Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Reply Submissions – Horticulture Award 2010

AM2014/196 & AM2014/197

Casual Employment & Part-Time Employment

31 August 2016

Ai GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/196 & AM2014/197

CASUAL AND PART-TIME EMPLOYMENT

1. INTRODUCTION

1. The Australian Workers' Union (**AWU**) and the National Union of Workers (**NUW**) are seeking variations to the *Horticulture Award 2010* (**Horticulture Award** or **Award**), which have been referred to the Full Bench as presently constituted for determination.

2. The changes proposed can be summarised as follows:

    - The AWU is seeking to restrict the circumstances in which a casual employee can perform ordinary hours of work and to extend the entitlement to overtime rates under the Award to casual employees.

    - The NUW is seeking the introduction of a requirement that part-time employees, by definition, work a regular pattern of ordinary hours and that such hours are agreed between the employer and employee upon engagement.

    - The NUW has also sought the introduction of a new clause that goes to the interaction between the casual loading and other penalties/loadings payable under the Award.

3. The NUW filed submissions in support of its claims on 14 October 2015. In our submission of 26 February 2016, we responded comprehensively to the union's proposals.[1] We continue to rely on those submissions.

[1] Ai Group's submission dated 26 February 2016 at page 347 – 356.

4. The AWU filed material in support of its claim on 14 October 2015. On 10 August 2016, the Full Bench issued directions requiring the filing of final written submissions by the proponents of any variations sought to the Horticulture Award. On 5 August 2016, the AWU filed such submissions and an amended claim.

5. In accordance with the aforementioned directions, the Australian Industry Group (**Ai Group**) files this submission in opposition to the AWU's proposal. It addresses the AWU's submissions of 14 October 2015 and 5 August 2016.

2. THE STATUTORY FRAMEWORK

6. The AWU’s claim is pursued in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Fair Work Commission (**Commission**) pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

7. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

8. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission’s powers under Part 2-3 of the Act, which includes s.156.

9. Later in this submission, we detail the reasons for our contention that the AWU’s submissions and evidence do not establish the provisions proposed are necessary in the relevant sense.

3. THE COMMISSION'S GENERAL APPROACH TO THE 4 YEARLY REVIEW

10. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision*[2] provides the framework within which the Review is to proceed.

11. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> [23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, <u>where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.</u>[3]

12. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. <u>The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.</u>[4]

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[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

13. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[5]

14. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net".

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[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

15. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (emphasis added):

> [36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. <u>In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.</u>[6]

16. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

17. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

18. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench: (underlining added)

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[7]

19. The AWU's claim conflicts with the principles outlined in the aforementioned decisions and accordingly should be rejected.

[7] Re *Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

4. THE AWU'S CLAIM

20. The AWU seeks a variation to the Horticulture Award so as to extend the entitlement of overtime rates to casual employees other than shiftworkers and introduce new restrictions as to when a casual employee may perform ordinary hours of work. We first consider the relevant provisions of the Award before turning to the AWU's claim and its effect.

The Current Award Provisions

21. Clause 10.4 of the Horticulture Award relates specifically to casual employees. Subclause (a) serves two purposes. It provides a definition of a 'casual employee' and the ordinary hours of a casual employee: (emphasis added)

> (a) A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.

22. Clause 10.4(a) provides for the determination of the ordinary hours of work for a casual employee. It is the only provision that purports to do so in respect of casual employees. That is, a casual employee's ordinary hours are either an average of 38 hours per week or the hours required to be worked by their employer, whichever is less. The Award does not impose any restrictions as to when these ordinary hours may be performed or the maximum number of ordinary hours that may be worked in a day. This is an important distinction that can be drawn between permanent employees and casual employees to whom the Award applies, and affords employers with a necessary flexibility.

23. The remaining subclauses prescribe the minimum amount that a casual employee must be paid for each hour worked and the matters that the casual loading is intended to compensate an employee for. Relevantly, subclause (c) states: (emphasis added)

> (c) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time and part-time employment provided for in this award.

24. Clause 22.1 of the Award prescribes the ordinary hours of work for full-time and part-time employees other than shiftworkers: (emphasis added)

> 22.1 The ordinary hours of work for all full-time and part-time employees other than shiftworkers will not exceed 152 hours over a four week period provided that:
>
> > (a) The ordinary hours will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.
> >
> > (b) The ordinary hours will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.
> >
> > (c) The ordinary hours will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.
> >
> > (d) All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime.

25. Clause 22.1 effectively sets the parameters within which the ordinary hours of work of full-time and part-time employees (other than shiftworkers) must be arranged. By virtue of clause 22.1(d), hours worked in excess of ordinary hours by a full-time and part-time employee other than a shiftworker will be deemed overtime.

26. Where an employee works such overtime, the rates prescribed by clause 24.2 are payable. We observe that clause 24.2 does not purport to define the circumstances in which overtime rates are payable. That is left to other provisions of the Award. Rather, it merely sets out the rates that are payable when overtime is performed.

The Current Entitlement to Overtime

27. It is important to first consider the entitlement of casual employees to overtime rates under the Award as presently drafted. It is Ai Group's position that, contrary to the AWU's assertion, a casual employee other than a shiftworker is not entitled to the overtime rates prescribed under clause 24. That is, casual

employees other than shiftworkers are excluded entirely from the overtime rates under the Horticulture Award.

28. Later in this submission, we detail the Part 10A Award Modernisation Process that preceded the making of the Award. We there establish that the ordinary hours of work and the entitlement of casual employees to overtime rates was the subject of explicit and repeated consideration by the AIRC, the industrial parties involved and the then Minister. The procedural history indicates an acceptance by Ai Group, the National Farmers Federation (**NFF**) and the AWU that under the predominant pre-reform federal award, the *Horticultural Industry (AWU) Award 2000* (**2000 Horticultural Award**), the vast majority of employers (listed as respondents at Schedules B and C to that award) were not required to pay their casual employees overtime rates.

29. As we later explain, the modern award was amended soon after it was made to ensure that it was consistent with the terms and conditions applying to Schedule B and C respondents to the 2000 Horticultural Award. The AWU did not oppose the variation, despite being well aware of the employer representatives' position as to the entitlement of casual employees to overtime. The submissions made by the parties and the AIRC's decision evince an intention to preserve the position under the 2000 Horticultural Award.

30. The current provisions of the Award should be read in light of this history and the clear intention of the parties and the AIRC when the Award was made and subsequently varied.

31. Before dealing with the proper interpretation of the current award terms, we briefly turn to the relevant provisions of the 2000 Horticultural Award applying to Schedule B and C respondents:

- Clause 15.4 was headed 'casual employment'. Clause 15.4.1 defined a casual employee as one that is engaged and paid by the hour. It went on to state that a casual employee is neither a shiftworker nor a weekly employee for the purposes of the award. Clause 15.4 did not contain any other subclause that dealt with a casual employee's ordinary hours

or entitlement to overtime. It did not contain a provision that would correspond with the current clause 10.4(a).

- Clause 26.2 dealt with the hours of work. Clause 26.2.1 stipulated that the ordinary hours of work for *weekly employees* would not exceed 152 hours in any consecutive four weeks and would be worked between 6.00 am and 6.00 pm, Monday to Friday, with the exception of shiftworkers. The clause went on to deal with the way in which the ordinary hours of work may be arranged. The final subclause, 26.2.6, specified that all time worked by *weekly employees* in excess of the ordinary hours prescribed above would be deemed overtime. These provisions did not apply to casual employees.

- Clause 29.2 dealt with shiftwork. By virtue of clause 15.4.1, it did not apply to casual employees.

- The instrument did not contain any provisions that would allow for a distinction to be drawn between the ordinary hours and overtime of a casual employee. That is, it did not contain a clause that defined or described the ordinary hours of a casual such that the performance of work outside or in excess of those hours would necessarily constitute overtime.

- Clause 28.2 specified the relevant overtime rates. It did not make any express reference to weekly employees or otherwise. Nonetheless, by virtue of the observation we have made above, it could not apply to casual employees. That is to say, the award did not specify circumstances in which work performed by a casual employee would constitute overtime, nor did it provide for the determination of a rate of pay for it.

32. As can be seen from this summary, the 2000 Horticultural Award did not grant the benefit of overtime rates to casual employees.

33. The ordinary hours of work provisions in the modern award are reflective of those found in the 2000 Horticultural Award. There is, however, one identifiable difference between the two instruments which, as we understand it, has given rise to the AWU's assertion that a casual employee is entitled to overtime rates for work performed in excess of 38 ordinary hours in a week. That is the presence of clause 10.4(a), which states that a casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.

34. Whilst the AWU has not articulated the basis upon which it has formed the view that casual employees are entitled to overtime for work performed in excess of their ordinary hours as defined by clause 10.4(a), we assume that it is premised upon the argument that follows. That is, the argument that hours worked in excess of an employee's ordinary hours must necessarily be overtime, and that time worked by an employee must either form part of their ordinary hours or be considered overtime. It is argued that hours worked in excess of a casual employee's ordinary hours as determined in accordance with clause 10.4(a) are overtime and to be paid in accordance with clause 24.2.

35. As we have earlier stated, clause 10.4(a) provides for the determination of a casual employee's ordinary hours. Such a provision must be included in a modern award for the purposes of satisfying s.147 of the Act; a matter that we return to later in this submission. Having regard to the making of the modern award, we have not been able to identify any submission or decision of the AIRC that might suggest that its inclusion was for the purposes of, or was intended to, create an entitlement to overtime rates where a casual employee works in excess of their ordinary hours as defined by clause 10.4(a). Indeed the submissions below will demonstrate that the making of the Award and a subsequent variation made to it lend themselves to a conclusion to the contrary; that it was the intention of the parties and the AIRC that casual employees be excluded from the entitlement to overtime rates.

36. That this was in fact the intention is made clear by the existence of provisions that expressly deem certain time worked as overtime.[8] It is of obvious relevance that the Award does not contain such a provision in respect of casual employees. Rather, clauses 22.1(d) and 22.2(h) exhaustively stipulate the circumstances in which an employee is entitled to the overtime rates contained in clause 24.2.

37. We also refer to clause 10.4(c) of the Award, which we have earlier reproduced. It states that the casual loading prescribed by clause 10.4(b) is paid instead of various entitlements arising under the NES "and the other entitlements of full-time or part-time employment provided for in this award". Clause 10.4(c) expressly contemplates that the casual loading is to be paid in lieu of various other award entitlements that are limited in their application to full-time and part-time employees. This necessarily includes the entitlement of overtime rates, which are payable only to full-time and part-time employees.

38. To the extent that the Commission forms the view that the Award as presently drafted is ambiguous or unclear in this regard, it should be varied such that it expressly states that a casual employee other than a shiftworker is not entitled to the overtime rates contained in clause 24.2.

The Variations Proposed by the AWU

39. The variation now sought by the AWU is set out in its amended draft determination of 5 August 2016. It seeks to replace clauses 10.4(a) and 22.1 of the Horticulture Award with the provisions there set out.

40. The AWU misdescribes the effect of its claim as '[confirming] that casual employees are entitled to the overtime rates specified in clause 24 of the Award when they work outside the day work span of ordinary hours'[9]. The effect of the claim is in fact far broader and goes well beyond 'confirming' a casual employee's entitlement to overtime rates under the Award.

[8] See clauses 22.1(d) and 22.2(h).

[9] See AWU's submissions dated 14 October 2015 at paragraph 3.

41. Properly understood, the AWU's claim would have the following consequences in respect of casual employees, other than shiftworkers:

- Clause 22.1(b) would purport to specify, or provide for the determination of the ordinary hours of work of a casual employee. That is, it would require that a casual employee's ordinary hours 'will be the lesser of 38 hours per week or the hours required to be worked by the employer and will be worked between Monday and Sunday inclusive'. Unlike the current clause 10.4(a), this provision would no longer permit an employer to average the ordinary hours of a casual employee.

- Clause 22.1(c) would impose an additional restriction as to the times within which a casual employee may perform ordinary hours of work. The provision would require that ordinary hours be worked between 6.00am and 6.00pm, except if varied by agreement between the employer and the majority of the employees in the section/s concerned. Presently, a casual employee may perform ordinary hours of work at any time.

- Clause 22.1(d) would impose a new limitation on the maximum number of ordinary hours that may be performed in a day by a casual employee. That is, a casual employee would be precluded from performing more than eight ordinary hours of work in a day, except by arrangement between the employer and majority of employees in the section/s concerned, in which case ordinary hours should not exceed 12 hours on any day. The Award does not presently prescribe a daily maximum number of hours in respect of casual employees.

- All time worked in excess of ordinary hours as set out in clause 22.1 would attract the overtime rates set out in clause 24.2. This would effectively introduce an entitlement to overtime for casual employees other than shiftworkers in circumstances where there is presently no such benefit.

Casual Employees in the Horticulture Industry

42. Casual employment is an essential feature of the horticulture industry. The nature of the work performed in inherently seasonal and contingent upon various factors including climatic conditions. The vast majority of horticultural crops can be harvested only during specific months in a year. As a result, businesses in the industry face distinct peaks and troughs that can often only be met through the use of casual labour.

43. Typically, a horticultural enterprise will engage a significant number of casual employees for a few months in a year, during which the employees work regular hours that are akin to, and in some cases in excess of, the hours of a full-time employee. Towards the end of the harvest period, however, the volume of work that needs to be performed, be it picking, sorting, cleaning or packing, gradually declines and eventually ceases to exist. After such time, the casual labour engaged for the peak season is no longer required as there is simply no work for them to perform.

44. The survey conducted by Ai Group and other employer organisations for the purposes of these proceedings (known as the 'Joint Employer Survey')[10] provides a useful insight into the reasons why employers engage casual employees and the reasons why the flexibility currently afforded by the Award is essential. The table below contains a sample of responses from employers covered by the Horticulture Award to questions as to why the respondents' organisations employ casual employees 'on an irregular basis' or 'on a regular full-time' basis:

[10] Exhibit 58.

Response ID	Response
213	This is answer is based on current requirements. The answer for us will change month to month and year to year depending on harvest volumes and also due seasonality of work on orchards which changes throughout the year.
1147	Levels of work change dramatically based on both seasons and weather. Employing them on a full time (or even permanent part time) would not be financially viable
2665	Seasonal work - the need is often full time but only for a portion of the year.
3417	To meet seasonal requirements of our business, and also to cover peaks and troughs in operational requirements during other periods.
4412	The majority of casuals are only employed during the season when we are at our busiest. Hours are less than full-time at the start and end of the season.
4719	some seasons the crop may be larger than others or the period required to get fruit to market may be shorter
4733	Due to seasonality of business - harvest periods etc
4961	Casual employees provide us with a full time level of staffing in suitable weather conditions, that can be sent-home if rainy weather is experienced. Most of our company's work is outdoor, bushland based that cannot be undertaken if unsuitable, usually prolonged wet weather is experienced. We can find office and workshop, wet-weather suitable work for our 8-full-time staff, but we cannot find work for the remaining 17-casual staff, when wet weather is experienced. Most of our company's work is on a "do-and-charge" basis, so if we cannot "do" the work we cannot charge for it. Casual employees allow us to knock off a fair proportion of our work force if unsuitable wet weather is experienced, offsetting the financial burden of paying staff that we cannot charge-out-for.

45. The responses above indicate that casual employees are typically engaged for a portion of the year and may be required to work ‘regular full-time hours’. Such businesses often engage casual labour in very high volumes for the harvest period and require them to work on any day of the week and outside the spread of hours currently applying to full-time and part-time employees.

46. As a result, the variations sought by the AWU, which would result in new limitations on when a casual employee can perform ordinary hours of work and the entitlement to overtime rates, would result in very significant adverse implications for these operators. They would introduce, for the first time, restrictions and costs that would seriously undermine their current operations.

The changes proposed are unsustainable and entirely inappropriate when regard is had to the seasonal nature of the work.

The Fair Work Ombudsman

47. The AWU refers to correspondence sent by the FWO to the Commission, dated 2 March 2015, in which it identified a number of 'queries commonly raised with the FWO and issues which may be a source of uncertainty for workplace participants to understand and implement award entitlements'.

48. The application of overtime rates to casual employees is one such matter:

> The FWO has received enquiries about whether casual employees are entitled to overtime rates of pay.
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> Clauses 22.1(d) and 22.2(h) define overtime as work in excess of ordinary hours. Clause 22.1 and 22.2 set out ordinary hours for full-time and part-time employees and shiftworkers but not for casuals.
>
> Clause 10.4(a) states that a casual employee's ordinary hours will be the "lesser of an average of 38 hours per week or the hours required to be worked by the employer". Clause 10.4(c) states that the casual loading provided for in clause 10.4(b) is paid "instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment".
>
> The interaction of these provisions may cause uncertainty amongst award users regarding whether the overtime rates in clause 22.1 and 22.2 apply to casual employees.[11]

49. The AWU submits that the FWO has 'identified the issue of whether casual employees are entitled to overtime rates as an area of ambiguity'.

50. We refer to **Attachment A** to these submissions; a letter from the FWO to Ai Group dated 12 June 2013 regarding this very issue. As can be seen, it states that the FWO's view is that casual employees are not entitled to overtime rates under the Horticulture Award. Its reasoning is consistent with that which we have earlier set out. We note that since the time of writing the letter, the relevant provisions of the Award have remained unchanged and therefore, the FWO's advice continues to be relevant.

[11] See FWO's correspondence dated 2 March 2015 at page 6 of the attachment.

51. We sought and obtained permission from the FWO for their letter to be submitted in these proceedings.

The Part 10A Award Modernisation Process

52. The Horticulture Award was made during stage 2 of the Part 10A Award Modernisation Process. During this process, Ai Group made submissions regarding the need for flexible hours of work provisions, given the nature of the work performed in the horticulture industry:

> With seven day a week food and beverage manufacturing and supermarket/shop trading hours, horticulture businesses are required to provide fresh produce seven days a week. Due to the perishable nature of horticulture products, changing volume levels dependent on customer demands, and the seasonal nature of fruit and vegetables, the industry cannot limit its operations to Monday to Friday. Therefore, in developing a modern award for the sector, the Commission must carefully consider the cost implications for work outside day work on Monday to Friday.[12]

53. When the Award was made, the AIRC noted that it had made amendments to the hours of work and overtime provisions it had originally proposed in its exposure draft and that the provisions in the Award were 'largely in line with the relevant provisions of the *Horticultural Industry (AWU) Award 2000,* as it [applied] to what [were] referred to as the Schedule A respondents to that award'.[13]

54. Clause 10.4(a) of the Award, when made, was in the same terms as it now appears. The ordinary hours of work were expressed as follows:

> 22. Ordinary hours of work and rostering
>
> 22.1 The ordinary hours of work for employees other than packing house employees will not, without payment of overtime, exceed 38 hours in a week of five days other than a Sunday.
>
> 22.2 Provided it is stipulated at the time an employee is engaged, when tree fruit picking is carried on, the ordinary hours of work may be worked over five and a half days, other than Sunday. However, no more than 38 hours may be worked over the five and a half days without payment of overtime.

[12] See Ai Group's submissions dated 13 February 2009 at paragraph 88.

[13] *Award Modernisation* [2009] AIRCFB 345 at [60].

> 22.3 The ordinary hours of duty for packing house employees will not exceed 38 per week without the payment of overtime and may be worked in five days of not more than eight hours Monday to Friday inclusive between 6.00 am and 6.00 pm.

55. The clause applied to all employees, including casuals, but provided less prescription as to how and when the ordinary hours of work may be performed. For instance, the clause does not specify a maximum number of daily ordinary hours or a spread of hours, other than at 22.3 in respect of packing house employees. Further, ordinary hours could be performed on a Saturday.

56. The AIRC subsequently considered submissions made by various parties regarding the form that any transitional provisions should take. Ai Group made the following submission in this regard:

> 93. The modern Horticulture Award 2010 will have a significant cost impact upon employers in this industry. The Horticulture Industry in Australia is vulnerable to international competition. Increases in labour costs imposed through the modern award will make the industry less competitive against overseas farmers and growers.
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> 94. Ai Group submits that the Commission should delay the operation of the hours of work, weekend penalty rates, piecework and casual loading provisions of the Horticulture Award 2010 until after the two year review provided for in Item 6, Schedule 5 of the Transitional Bill. This will enable the employers to gather accurate data about the cost impact of the new provisions whilst not having to incur the costs in the short term.[14]

57. After highlighting the main issues of concern arising from the Award (including the hours of work provisions and increased penalty rates), Ai Group submitted that based on ‘initial data gathered by employers in the sector’ it appeared that ‘these changes will increase labour costs by approximately 30%’.[15]

58. The AIRC acknowledged these submissions, and similar submissions made by other employer parties in its decision regarding transitional provisions. In so doing, it expressly stated that ‘a number of modern award provisions may require re-examination … in particular … provisions relating to hours of work, overtime and penalties’: (emphasis added)

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[14] See Ai Group’s submissions dated 29 May 2009 at paragraphs 93 – 94.

[15] See Ai Group’s submissions dated 29 May 2009 at paragraphs 95 – 99.

> [99] A number of employer representatives including the Horticulture Australia Council, the National Farmers' Federation (NFF) and the AiGroup submitted that the operation of the Horticulture Award 2010 should be delayed for two years pending the review of modern awards provided for in item 6 of Schedule 5 to the Transitional Act. They all expressed concern about the cost of implementing the award, particularly the provisions relating to piecework, casual loading, span of ordinary hours, overtime and penalty rates. It was suggested that, due to the wide range of provisions in award-based transitional instruments, two years will be needed to properly identify the effect of the new award and to develop proposals for variations. No union responded to those submissions, although the AWU did file a submission setting out its position in relation to transitional provisions generally.
>
> …
>
> [101] Given the scale of the cost increases referred to in the employers' submissions, which at this stage at least have not been contradicted, we have concluded that a number of the modern award provisions may require re-examination. We mention in particular the piecework provisions and provisions relating to hours of work, overtime and penalties. Despite that conclusion it would not be appropriate to simply postpone the operation of the provisions for two years. The appropriate course is for one or more of the employer groups to lodge an application to vary the modern award. If that is done we will establish a program to determine the application before the end of the year.[16]

59. On 26 August 2009, after the AIRC handed down the decision cited above, the award modernisation request made by the Minister for Employment and Workplace Relations was varied. The following was inserted in respect of the Horticulture Award: (emphasis added)

> 50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.
>
> 51. Where a modern award covers horticultural work, the Commission should:
>
> - have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
> - provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

60. In response to this variation to the request and the AIRC's Statement[17] of 10 September 2009, applications were made to vary the hours of work provisions by Ai Group, the NFF and the Horticulture Australia Council. Ai Group and the

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[16] *Award Modernisation* [2009] AIRCFB 800 at [99] – [101].

[17] *Award Modernisation* [2009] AIRCFB 835.

NFF's joint application[18] sought, amongst various other changes, a new clause 22.1 in the very terms that now appear in the Award.

61. The modern award, when made, was based primarily on the 2000 Horticultural Award. That award contained two sets of key terms and conditions; one that applied to the respondents listed at Schedule A to the award and the other applied to Schedule B and C respondents. The modern award terms were largely taken from the terms applying to Schedule A respondents.[19]

62. The NFF submitted that given the scope of Schedules B and C to the 2000 Horticultural Award, the terms and conditions applying to those respondents should be considered the predominant pre-reform federal award.[20] It argued that the Award when first made contained ordinary hours and overtime provisions that reflected those applying to Schedule A respondents to the 2000 Horticultural Award, which would result in significant changes when compared to other pre-reform horticulture industry awards.[21] One such change identified by the NFF was 'the introduction of ordinary hours and overtime entitlements for casual employees which [did not] exist for Schedule B & C employers'.[22] The NFF submitted that:

> 92. Further, the NFF is concerned that the flexibility of working 152 hours over 4 weeks as opposed to 38 hours per week coupled with the extension of overtime to casual employees dramatically increases the cost of employing casuals who regularly work overtime particularly in peak season.
>
> 93. The NFF is of the view that this is such a significant departure resulting in a significant cost increase and it is inconsistent with the existing industry standards.
>
> …
>
> 100. An important aspect of the hours of work clause is that it does not cover casual employees, an exclusion that exists in the current provision.
>
> 101. The NFF strongly states that the casual exclusion cannot be removed. Any attempt to remove the exclusion would dramatically alter the nature of the current

[18] Joint application filed by Ai Group and the NFF dated 2 October 2009 (AM2009/25).

[19] *Award Modernisation* [2009] AIRCFB 345 at [60].

[20] See NFF submission dated 23 October 2009 at paragraph 32 – 33.

[21] See NFF submission dated 23 October 2009 at paragraph 88.

[22] See NFF submission dated 23 October 2009 at paragraph 90.

safety net and would therefore be inconsistent with the award modernisation process as outlined earlier in these submissions.[23]

63. Ai Group supported the NFF's submissions. In its submissions in reply, the AWU indicated that it did not oppose the proposal advanced by Ai Group and the NFF on the basis that it reflected the provisions applying to Schedule B and C respondents to the 2000 Horticultural Award.[24]

64. The Horticulture Australia Council also sought a variation to the ordinary hours provisions which, albeit in different terms, contained a clause that would exclude casual employees from an entitlement to overtime.[25]

65. A Full Bench of the AIRC dealt with the applications as follows:

> [17] In relation to hours of work and overtime provisions, there are two approaches before us. First, there are the provisions in the joint application which are not opposed by the AWU. Secondly, there are the provisions proposed by the HAC, which the AWU opposes. … We will vary the hours of work provisions as proposed in the joint application.[26]

66. The submissions made by Ai Group and the NFF, and the absence of any opposition from the AWU, was based on a joint acceptance of the significant change that would result if the Award was not varied as proposed. The AWU appeared to have acknowledged that Schedule B and C respondents under the 2000 Horticultural Award, which represented the predominant set of terms and conditions applying to the horticulture industry prior to the modernisation process, were not required to pay casual employees overtime rates. At the very least, the AWU was well aware that the position of the relevant employer organisations was that, predominantly, casual employees were not entitled to overtime rates under the 2000 Horticultural Award and that the intention of the variation proposed was to maintain this.

67. The concerns expressed by employer organisations, including Ai Group, as to the significant financial impost on employers if the Award were to deviate from

[23] See NFF submission dated 23 October 2009 at paragraph 92 – 93 and 100 – 101.

[24] See AWU submission dated 13 November 2009 at paragraphs 106 – 108.

[25] See Horticulture Australia Council application dated 7 October 2009 at page 6.

[26] Re *Horticulture Award 2010* [2009] AIRCFB 966 at [17].

the pre-modern standard as well as the subsequent amendment to the Minister's request, which expressly required the that the AIRC 'provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed', are also relevant to the context in which the variation was made.

68. There was a clear recognition on the part of the industrial parties, the AIRC and the Minister that the nature of the work performed and the seasonal fluctuations experienced by the industry warranted an approach that would maintain existing flexibilities. The hours of work provisions and their interaction with overtime entitlements were given detailed consideration by the parties involved in the process, including the AWU, and the AIRC. There appears to have been some consensus amongst the stakeholders that a modern award that required the payment of overtime rates to casual employees would amount to a significant change to the pre-modern standard, which would create a serious new financial obligation and inflexibilities.

69. The above recount of the Part 10A process makes clear that there was an intention to preserve the obligations imposed by the 2000 Horticultural Award in the modern award; that is, that casual employees would not be entitled to overtime rates. Unsurprisingly, the AWU has not dealt with this history in the material it has filed in these proceedings.

70. Whilst we do not contend that the Commission is formally bound by the decision of the AIRC, its clear and explicit consideration of the issue, the agreement reached between the parties and the Minister's amended request tell against the Commission making sweeping changes to the Horticulture Award in the absence of compelling evidence that might enable it to form the view that the changes proposed are *necessary*.

71. We have earlier set out the relevant passages from the Commission's Preliminary Jurisdictional Issues Decision, however we here reproduce a paragraph that is particularly pertinent to this matter:

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the *Workplace Relations Act* 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.[27]

72. The Commission is also well aware of the *Nguyen v Nguyen* principle adopted by the Full Bench in that same decision: (emphasis added)

> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[28]

73. The historical context applicable to the Horticulture Award is instructive and should be given due consideration. It is incumbent upon the AWU to establish that, despite the Commission's decision that the Award *prima facie* achieved the legislative objective of providing a fair and relevant minimum safety net at the time that it was made, that objective is no longer being met and the proposed clause 22.1 is the necessary remedy. The AWU's submissions and evidence fall well short of establishing this.

Section 147 of the Act and Averaging Ordinary Hours

74. Section 147 of the Act is in the following terms:

> A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

[27] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

[28] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [27].

75. The effect of s.147 is to mandate the inclusion of an award term that specifies, or provides for the determination of, the ordinary hours of work for casual employees, being a 'type of employment' permitted by the Horticulture Award.

76. Clause 10.4(a) provides for the determination of a casual employee's ordinary hours; they are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. The provision does not, however, specify the period over which the ordinary hours may be averaged. It is the AWU's contention that as a result, the ordinary hours for a casual employee cannot be conclusively determined. On this basis, the AWU submits that the provision does not meet the requirements of s.147.

77. The Award does not prescribe the period over which a casual employee's ordinary hours are to be averaged and in doing so, leaves the matter to the employer's discretion. We do not consider that consequently, the Award does not allow for the determination of a casual employee's ordinary hours such that the requirements of s.147 are not met.

78. All that is required is an award provision that 'provides for the determination' of ordinary hours. That is, the award clause must provide a means or mechanism by which the ordinary hours of work can be ascertained. No further prescription is necessary.

79. The ordinary hours of work of a casual employee can be readily determined once an employer identifies a period over which to calculate the average. Whilst we accept that an 'average' number of weekly hours cannot be determined without selecting the number of weeks over which it is to be calculated, this is a matter that can (and in our view, should) be left to the employer's discretion. The absence of such prescription does not render the clause incapable of providing for the determination of the ordinary hours of work. The AWU's submission is ill-considered and should not be accepted.

80. The grant of the AWU's claim in the terms proposed would result in the deletion of the relevant text from clause 10.4(a) and the insertion of a new clause 22.1(b). The effect of that clause would be to no longer allow any averaging of

a casual employee’s ordinary hours. In effect, if a casual employee works in excess of 38 hours in any given week, that employee would be entitled to overtime rates.

81. The AWU has not provided any justification for this. There is no argument or indeed any explicit acknowledgement of this element of its proposal in the AWU’s submissions. No material has been put before the Commission that might enable it to reach the conclusion that the proposed clause 22.1(b) is ‘necessary’ to achieve the modern awards objective. Indeed the seasonal nature of the work performed by casual employees in the horticulture industry renders such averaging particularly relevant. As the evidence establishes, casual employees may be required to perform work for short periods of time during the year, however their hours of work will likely exceed 38 in a week. Accordingly, the ability to average a casual employee’s ordinary hours provides employers with an important flexibility.

82. If the Full Bench concludes that the Award should allow for the averaging of a casual employee’s ordinary hours and that it is necessary to specify the averaging period, we submit that it should be no less than 12 months. This would appropriately provide an employer with the ability to take into consideration seasonal fluctuations over the course of a year. There is no case before the Commission to justify the adoption of a lesser period.

Casual Shiftworkers

83. Clause 22.2 provides for the ordinary hours of a shiftworker. The Award does not define ‘shiftworker’, however the clause contains definitions for an ‘afternoon shift’ and a ‘night shift’. The purpose of a shiftwork provision such as that contained at clause 22.2 is to enable the performance of ordinary hours of work outside the spread of hours prescribed by the Award for day work, without necessarily incurring an overtime penalty. Where an employee performs work on an afternoon shift or a night shift, they must be paid 15% more than the ordinary rates for such shifts. But for the shiftwork provisions, work performed at such times would fall outside the ordinary hours prescribed by clause 22.1

and would therefore attract overtime rates if the employee were engaged on a full-time or part-time basis.

84. The AWU submits that clause 22.2(h) entitles casual employees performing shiftwork to overtime rates and that this creates an anomaly when compared to clause 22.1(d). We raise two arguments in response.

85. Firstly, any argument that clause 22.2 does not exclude casuals, cannot displace the clear exclusion of casual employees other than shiftworkers from the current entitlement to overtime. Further, to the extent that it does create an anomaly (albeit a contention that we do not accept), it does not overcome the deficiencies in the AWU's case, as a result of which it has failed to establish that the proposed clause 22.1 is necessary to achieve the modern awards objective.

86. Secondly, we refer to our earlier recitation of the relevant provisions contained in the 2000 Horticultural Award. Clause 15.4.1 stated that a casual employee was not a shiftworker for the purposes of that award. Therefore, the shiftwork provisions it contained, including a clause that required the payment of overtime rates in certain circumstances, did not apply to a casual employee.

87. The shiftwork provisions at clause 22.2 of the Award were inserted after it was made, as a result of a joint application by Ai Group and the NFF. Detailed reference is made to the parties' submissions in relation to the application and the AIRC's consideration of it. As will be seen, the application was made on the premise that the Award be amended to reflect the ordinary hours of work provisions contained in the 2000 Horticultural Award, including the shiftwork provisions. Those shiftwork provisions, however, did not apply to casual employees.

88. Consequently, it appears that clause 22.2 was not intended to apply to casual employees and that the alleged anomaly can be explained by this history.

The AWU's Evidence

89. The witness evidence relied upon by the AWU serves only to support Ai Group's interpretation of the current provisions. That is, the AWU's evidence establishes that many operators in the industry interpret the Award to exclude casual employees from the application of the provision that prescribes overtime rates.

90. The evidence also demonstrates the significance of the variations it seeks and the impact that they would have. The unions' claim is neither trivial nor insignificant. Whilst its brief submissions and its characterisation of the claim as one that seeks to 'clarify' the terms of the current Award might suggest that the impact of the changes sought are but trifling, a considered review of the implications that would flow reveals that the change sought is of clear substance and should only be granted if the union has provided compelling submissions and probative evidence in support. Arguments limited to the 'industrial merit' of its case or an assertion that the provision sought 'should not be controversial in Australia in 2015'[29] are hardly sufficient.

91. It strikes us that variations sought to awards to *reduce* penalty rates have been the subject of ongoing proceedings in the context of this Review for a period of over than 12 months, involving dozens of witnesses, mountains of evidentiary material and significant costs have been incurred by the proponents of those claims in order to mount a credible case. The imposition of serious new inflexibilities and financial obligations upon employers are of no less significance.

Section 138 and the Modern Awards Objective

92. In exercising its discretion to vary the Award, the Commission must have regard to s.138 and the modern awards objective. In order to adopt the variation proposed by the AWU, the Commission must be satisfied that the proposed clause 22.1 is necessary to ensure that the Award, together with the

[29] See AWU's submission dated 14 October 2015 at paragraph 25.

NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

93. We note also the following observations made by the Commission in its *Preliminary Jurisdictional Issues Decision* (emphasis added):

> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> [34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective."[30]

94. The AWU has not established that the term it has proposed is necessary to ensure that the Award meets the modern awards objective. Its failure to successfully mount a merit case for its proposal leads to the inevitable conclusion that its claim must be dismissed.

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

95. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation of s.134(1)(a):

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms."[31]

96. Further, the term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

[30] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33] – [34].

[31] [2015] FWCFB 3500 at [310] – [311]

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach."[32]

97. The AWU has not undertaken the analysis required by s.134(1)(a), including:

- To the extent that award reliant casual employees covered by the Horticulture Award are in fact 'low paid'; an assessment of their ability to purchase the essentials for a decent standard of living and to engage in community life, assessed in the context of contemporary norms; and

- A comparison between casual employees to whom the Horticulture Award applies and are paid the minimum award rates and other groups of employees that are deemed to be relevant.

98. As a result, there is insufficient material before the Commission that would enable it to reach a conclusion that this factor lends support to the AWU's claim.

The need to encourage collective bargaining (s.134(1)(b))

99. The current clause 22.1 leaves greater room for bargaining and may incentivise employers and employees to negotiate a higher rate. The insertion of the provision proposed by the AWU would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.

100. Moreover, the introduction of inflexible or costly provisions should not be justified as a means of encouraging collective bargaining, as the AWU here

[32] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

seeks to do. We refer to the decision of Vice President Watson during the two year review of modern awards in respect of the annual leave common issues, in which His Honour stated: (emphasis added)

> [229] The variations concerning cashing out of annual leave are vehemently opposed by various unions and the ACTU. The ACTU is also strongly opposed to the Ai Group's application to vary the award flexibility clause. The ACTU submits that it cannot be said that all awards are not operating effectively, contain anomalies or do not meet the modern awards objective without the variation it seeks to the award flexibility clause. Some unions oppose the variations because it would remove an incentive for employers to make enterprise agreements. I note in this regard that the concept of retaining inflexibilities in awards to provide a bargaining chip for making enterprise agreements was discredited during the award simplification process from the late 1990s.[33]

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

101. There is insufficient evidence to enable the Commission to conclude that, as a general proposition, the introduction of overtime rates for casual employees will increase workforce participation and therefore promote social inclusion, as contended by the AWU.

102. To the extent that the variation proposed discourages employers from engaging casual employees in light of the additional costs that would be incurred, the variation proposed is in fact contrary to s.134(1)(c).

The need to promote flexible work practices and the efficient and productive performance of work (s.134(1)(d))

103. We have earlier identified the changes that to an employer's ability to require a casual employee to perform ordinary hours of work that would result if the AWU's claim was granted. It would introduce new limitations as to when such work could be performed by a casual employee. Self-evidently, this undermines flexible work practices, such as those implemented by employers during the harvest, and the efficient and productive performance of work.

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[33] *Modern Awards Review 2012 – Annual Leave* [2013] FWCFB 6266 at [229], citing *BHP Colliers and others v CFMEU* (Print S6142).

The need to provide additional remuneration (s.134(1)(da))

104. We acknowledge that, since the passage of the *Fair Work Amendment Act 2013*, the Commission is required to consider the need to provide additional remuneration for employees working in various circumstances including overtime, shifts, and on weekends and public holidays. It should be noted however, that this is but one of many factors listed at s.134(1) to which the Commission must have regard, in determining whether the Award achieves the modern awards objective. As stated by the Commission in its Preliminary Jurisdictional Issues decision, which we have earlier cited, no one factor arising from s.134(1) is to be given particular primary. Each of the matters arising under s.134(1) are to be treated as issues of significance, which should be given due consideration and weight.

105. For these reasons, it is not sufficient for the AWU to rest its case on s.134(1)(da) of the Act. Although the Commission may form the view that considerations arising from this subsection alone lend support for the AWU's claims, this is not determinative. Equal consideration should be given to matters arising under each of the other limbs of s.134(1), which we have here addressed.

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

106. As submitted by the AWU, this element of the modern awards objective is not relevant to these proceedings.

The likely impact on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f))

107. The impact of the variation proposed on employment costs and business is self-evident. The change would clearly impose a significant additional employment cost. To the extent that it discourages employers from engaging casual employees or alters the way in which they are required to work due to

the proposed inflexibilities, the impact of the variation may also be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

108. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act.

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

109. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. This is particularly relevant in circumstances where the current Award is intended to reflect the position in the predominant pre-modern awards. To now introduce new financial penalties that would impose significant additional costs, without there being any evidence that the Award does not presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

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

110. To the extent that the matters arising from ss.134(1)(b), (d), (f) and (g) adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy, the AWU's claim also conflicts with s.134(1)(h).

Conclusion

111. For all of the reasons stated above, the AWU's claim should be dismissed.

Australian Government
Fair Work OMBUDSMAN

Reference Number: 5443534

12 June 2013

Ms Lucy Crook
lucy.crook@aigroup.asn.au

Dear Ms Crook,

Thank you for your email of 3 June 2013 about overtime for casual employees under the *Horticulture Award 2010* [MA000028] (**Horticulture Award**).

As you are aware, it is the view of the Fair Work Ombudsman (**FWO**) that casual employees are not entitled to overtime under this award.

We understand you are seeking information about our reasoning in forming this view. We provide our reasoning below. We have also set out the relevant provisions of the Horticulture Award in the Attachment to this letter.

Please note that FWO's views are not determinative and a Court or tribunal asked to consider this question may come to a different conclusion.

Reasoning

The Horticulture Award specifically provides for overtime entitlements for full-time and part-time employees and shiftworkers (see clauses 22.1(d) and 22.2(h)). However, the award does not contain any specific entitlement to overtime for casual employees.

We believe that as overtime has been specifically defined only for full-time, part-time and shiftworker employees, then only these categories of employees are entitled to receive overtime under clause 24.

Further, clause 10.4(c) states that the casual loading of 25% paid to casual employees is paid instead of 'annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment provided for in this award'. In our view, overtime is a full-time or part-time entitlement under this award, and the casual loading is intended to be paid in lieu of this, as well as other full-time/part-time entitlements.

A casual employee is only entitled to what is provided for under clause 10.4, unless an additional entitlement is specified elsewhere in the award. For example, casuals will receive public holiday penalties for hours worked on a public holiday.

A casual employee therefore receives their hourly rate and casual loading for all hours worked, unless they are working on a public holiday, in which case they will receive a public holiday penalty for hours worked on a public holiday.

We note that there may be some divergence of views amongst the relevant industry parties, however there was no application to vary the award during the Fair Work Commission's 2012 Modern Award Review process. In the absence of any successful application to vary the award or any decision to the contrary, FWO's view remains that casuals are not entitled to overtime under this award.

If you have any questions about this letter, please email us at practitionerassist@fwo.gov.au and state the reference number above.

Yours sincerely,

Romit Tappoo
Assistant Director | *Practitioner Assist*
Knowledge Services Branch
Fair Work Ombudsman

Important note: Disclaimer

FWO is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws.

There are a number of factors that might affect the applicability of the information written here

These include:

- whether you have provided us with all the relevant and correct information about your situation;
- changes in your circumstances; and
- changes in the law.

It is your responsibility to comply with workplace laws that apply to you.

FWO's information is not legal advice and FWO does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered.

ATTACHMENT: Relevant provisions of the Horticulture Award

10. Types of employment

[…]

10.4 Casual employment

[…]

(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for an employee in that classification in clause 14—Minimum wages, plus a casual loading of 25%.

(c) The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment provided for in this award.

22. Ordinary hours of work and rostering

22.1 The ordinary hours of work for all full-time and part-time employees other than shiftworkers will not exceed 152 hours over a four week period provided that:

[…]

(d) All time worked by full-time and part-time employees in excess of the ordinary hours will be deemed overtime.

22.2 The ordinary hours of work for a shiftworker will not exceed 152 hours over a four week period provided that:

[…]

(h) All time worked in excess of the ordinary hours will be deemed overtime.

[Emphases added]