less, and in many cases will only have capital to invest in their annual crop in proportion to a certain number of workers at any given time.

The need to provide additional remuneration for employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts; (subsection 134(1)(da))

23. In the Annual Wage Review 2013–14 decision, a Full Bench of the Commission considered the impact of new subsection 134(1)(da) of the FW Act. The Commission stated:

“Section 134(1)(da) requires the Commission to take into account certain considerations but it does not dictate a particular result. The modern awards objective is very broadly expressed and no particular primacy is attached to any of the considerations set out in s.134(1)(a) to (h).”

24. This approach has been adopted on numerous occasions since that time.³⁹ In *4 yearly review of modern awards—Common issue—Award Flexibility*⁴⁰ a Full Bench of the Commission said as follows:

“First, contrary to the submission advanced, s.134(1)(da) does not mandate the provision of TOIL on the basis of compensatory time. As we have observed earlier, the modern awards objective is very broadly expressed; there is a degree of tension between some of the s.134 considerations; and no particular primacy is attached to

³⁸ Exhibit 158.

³⁹ See for example, *4 yearly review of modern awards – Annual leave* [2015] FWCFB 5771.

⁴⁰ [2015] FWCFB 4466 at [172].

any of the matters specified in s.134(1)(a)–(h). The matters specified in s.134(1)(da) are to be taken into account in ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’. But, importantly, s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2–3 which *must* be included in modern awards, including the flexibility term to which we have referred earlier (s.144(1)).”

25. This decision makes clear that the FW Act does not mandate the inclusion of penalty rates in modern awards and nor does it dictate a particular result that must flow from the fact that an employee works certain patterns of work that do not align with the Monday to Friday, 9am to 5pm ‘norm’.⁴¹
26. As our submissions in these proceedings demonstrate, there are valid, longstanding reasons for the approach to payment of casual employees which has a direct bearing on the competitiveness of the horticulture industry. Australian employment standards are generous by global standards, with the national minimum wage being only one part of a complex web of safety net provisions. In addition to tax relief and child care subsidies, the legislative safety net and modern awards are comprehensive and wide-reaching.
27. In considering this criteria, the Commission should balance the need for higher wages against the need for the horticulture industry, which relies heavily on exports, to be and to remain globally competitive. In circumstances where Australia already has the highest labour costs in the OECD, this factor should weigh against the imposition of significant labour cost increases which will make it much harder for growers to compete in global markets or heighten existing labour shortages which already cost the industry millions of dollars in lost productivity each year.

The principle of equal remuneration for work of equal or comparable value (subsection 134(1)(e))

28. This criteria is neutral in relation to the AWU and NUW claims.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f))

⁴¹ *Annual Wage Review 2013-14* [2014] FWCFB 3500

29. Operational changes made by farmers to minimize the impact of the proposed changes are likely to have a detrimental impact on the overall productivity of the sector, as well as on the income of employees in the sector as employee hours are reduced and labour shortages restrict capacity to maximize production.
30. The AWU have noted that ‘it is significant that the extra costs are not of a permanent nature – they will only arise during busy harvest time’. This submission fails to acknowledge that this is the very period during which growers are under the most cost pressure and are the most resource-strained. Agricultural operations are seasonal and fluctuations mean that for many, outlays must be managed so that they are averaged over the year. As noted in the NFF submission dated 5 August 2016,⁴² growers may only receive one pay cheque each year. Significant increases in price are no less significant if they fall at busy times of the year.
31. While we are optimistic that the agriculture sector can capitalize on growth opportunities, this is far from being realized. Constant regulatory change, for example through the proposed ‘backpacker tax’ is currently having a dampening effect on the growth potential of the industry. Increasing labour costs on the promise of a sector’s anticipated future growth is not a sound economic approach and is likely to have the opposite effect – that is, constraining growth through reduced competitiveness in global markets.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (subsection 134(1)(g))

32. Maintaining current arrangements will promote certainty, stability and sustainability both in the Horticulture Award and in the horticulture industry more broadly.

The likely impact of any exercise of modern award powers on employment growth, inflation and sustainability, performance and competitiveness of the national economy (subsection 134(1)(h))

33. For the reasons outlined above, imposing new and significant labour cost increases on the horticulture industry will have a dampening effect on the horticulture industry. This will have flow on effects for the sustainability, performance and competitiveness of the national economy. While job creation might be anticipated from limiting

⁴² at [17].

employee hours of work to 38 hours per week, the reality of seasonal labour shortages in the industry means that this is unlikely to eventuate. Instead, growers will choose to plant less area under crop. Every acre lost to production will reduce Australia's total value of agricultural exports, constraining national economic competitiveness and growth.

An alternative approach?

34. Toward the end of the hearing, Mr Crawford of the AWU appeared to change position in relation to the AWU claim:

“Your Honour, to be frank, given we're talking about this now, our current proposed variation would, as I recall, extend the span of ordinary hours, which is Monday to Friday for permanent workers, to casual employees. Which would mean any hours on the weekend would be overtime. I can indicate to the bench that the union would consider it acceptable if the entitlement was only for in excess of 38 hours in the week, for casual employees. We would consider that. I mean we have read the concerns raised by farmers that they have to operate every day of the week and get the fruit or vegetables off when they do. So we have heard those concerns, but we're certainly not comfortable with the situation whereby there's some reference to averaging, and no period over which that average is calculated.”

35. This change in position was confirmed in the AWU's closing submissions.⁴³ In addition, the AWU now appear to suggest that casual employees are entitled to overtime under the Horticulture Award if they are classified as shiftworkers (that is, employees who finish work after 6.00pm or before 8.00am.⁴⁴

36. Shiftworkers under the Horticulture Award are employed either as full time or part time employees. Casual employees cannot be employed as shiftworkers and this reflects the longstanding position in the pre-reform awards from which the current terms (subclause 22.1, subclause 22.2 and subclause 10.4(c) of the Horticulture Award 2010) are derived.

37. The Fair Work Ombudsman's *Pay Guide – Horticulture Award 2010 [MA000028]* confirms this view on page 2 stating that shift allowance is payable to full time and part time employees but not casuals. The tables clearly show a breakdown of various rates of pay for each classification level for full time, part time and casual employees, with no provision for casual shift allowance or overtime.

⁴³ AWU Submission, 5 August 2016 at [5].

⁴⁴ Ibid at [6].

38. The AWU's new proposals come at such a late stage in the proceedings that they are unable to be dealt with in any meaningful and procedurally fair way. All of the evidence has been heard, and parties are in the final stages of summarizing their case.
39. The NFF opposes the amended AWU proposal. We have demonstrated the deleterious effect that granting the AWU claim in these proceedings will have on the horticulture industry. If the Commission is nevertheless persuaded to grant the AWU claim, or a modified version of it, the NFF seeks a full opportunity to be heard on any proposed change as well as the opportunity to make further submissions after consulting with our members.

The NUW Claims

40. The NUW sought to make late claims in these proceedings in relation to the definitions of casual and part-time employee in the Horticulture Award.
41. We note that the NUW did not file any evidence in support of its claims and nor did it appear or seek to press those claims during the proceedings.
42. The NFF relies on our submission of 22 February 2016 in relation to the NUW claim.
43. In the absence of any evidence to support the claims, they should be disregarded in its entirety.

Conclusion

44. The AWU claim for overtime and weekend penalty rates in the horticulture industry should be dismissed.
45. The NUW claims in relation to the Horticulture Award should be dismissed.

Sarah McKinnon
General Manager, Workplace Relations & Legal Affairs
2 September 2016