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: 5 August 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. The NFF makes this submission together with the Voice of Horticulture, an organization representing 35 horticulture industry groups across the fruit, vegetable, nut, mushroom, turf, nursery plant and cut flowers industries.

2. The NFF filed submissions in this matter on 12 October 2015 and 22 February 2016 dealing with the following claims:

    a. The NFF claim to vary the Pastoral Award 2010 (**the Pastoral Award**), by reducing the minimum period of engagement for dairy operators from three to two hours;

    b. the claim of the Australian Council of Trade Unions (**ACTU**) for a right of casual employees to convert to permanent employment (a **casual conversion right**), and to retrospectively accrue redundancy entitlements;

    c. the claim by the ACTU for a standard 4 hour minimum engagement period across all industries;

    d. the claim by the ACTU for a modern award prohibition on employment to avoid award obligations;

    e. the claim by the ACTU for a modern award restriction on employment of new casuals where existing casuals are working less than 38 hours per week;

f. the claim by the ACTU for a modern award obligation to inform casual employees of certain information when engaged;

g. the claim by the Australian Workers Union (**AWU**) for overtime and weekend penalties in the horticulture industry; and

h. the claim by the National Union of Workers (**NUW**) for changes to the meaning of casual and part-time employee in the Horticulture Award 2010 (**Horticulture Award**).

3. This supplementary submission is made in accordance with Directions by the Fair Work Commission (**Commission**) on 29 June 2016. It deals with the common claims made by the ACTU and supported by the AWU and the NUW in these proceedings. It also deals with the NFF claim to reduce the minimum engagement period for dairy operators under the Pastoral Award, as this claim is interwoven with the ACTU common claim to increase the minimum engagement period in all modern awards to 4 hours.

4. The NFF intends to file a further supplementary submission in relation to the AWU claim for overtime and weekend penalties in the horticulture industry and the claim by the NUW for changes to the meaning of casual and part-time employee in the Horticulture Award once further Directions are issued (as sought by the Australian Industry Group and discussed in the mention of the matter on 5 August 2016).

Casual Employment in the agricultural sector

5. The agriculture sector is subject to significant fluctuation. There are annual fluctuations in profitability, seasonal fluctuations and daily fluctuations.

6. For example, in the dairy industry farm business profit fluctuates dramatically on a state-by-state and year-by-year basis.[1] Profits of any significance are not guaranteed. In the period from July 2013 to June 2016, farm business profit ranged from $4,000 per year to $60,000 per year.[2]

7. Even taking into account assumed wages, dairy farmer incomes sit at around the Australian poverty line for 2016 (the annual equivalent of $27,294.28 for a single

[1] Transcript, 11 July 2016, PN216-7, PN221 (Shearman, dairy), PN366 (Wearden, dairy)
[2] Transcript, 11 July 2016, PN216

adult or $51,266.28 per week for a couple with two children).[3] At the upper end, earnings of $60,000 per year after expenses sit well below the average full time weekly earnings in Australia (the annual equivalent of $80,927.60[4]).

8. Recent downgrades in the milk price have not improved the position of the dairy industry. The upper earnings ratio of $60,000 over the past three years is likely to be lost by the many farmers who how face retrospective cuts to the milk price, translated as debts to processors of around $100,000 in each case.[5]

9. As outlined in our submission of 22 February 2016, the agriculture sector is highly vulnerable to seasonality, exposure to the elements[6] and market forces[7]. Weather variability and natural disasters, seasonality of produce, exchange rates, changes in production costs including irrigation and feed prices[8], declining margins and a customer base dominated by only a few large retailers[9] all determine when work is performed.

10. In many agricultural industries, peak times of the year are characterised by intense bursts of activity when a small core workforce can grow and multiply many times over for the brief harvest period.

11. Harvest is a challenging time even in ideal weather conditions. Too much rain or strong weather events can cause substantial losses in production which can never be recovered. As Fred Peacock (wine) explained, failing to pick the final rows of fruit on a particular day means that those rows of fruit are effectively lost to the farmer. Harvesting the next day has no value if, for example, the amount of fruit remaining does not meet the minimum batch size[10], or is damaged because of rain[11], or becomes overripe[12].

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3 Melbourne Institute of Applied Economic and Social Research *Poverty Lines: Australia* ISSN 1448-0530 March Quarter 2016

4 Australian Bureau of Statistics, Average Weekly Earnings, Key Figures, Australia, November 2015 http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0

5 http://www.abc.net.au/news/2016-06-30/dairy-farmers-milk-prices/7546978

6 Exhibit 184 (Edwards, hops) at [3], Exhibit 153 (Bulmer, salad lettuce and brassicas) at [7], Exhibit 155 (Collins, mangoes and avocadoes) at [10].
See also Transcript 11 July 2016, PN384 (Wearden, dairy).

7 Transcript, 11 July 2016, PN218 (Shearman, dairy) regarding milk prices, Exhibit 164 (Miller, apples and cherries) at [9].

8 Transcript, 11 July 2016, PN426 (Wearden, dairy).

9 Exhibit 164 (Miller, apples and cherries) at [9], Exhibit 187 (Sutton, tomatoes, eschallots, leafy vegetables and broccolini) at [12].

10 Evidence of Fred Peacock, transcript, 11 July 2016, at PN616-9.

12. As the evidence in the proceedings shows, farmers are price takers.[13] They do not set the price for their produce, which is determined by commodity and wholesale markets, both global and domestic. As Brock Sutton (cherry tomatoes, gourmet tomatoes, eschallots, leafy vegetables and broccolini) observed:

> "These penalty rates will have a direct affect on the viability of every business in the industry. It will affect our ability to complete orders for customers including Coles and Woolworths, which are the lifeblood of some businesses and the general public's grocery requirements. The Australian wage rate for casuals is amongst the highest in the world. In a price taking industry, this puts untold pressure on the business, with no way to change their prices."[14]

13. The ability of farmers to absorb increases in costs is limited. As Andreas Rehberger (mangoes, pineapples, pumpkin and passionfruit) stated:

> "In my business, increased labour costs from the proposed changes are significant because it is impossible for us to pass on these additional costs. Our return price for produce is dictated by the wholesale market trends, we fight for every dollar in the current market climate." [15]

14. Susan Finger (apples) gave similar evidence:

> "Unlike some other industries, (eg hospitality) we cannot say to our customers that fruit picked on public holidays demands a higher price as we have had to pay double time to our pickers. Our prices are set by the market and are supply/demand driven." [16]

and:

> "Our business cannot afford to pay overtime as we are unable to recoup the additional expense paid due to market driven supply chains." [17]

as did Brendan Miller (apples and cherries):

> "We grow a commodity product which in our country is often over produced. This usually only allows the smallest margin for profit, if any, as many producers are in the middle of a price war between supermarkets. We rely on exports to a large extent to relieve this pressure in the local market."[18]

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11 Evidence of John Dollisson, transcript, 11 July 2016, PN1016.
12 Exhibit 154 (Chapman, berries and cherries) at [4].
13 For example, see Transcript, 11 July 2016 at PN1332; Exhibit 185 (Dollison) at [7].
14 Exhibit 187 (Sutton, tomatoes, eschallots, leafy vegetables and broccolini) at [12].
15 Exhibit 167 (Rehberger, mangoes, pineapples, pumpkin and passionfruit) at [14].
16 Exhibit 158 (Finger, apples) at [13].
17 Exhibit 158 (Finger, apples) at [15].
18 Exhibit 164 (Miller, apples and cherries) at [9].

15. This difficulty is compounded by lengthy lead times in production. As Mr Sutton (cherry tomatoes, gourmet tomatoes, eschallots, leafy vegetables and broccolini) says:

> "There is also the clear reality that there is always a lengthy lead time to production in this industry. It can take 16 weeks (and more) for a crop to be harvested and then packed and sent to be sold. This lead time means a large percentage of the costs for producing the goods are already incurred by the time harvest is ready, limiting the options for the business to make production decisions as other industries might. The other reality is that all of this investment can be lost in a single weather event on a single day."[19]

16. Some farmers operate on high volumes and low margins[20] and therefore have minimal capacity to absorb additional costs, and some are price-sensitive to overseas competition, either in the local market[21] or in overseas markets[22].

17. Further, it is not unusual for farmers to be paid in a single cheque each year in return for their annual crop. Budgets must be managed within this context, and there is limited or no capacity to absorb extra, unanticipated cost increases. As Clint Edwards (hops) stated:

> "I get one pay cheque a year, so it is a busy time for everyone."[23]

And:

> "What it means is that out through the whole year, you know, expenses going through, whether it be wages for the stringing, the training, the harvest; through sprays, chemicals, fertiliser, string; maintenance to buildings and machinery; all that is outlaid at a risk to myself, not knowing that the crop is going to good enough or, you know, the quality is not going to be good enough, and I have to try and, you know, put that risk in place and hoping that I get a good crop for the year to pay for all those outlayings that I've put out through the year."[24]

18. Ultimately, the agriculture sector needs enough flexibility to align its labour needs with the environment in which it operates if it is to compete effectively in both domestic and global markets. Without the right settings, the capacity of farmers to grow their business and create new jobs will be limited, and this will have adverse consequences for both employers and employees.

The case for 'insecure employment' is overstated

19 Exhibit 187 (Sutton, tomatoes, eschallots, leafy vegetables and broccolini) at [13].
20 Exhibit 153 (Bulmer, horticulture) at [2].
21 Exhibit 169 (Wolens, pineapples and sugarcane) at [10].
22 Exhibit 157 (Dudgeon, cherries) at [11].

19. The evidence in these proceedings does not support a finding that there is a 'problem' of insecure work in Australia or that casual employment is inherently a problem that needs to be addressed. More significantly, and understood in the legislative context of these proceedings, there is no probative evidence supporting the proposition that the 'problem' of insecure employment in Australia warrants the granting of the common claims sought by the ACTU and the AWU.

20. On the contrary, the evidence is that for many, casual employment is preferred because it is easier to access, it pays more, and it is flexible enough to accommodate individual choice. It suits a range of demographics, and particularly those individuals who are either unable or unwilling to commit to permanent employment because of where they want to live, or competing responsibilities (caring for parents or children, studying and the like).

The Lives on Hold Report

21. The ACTU relied on the Lives on Hold Report (**the Report**) to support the imposition of new restrictions on the use of casual employment by the Commission.

22. A key contributor to the Report, Ms Jill Biddington, gave evidence in the proceedings. Ms Biddington is a former union leader and a member of the panel formed to conduct the 'Insecure Work Inquiry', which preceded the Report. As her evidence confirmed, the Report really only represents a small, specific portion of individuals in society – many of whom are not in the workforce.

23. The following exchange is pertinent:

VP HATCHER:	"You would accept that the nature of the process was that it would attract people who were aggrieved by casual employment rather than those who are quite content with it?
MS BIDDINGTON:	"Absolutely. The process was about finding those people who have slipped through an enormous number of cracks; people who are not covered as employees by the legislation; people who receive the assistance of food kitchens, Brotherhood of St Laurence, St Vincent De Paul."[25]

24. As Ms Biddington stated, not all of the workers who made submissions to the inquiry were casual employees, and some may have been independent contractors:

[25] Transcript at PN690, 14 March 2016.

> "Some of them – I can remember one that came from a mother of a son who had been working as a casual in the fast food industry and she made a submission."[26]

She went on to explain:

> "…so this report, I think, represents the most isolated, the least included in our society; the people who so desperately want to work but are unable to."[27]

25. For these individuals, the pressing need appears to be social welfare policy reform. Creating new barriers to entry into the workforce – such as those that restrict the use of casual and part-time employment, will make it harder, not easier, for these individuals to improve their lives.

26. While the inquiry heard from approximately 500 people and received 550 submissions, a review of the list of those participating in the inquiry confirms that not a single submission was received from an employer (other than perhaps welfare agencies). In fact, other than a passing reference to one "community minded soul" and employer who came along in Port Macquarie[28], there is no evidence that employers were involved in the inquiry at all.

27. Dr Elsa Underhill, a Senior Lecturer and Director of Research in the Department of Management at Deakin University, also gave evidence in connection with the Report and what is said to be a link between unstable casual employment and poor health outcomes.[29]

28. In cross-examination it became apparent that Dr Underhill's conclusions were based on limited direct evidence of the position in Australia as compared to other countries and hence of marginal forensic value. More so, some international studies considered the health impact on temporary employment, of which casual employment is only a sub-set[30].

29. Casual employment is comprehensively regulated in Australia. The National Employment Standards, modern awards and enterprise agreements contain a range of workplace rights and entitlements available to casual employees. Without evidence of how casual employment is regulated in other countries, the analysis undertaken by

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26 Transcript at PN716, 14 March 2016.
27 Evidence of Jill Biddington, Transcript at PN701, 14 March 2016.
28 Evidence of Jill Biddington, Transcript at PN714, 14 March 2016.
29 Exhibit 92 (Underhill); see also Transcript from PN7870, 22 March 2016.
30 Transcript at PN7954, 22 March 2016.

Dr Underhill is unable to inform the present debate in regards to changing regulation in Australia. Dr Underhill did concede that different forms of employment within the range of temporary employment arrangements would have different relationships to health or occupational health and safety outcomes[31].

30. Dr Underhill herself confirmed that:

> "there actually isn't a lot of evidence around stable casual employment and OHS outcomes."[32]

31. The evidence of Professor Raymond Markey sought to debunk calls for 'flexibility' by business groups. Professor Markey's '*Report on Casual Employment in Australia*'[33] distinguishes between numerical flexibility and functional flexibility. He says that employers contend that numerical flexibility is necessary to deliver productivity gains. Professor Markey cites an international study that suggests that whilst functional forms of flexibility offer gains for innovation, numerical forms *may* actually have a negative impact and that his study runs in direct contradiction to the employer claims. He concludes that:

> "The "flexibility" associated with casual employment is also unlikely to deliver gains in productivity for the economy, in spite of employer contentions to the contrary …. **Seen in this light, the ACTU proposals seem likely to enhance both productivity and employee flexibility.**"[34]

32. The fundamental flaw with Professor Markey's reasoning is that it does not properly take into account what he calls "the Australian cultural and institutional framework within which work is organized". In cross-examination Professor Markey said the following:

MR WARD:	"Can I ask these questions of you? Subject to their competency, you think that businesses will rationally determine what is the optimum labour mix in their business. That is, do you think they behave rationally to determine how many full time, part time, casual, labour hire or specialist contractors they have in the business?
PROF. MARKEY:	I think there are strong cultural influences and institutional influences which determine the bounds of that rationality.
MR WARD:	So you are not saying they behave irrationally?

31 Transcript at PN7959-7960, 22 March 2016.
32 Transcript at PN7893, 22 March 2016.
33 Exhibit 110 (Markey), Attachment RM-2) at 16-17.
34 Exhibit 110 (Markey), Attachment RM-2) at 40.

PROF. MARKEY: Within the constraints of their knowledge and the cultural and institutional framework. And the reason I stress that is because there have been similar structural changes in the economy in most of the OECD economies and virtually none of them have the level of casual employment that Australia does because they organise things differently even though they need flexibility and they certainly need part time employment."[35]

33. For present purposes it does not matter whether Professor Markey's view of the optimum labour mix is actually correct, nor whether businesses acting within "their knowledge and the cultural and institutional framework" actually behave rationally or irrationally. In order for the Commission to accept that "the ACTU proposals seem likely to enhance both productivity and employee flexibility", the Commission must be satisfied that employers will act how Professor Markey thinks they could/should act, rather than how Professor Markey acknowledges that they do act.

Casual work improves access to employment

34. A number of witnesses gave evidence in the proceedings in support of the union claims. Much of the evidence given by these witnesses reveals that casual employment provides employment opportunities where other options are either limited or non-existent.

35. ACTU witness Tracey Kemp gave evidence that she had been employed in the social and community services industry in various roles for approximately 14 years. Over that time, Ms Kemp chose a series of employment arrangements to suit her evolving needs.[36] These included travel, working for her partners' business, caring for her children and weekend work attracting penalty rates. Ms Kemp gave evidence that she had been able to utilise the range of different types of employment, both permanent and casual, in order to obtain the flexibility that she required, and this suited her well.

36. It was clear that Ms Kemp did not have difficulty finding work, and that she moved through jobs and types of employment at her own initiative, for her own reasons. Rather than seeing Ms Kemp's casual work as unstable and therefore less productive (per Professor Markey's reasoning), and less satisfying (per the Report) and putting Ms Kemp at risk to her safety (per Dr Underhill's reasoning), the Commission can see

35 Transcript at PN9038-PN9039, 23 March 2016

36 See Exhibit 1 (Kemp) and Transcript from PN359, 14 March 2016.

Ms Kemp's work history as an example of the flexibility of the labour market aligning with Ms Kemp's work needs.

37. While Ms Kemp said she would now prefer to be employed on a permanent basis, there was only a limited pool of employment opportunities that she was willing to consider:

> "I can't find any that are in the industry that I choose to work in that are in my local area."[37]

38. Despite the preference for permanent employment, being employed on a casual basis was not unsatisfactory enough for her to consider leaving the position:

> "I am not predisposed to leaving that job just for one reason which is the casual nature of it."[38]

39. Another ACTU witness, Limasene Potoi, was employed as a casual from 1997 until approximately 2011. She gave evidence that she is now employed in two jobs, one full-time (permanent) and the other part-time (now permanent, initially casual). If anything, Ms Potoi's evidence demonstrated that far from being a problem, casual and part-time employment has been a positive means for her to supplement her permanent income.

40. Ms Potoi gave evidence that she occasionally worked extra shifts when other carers could not attend for work. The extra shifts were often at times that were difficult for her to accommodate, but she chose to take them on anyway because she knew how hard it was to find trained carers to fill the shift, she was concerned for her client and knew that not taking the extra shift would ultimately create extra work for her.

41. According to Ms Potoi:

> "Because I have been there 18 years, I am very familiar with this routine, and I know – I understand how difficult it is to get someone trained;"[39]

and

> "I know when I don't fill those shifts and someone inexperienced comes in and does the shifts, he often ends up with pressure sores;"[40]

and

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37 Transcript at PN490, 14 March 2016.
38 Transcript at PN493, 14 March 2016.
39 Transcript at PN1340, 15 March 2016. See also Exhibit 8.
40 Transcript at PN1340, 15 March 2016. See also Exhibit 8.

"It's a lot easier for me to go in and do the shift, to try and avoid that happening."[41]

42. Ms Potoi's impressive work ethic and her dedication to clients were notable. For Ms Potoi, the benefits of taking the extra shift outweighed the inconvenience of additional work. This evidence showed how the flexibility of casual employment can facilitate unforeseen circumstances to the benefit of both employers and employees.

43. As the evidence demonstrated, for Ms Potoi, casual employment provided her with the flexibility to balance work and study:

MR WARD: "Can I understand this, when you were at university doing full-time study, I take it you were trying to balance work with your studies and that's why you took a casual job?"

MS POTOI: Yes."[42]

44. Ms Potoi gave evidence that for personal reasons, she took on a second job as a way to earn more money:

"I work two jobs because my husband earns a low income and we are trying to start a family." [43]

45. ACTU witness Linda Rackstraw gave evidence that she was currently unemployed but was previously a casual employee with McDonalds and prior to that, held a permanent position with Bendigo Health.[44]

46. For her own reasons, Ms Rackstraw opted to resign from her permanent job with Bendigo Health and take up a casual job for McDonalds.[45]

47. Ms Rackstraw complained about her experience of employment at McDonalds, including fluctuating and inconsistent hours. Despite her concerns, she remained employed by McDonalds for several years.

48. During this period of employment, Ms Rackstraw applied for, and was offered, other employment. She appears to have chosen not to take up offers of alternative work, assuming this would jeopardise her employment with McDonalds,[46] but never seeking to confirm that position, even on a hypothetical basis.[47]

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41 Transcript at PN1340, 15 March 2016. See also Exhibit 8 (Potoi).
42 Transcript at PN1317, 15 March 2016.
43 Exhibit 8 (Potoi) at [24].
44 Transcript from PN1372. See also Exhibit 9 (Rackstraw).
45 Transcript at PN1484-1488, 15 March 2016.
46 Transcript at PN1502, 15 March 2016.
47 Transcript at PN1503 to PN1506, 15 March 2016.

49. ACTU witness Kylie Grey also gave evidence of her employment history, consisting of both permanent and casual employment on terms that suited her.[48] In Ms Grey's case, a period of casual employment opened up the opportunity for permanent part-time employment, facilitated by her employer.

50. Ms Grey worked for two years for McArthur Management Service (MMS), initially as a casual employee.

51. While employed as a casual employee, Ms Grey gave evidence of her decision from time to time to refuse shifts, for various reasons, without any adverse impact on her employment prospects.[49]

52. After being offered shifts by MMS at North Melbourne Children's Centre, she was able to secure permanent part time employment.[50]

53. Upon being made aware of Ms Grey's successful application for a permanent part-time position with North Melbourne Children's Centre, MMS facilitated her continued employment as a casual while she, "worked through the various police checks, working with children checks, medicals and the other steps which were required prior to the offer of employment."[51]

54. ACTU witness Scott Quinn, who works in home and community care, gave evidence that he was dissatisfied with his hours of work:

MR WARD:	Now, if it's so bad working for CBS, why have you stayed for 10 years?---
MR QUINN:	"Well, it's not that it's so bad. The employment - the bosses are very good. I have no complaints with the bosses. It's just that the hours can vary and can vary greatly from 7:00 in the morning until midnight."[52]
MR WARD:	"But it hasn't frustrated you enough to leave and go and get a full-time job somewhere else?"
MR QUINN:	"No, because I enjoy what I do and it's the clients that would miss out."[53]

55. It is clear from this exchange that the concern of Mr Quinn is more related to the nature of the industry than the nature of casual employment itself. The very fact that

48 Transcript from PN2598, 16 March 2016. See also Exhibit 20 (Grey).
49 Transcript at PN2648 to PN2650, 16 March 2016.
50 Transcript at PN2655 to PN2658, 16 March 2016.
51 Transcript at PN2653, 16 March 2016.
52 Transcript at PN1731, 16 March 2016.
53 Transcript at PN1733, 16 March 2016.

Mr Quinn has remained in the role for 10 years, after having worked in other jobs with more 'standard' hours of work, reflects his enjoyment of the role and his relationship with clients.

56. ACTU witness Madeleine Minervini gave evidence that in recent years she has found it hard to find employment in her chosen field, because of restrictions and a lack of qualifications. To supplement her income in the meantime, she secured casual employment with Romeo's IGA, which offered her the flexibility to study toward qualifications that would improve her job prospects:[54]

> MR WARD: "Would it be fair to say that, unlike the jobs that you've been applying for where you've needed qualifications and certain certifications, that wasn't really necessary when you applied for work at Romeo's IGA?"
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> MS MINERVINI: 'No. well, no, not really because I didn't – I had worked in – my first job was with Foodland, back when I left school, but I didn't have to have those qualifications as they train you on the job."[55]

57. For Ms Minervini, casual employment gave her a foothold in the workplace and allowed her to earn an income while studying higher qualifications to secure employment in her chosen profession.

The Common Claims

A Casual Conversion Right

58. The ACTU and the AWU seek to insert new terms in all modern awards to provide a casual conversion right for employees.

59. The evidence put forward by the AWU does not support the argument that including casual conversion rights in all modern awards is necessary to achieve the modern awards objective. At best, the evidence shows that such provisions are of limited relevance. Few employees actually take up casual conversion rights, either on their own initiative or in response to an offer from their employer. In cases where a request for permanent employment is made, employers and employees are capable of reaching agreement on the transition without any need for a formal legal process.

60. NFF witness Brock Sutton (cherry tomatoes, gourmet tomatoes, eschallots, leafy vegetables and broccolini) gave evidence in the proceedings about converting casual

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54 Transcript from PN2159, 15 March 2016. See also, Exhibit 15 (Minervini).

55 Transcript at PN2275, 15 March 2016.

employees to permanent employment. In response to a question about whether he had ever had a request from any of his casual employees to become permanent, he said:

> "In the past we have given the option for those casual employees to be put on a full time or full time equivalent basis. I think there was maybe one employee that took that option up. The rest of the employees chose to stay on a casual basis."[56]

61. ACTU witness, Colin Aiton, gave evidence that he had been unable to obtain a home loan as a casual employee:

> "The bank knocked me back on the basis that I'd been a casual for seven years."[57]

62. This evidence was subsequently qualified by Mr Aiton:

> 'The bank actually stated that you do need to at least be earning $1000 a week, because I'm the only income-earner in my family. My wife don't work. She's a homemaker. So I just don't have the – I wasn't getting enough money as a casual to get this bank loan and there was no permanent work, so the manager looked at me and said, no, sorry, that's why you're being knocked back."[58]

63. It is not clear what type of loan Mr Aiton was seeking, or how much money he wanted to borrow. However it is clear that it was not his status as a casual employee, but rather his amount of weekly earnings and his household's single-income status that made it difficult for him to obtain a loan.

64. ACTU witness, Michael Fisher, also assumed that it was harder for casual employees to secure home loans:

> "Well, I'm pretty sick of renting and would like to buy a house and I imagine it would make it a lot easier getting a home loan if I'm full time."[59]

65. However no material was produced to indicate that Mr Fisher had ever sought a home loan or made any inquiries to that effect.

66. Overall, the evidence does not support the need for a new general right to casual conversion. Many, if not most casual employees participating in these proceedings were casual by choice, and were able to make the transition from casual to permanent employment in the ordinary course once it suited them. On deeper analysis, complaints about casual employment were actually concerns about choices made, or

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56 Transcript at PN1188, 11 July 2016.
57 Transcript at PN2338 to PN2340, 15 March 2016.
58 Transcript at PN2368, 15 March 2016.
59 Transcript at PN2535, 15 March 2016.

the nature of a particular industry, or based on untested assumptions or misinformation.

The form of the casual conversion term

67. If the Commission finds that casual conversion rights should be inserted in modern awards because they are fair, relevant and necessary to achieve the modern awards objective, caution should be exercised to avoid an outcome where employees benefit twice from the same entitlement.

68. The claim for casual conversion rights includes the following term:

> "A casual employee who converts to full-time or part-time employment shall have their service prior to conversion recognised and counted for the purposes of unfair dismissal, as well as parental leave, the right to request flexible working arrangements, notice of termination, and redundancy under the NES and this Award. This does not include periods of service as an irregular casual."

69. As the proposed term makes clear, service prior to conversion to permanent employment would be counted for the purpose of calculating parental leave, notice of termination and redundancy under the National Employment Standards. Employees would gain a windfall where, after being paid a loading in lieu of leave, notice and redundancy entitlements for a period, they would regain those entitlements in full from the point of conversion.

70. As Mr Herbert, representing the Australian Meat Industry Council put it in answer to a question from the Full Bench:

> "That would be double dipping, and that is, employees would be receiving a casual penalty which is reflective of the fact that they are not entitled, generally speaking, to long service leave, and then to receive that same amount of service as service as service counting towards long service leave or redundancy or things of that kind would be double-dipping."[60]

71. In *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434 a Full Bench of the Commission considered an appeal against a decision that casual employees who had worked in regular, systematic employment for 12 months were entitled to redundancy pay under s 123(1)(c) of the *Fair Work Act 2009* (**FW Act**) as they were not 'casual employees' as defined in that section.

72. In overturning the decision on appeal, the Full Bench said:

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[60] Transcript at PN231, 14 March 2016.

> "To adopt the construction of s 123(1)(c) adopted by the Commissioner would allow for double dipping by employees engaged as casuals and paid the casual loading, but who work regular and systematic hours, of the sort that the Full Bench in the *Redundancy Case 2004* set its face against (PR32004 at [154])."[61]

73. In our submission, an approach that avoids the result of 'double dipping' should be adopted in this matter if the Commission determines that casual conversion rights should be adopted, either in particular modern awards, or generally in relation to all modern awards.

The minimum engagement period

74. The ACTU seek a minimum engagement of four hours for employees in most, if not all, modern awards.

75. The evidence demonstrates that a minimum engagement of four hours is not a condition that can or should be universally applied across modern awards.

76. In many industries, a minimum engagement period of four hours will stifle employment growth; increase employment costs, undermine flexible, modern work practices; and prevent the efficient and productive performance of work, contrary to the modern awards objective.

77. For ACTU witness Limasene Potoi, short shifts allowed her to earn an income while studying at university:

> "It was good to have shorter shifts when I was studying at University because the shorter shifts allowed me time to study and earn a small income to pay for uni books etc. The short shifts were also good when I had time between lectures."[62]

78. For ACTU witness Tracey Kemp, a 'short shift' was less than three hours, and she had never worked one:

> "Often, casual workers at FSG are expected to do short shifts. The shortest shift I have worked was three hours. However, some of my colleagues regularly work shifts that are just two hours in length."[63]

79. In the horticulture industry, the evidence confirmed that a four hour minimum engagement would be completely impractical.

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61 *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, [48].

62 Exhibit 8 (Potoi), paragraph 18.

63 Exhibit 1 (Kemp), paragraph 16.

80. As NFF witness Brendan Miller (apples and cherries) explained:

> "During the winter months we encounter a lot of rainy days. The current habits of our orchard staff is that even if the weather is looking a little dicey in the morning, they will start work to see if it improves."[64]

81. NFF witness Andreas Rehberger (mangoes, pineapples, pumpkin and passionfruit) described it this way:

> "Seasonal conditions (eg delays to weather, pest incursions etc) can mean days are shortened due to the inability to harvest due to inclement weather. In warm weather we may shorten work hours due to heat. Delays with equipment also compromise the hours we can employ people."[65]

82. NFF witness Kylie Collins (mangoes and avocadoes) said:

> "If we have unexpected deluges of rain (which is common in far north Queensland) we have to stop harvest as the fruit is not able to be picked in the rain. This means that we may need to stop work within an hour of starting work."[66]

83. In the wine industry, Anthony Grundel gave evidence as follows:

> "The issue starts when you have enough hours in the shift – enough work in the shift for four hours, but you've really got other little blocks of work where it's only two hours or three hours or things like that, not four, not enough for four, so rather than bringing in another person for four hours, you basically make the two that are working stay later, work longer, which is the reason why we're open till 7.00 – they can stay there till 7 o'clock at night, because they're still cleaning things up."[67]
>
> …
>
> "at the moment we're bringing in someone for a four-hour shift to cover off - which is just two hours' work, which is basically half an hour inside, half an hour prep, an hour doing the tasting, half an hour the other side."[68]

84. The following exchange highlighted the type of person likely to be attracted to brief periods of employment:

> VP HATCHER: "What's the profile of a person who would be able to do a cellar door shift at fairly short notice for two hours?"…
>
> MR GRUNDEL: "From previous history from employing staff in cellar door there, quite often they're either people wanting to learn more about the wine industry, so they're keen to just get experience and work in cellar door and get a hands-on role; they're semi-retirees, so we've

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64 Exhibit 164 (Miller) at [4].
65 Exhibit 167 (Rehberger) at [8].
66 Exhibit 155 (Collins) at [10].
67 Anthony Grundel, Transcript, 11 July 2016 at PN470.
68 Anthony Grundel, Transcript, 11 July 2016 at PN472.

> got, for example, I have a lady that works for me at the moment, one of my casuals who's a retired school teacher, and she just loves engaging with people, so she's happy to work casual shifts for us on a needs basis. The other side of it is we've had parents that just want a couple of afternoons in a shift just to work around sporting commitments and things like that. So there's an interesting mix of demographics that we have working for us."[69]

85. In the dairy industry, NFF witness Ms Shearman explained:

> "…some people like to get up early and you actually fit the people in with what they want to do and, you know, we don't – if they do one or two shifts early in the morning, that's all they [do]. They don't do every morning. But you know, I know the ones that I wouldn't even ask to work a morning, because they like working afternoons. And it fits in with their schedule. Like, I've got one girl that milks morning and then she goes home and she does other jobs on her farm. Or, you know, fits in with getting kids off to school, or being there with the kids in the afternoon if they just milk mornings. They can actually go off – the unemployed girl works only one morning with me but she actually works another job as well and she can actually do that job and then go off to her second job that she's trying to actually build up to get a full time job out of one."[70]

86. Ms Shearman described one of her employees as follows:

> "He has a disability, he is 20 years of age, when he first came to me he was very – he has no social skills at all and I paid him a lot of the time for three hours, when he might go home after two and a half hours. Now he has developed over the last six months into a good little milker. He's now told me that he's got a job in a nursery. Now I don't believe, six months ago he'd even try doing that."[71]

87. The evidence in the proceedings supports the NFF claim to reduce the minimum engagement for dairy operators from three to two hours. Material introduced by the AWU during cross-examination on 11 July 2016 also supports, and is not inconsistent with, the NFF claim.

88. Mr Crawford referred to a report *Australian Dairy: Financial performance of dairy farms 2011-12 to 2013-14* which contains figures on milking time at Table 2 on page 20[72]. The report states that "total milking time" for dairy farms of a similar size to that of NFF witness Ms Shearman is "4.3 hours". It is not clear whether the figure is 'per milking' or 'per day'.

89. In answer to a question about that statistic, Ms Shearman stated:

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69 Anthony Grundel, Transcript, 11 July 2016 at PN475-6.
70 Ibid, PN287.
71 Ibid, PN291.
72 Exhibit 186 (AWU bundle concerning horticultural and pastoral industry awards), TAB 2.

"If it took me 4.3 hours to milk 180 cows I'd go broke."[73]

90. For Ms Shearman, a milking takes between 2 and 2.5 hours depending on the time of year.[74] Casual staff are not engaged to bring the cow in as this is when paddocks and cow condition are checked, something many casual milkers are not able to do because they spend less time on the farm. As Ms Shearman explained:

> "You need someone that is skilled because you're not just bringing cows in, you're looking to make sure – see what paddock conditions are, what cow condition is, if a cow is on – coming, what we call, on heat, so they're coming into season, and a casual person that is only there two or three afternoons a week will not know that. They might not note that a water trough is dry, and things like that.[75]

91. Ms Wearden was also surprised by the AWU figures:

> "Well, when I did look at this table this morning I was actually quite shocked because I could not believe that that – but yes, I would say that there's quite a difference, but I would say that the – from my experience I would say that what we do on our farm is much more the average of what I'm aware of, so that doesn't describe what I'm aware of."[76]

92. If the AWU figures were 'per milking' figures, the activity of milking, which occurs twice each day, would take a total of 8.6 hours - an absurd result. Cows would have almost no time in the day for grazing and resting, each of which are essential for animal health and good milk production. The only sensible reading of this data is that milking times indicated are total milking times per day.

93. Industry data on milking time collected in 2009 for the CowTime Program was filed by the NFF in these proceedings.[77] Data collected from approximately 100 farms, covering each type of dairy, showed more realistic milking, herd collection and cleaning times than that relied upon by the AWU. The CowTime data should be preferred.

94. As NFF witness Noel Campbell said:

> "We want to make the milking as quick as possible to minimize the amount of time the cows are spent in the dairy shed and the milking yard. It is important for

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73 Transcript, 11 July 2016, PN265.
74 Exhibit 177 (Shearman) at [5].
75 Transcript, 11 July 2016, PN266.
76 Transcript, 11 July 2016, PN387.
77 NFF submission, 12 October 2015 at [34].

cows' health and welfare that they maximize the time spent in the paddock eating and drinking, rather than in an enclosed space such as a concrete yard." [78]

95. The evidence of Ms Shearman also addressed this need:

> "Because you're not only looking at the time that you're paying people, the longer the cows are standing in the yard, the less that they're actually out in the paddock, so you really don't want them standing in the yard any longer than you do, that's why you want efficiency. The sooner you get your cows in and out, the better it is for the cows that are not standing on concrete and that are actually out grazing."[79]

96. NFF witness Ms Wearden added:

> "Practices for keeping cows in the shed should be a maximum of one and a half to two hours because after that there's considerations with foot and discomfort and lack of grazing time if you keep them in the dairy for too long. So to maintain herd health and optimize their grazing time you want them in and out of the dairy as quickly as possible."[80]

97. Ms Wearden went on to respond to questions from the AWU about whether conditions in the dairy industry made it hard to attract people:

> "I actually think we are trying to enhance it by providing flexibility…we were finding that by trying to ask people to stay on longer than what they needed to, just to make up their three hours, they were becoming frustrated."[81]

98. The physical nature of work in a dairy and exposure to the elements also supports the need for a shorter minimum engagement where filling in time with extra jobs is unpleasant for all parties involved. As Ms Shearman said in her evidence:

> "[milking times] do alter, your Honour, and that's why it's very hard to find extra jobs in winter time because I milk a lot earlier in winter time. I'd start at 3 o'clock in winter because it gets dark and very cold earlier. Summer time, it's later so the kids can fit in with that a lot easier. And they can, you know, mow a bit of lawn or something like that, but winter time, once we finish we all want to go home and go inside."[82]

99. It is clear from the evidence provided by witnesses that, while school children make up a good proportion of the dairy workforce who require flexibility, they are not the only category of workers.

100. Ms Shearman gave evidence about the nature of the dairy industry:

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78 Noel Pearson, statement of 15 October 2015 at [8]. See also general evidence of Ms Shearman on transcript, 11 July 2016, from PN204.

79 Ibid, PN323.

80 Transcript, 11 July 2016, PN388.

81 Ibid, PN295.

82 Ibid, PN295.

> "You look at the age of farmers in our industry and how many of them could actually employ more people if that minimum engagement was reduced. Because there are jobs that some people would love to do that do not go to the three hours. So when you're looking at an aging population in the farming community, if they could actually get more relief, they can continue to do that job for longer and also have a better work – less hours that they are working so that they can have a bit better quality of life. Because dairy farmers work extraordinary long hours, so anything that we can do to sustain them for longer and actually keep families together and more of a family life, I think is a bonus."[83]

101. This evidence clearly demonstrates how casual employment can encourage job creation. More broadly, the evidence in the proceedings demonstrates that there are many scenarios where flexibility in relation to the minimum engagement period is required. The urgency of the annual harvest of perishable goods is one scenario, the cold winter another, and there are many more, including the need to foster work opportunities that fit in with the busy lives of students and parents and to promote greater social inclusion for retirees.

Stand down under section 524 of the FW Act

102. During cross examination of NFF witnesses, the AWU suggested that standing employees down under section 524 of the FW Act could be used to avoid the imposition of a new, four hour minimum engagement on the agriculture sector. A similar suggestion was made in the ACTU submissions of 22 July 2016 (see paragraph 3(d)(iv)).

103. Relevantly, section 524 provides as follows:

> **"Employer may stand down employees in certain circumstances**
>
> (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
>
> …(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
>
> …
>
> (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period."

[83] Transcript, 11 July 2016, PN243.

104. By implication, this suggestion accepts that there will be times when it is not reasonable to expect farmers to provide a minimum engagement period for employees. That being accepted, in our submission the better approach is to avoid imposing an unworkable minimum engagement period on the agriculture sector in the first place.

105. Relying on section 524 each time it rains is more likely to increase industrial disputation about whether or not matters are in the employer's control.

106. Even Mr Crawford of the AWU seemed to retreat from his own suggestion in cross-examination:

> "If it's forecast to rain, you know, for a few days, and for some reason the employee gets people in, and sure enough it's pouring, then perhaps the stand down provision couldn't apply in those circumstances because the employer could reasonably held responsible. But if it is an unforeseen event, I think the situation is probably different."[84]

107. AWU witness Ron Cowdrey expressed great faith in a farmers' ability to predict the weather (a position that could/would be used against any reliance on stand down provisions):

> "With technology these days every farmer worth his salt sort of knows what weather is coming probably two days prior, so he's able to program his work; so he knows whether he has got to harvest two days before the rain hits."[85]

108. Despite the confidence of Mr Cowdrey, weather forecasting remains an inaccurate science. The majority of farmers are at the mercy of the elements and while they can plan around it to a degree, they never know exactly when inclement weather will come in, or how severe it will be, or how long it will last.

109. Agriculture predominantly occurs in an uncontrolled environment. Weather affects crop yield and production levels. As the evidence in these proceedings shows, unharvested produce equates to lost earnings opportunity, which can never be recovered. Weather can also cause stock losses, as happened in the recent Tasmanian floods. The consequences of weather events affect workforce planning as much as the actual weather event in question. For all of these reasons, flexibility of hours is absolutely critical in the agriculture sector, perhaps unlike any other sector of the Australian economy.

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84 Transcript at PN1085, 11 July 2016.

85 Transcript at PN749, 11 July 2016.

No engagement to avoid award obligations

110. The ACTU claim for a new award term preventing the engagement of a person in any capacity to avoid award obligations was not supported by any evidence in the proceedings.

111. It would create a situation of 'double jeopardy' where employers could be held liable for modern award breaches both under the award and under the FW Act.

112. The claim cannot be said to be "necessary" to achieve the modern awards objective in circumstances where equivalent protections already exist in the body of the FW Act.

113. The claim should be dismissed.

No new casuals where existing casuals are working less than 38 hours per week

114. The ACTU claim for a new award term requiring additional work to be offered to existing casual and part-time employees before new employees can employed was not supported by any evidence in the proceedings.

115. The claims would make it very difficult to organise work in the agriculture sector, where many hands make light work but there will often not be enough work to justify full time employment for all. A requirement of this kind is akin to a return to the days of seniority provisions, where existing employees are given preference over new employees, with no regard for the relevant workplace needs. Such an approach is contrary to the modern awards objective, which seeks to promote productivity and efficiency; employment growth and increased workforce participation.

116. The claim should be dismissed.

Provision of information to casual employees on engagement;

117. Most modern awards already contain requirements for employees to be given a range of information upon commencement of employment and thereafter in the regular pay cycle.

118. Payslip requirements require the provision of detailed information to employees on a regular basis, including the name of the employer, classification and rate of pay. Providing casual employees with an indication of likely number of hours required flies in the face of the nature of casual employment. In many respects this would be unworkable and would only place high numbers of employers in breach of their award obligations.

119. The claim should be dismissed.

Addressing the modern awards objective

Relative living standards and the needs of the low paid (subsection 134(1)(a)); the need to promote social inclusion through increased workforce participation (subsection 134(1)(c))

120. The common claims made by the ACTU in these proceedings are likely to have adverse consequences for the relative living standards and the needs of the low paid. They are at odds with the need to promote social inclusion, as granting the claims would reduce opportunities for workforce participation among those who need it most.

121. Minimum engagement: as the evidence demonstrates, many award-reliant individuals including students, parents, carers and retirees rely on opportunities for flexible work. Shutting them out of the workforce by eliminating shifts of less than four hours in every industry in Australia will mean that students can no longer working during the week before or after school and those seeking to enter the workforce or to supplement their income with a bit of work on the weekend will find it much more difficult to do so.

122. Casual conversion: new rights to convert to permanent employment will have at best a neutral impact on relative living standards and the needs of the low paid – on the one hand, income levels will reduce for the few who choose to convert from casual to permanent employment, while those employees will gain access to paid leave entitlements which may improve their relative living standards. At worst it will adversely affect relative living standards and the needs of the low paid because it will act as a disincentive to maintaining ongoing casual employment.

123. No employment to avoid award obligations: this criterion is neutral in relation to the proposed prohibition on employment in breach of modern award terms. The FW Act contains a comprehensive compliance and enforcement regime which already seeks to ensure that low paid employees enjoy a fair and relevant safety net of minimum wage and conditions of employment.

124. Restricting new casual and part-time employment: the vast majority (90%) of casual employees work less than full time hours each week.[86] As with the minimum engagement claim, restricting the employment of new casual and part-time employees in the manner claimed would reduce opportunities for many individuals to find work, including students, those seeking to enter the workforce or to supplement their income with a bit of extra work. Reducing opportunities for part-time employment would have a disproportionate effect on women, who comprise 72% of the part-time workforce.

125. Commencement information for casual employees: this criterion is neutral in relation to the ACTU claim to duplicate existing disclosure provisions in modern awards and the FW Act.

The need to encourage collective bargaining (subsection 134(1)(b))

126. The common claims made by the ACTU in these proceedings are unlikely to encourage collective bargaining in the absence of reform to the current regulatory settings to make bargaining a more worthwhile endeavor for employers.

127. Despite strong concern about the level of minimum engagement in the dairy industry since 2010, the incidence of enterprise bargaining in the agriculture sector is very low: in September 2015, there were only 139 current enterprise agreements in the entire agriculture, forestry and fishing sector.[87]

128. There is no basis to conclude that this trend would reverse if the common claims were granted.

The need to promote flexible modern work practices and the efficient and productive performance of work (subsection 134(1)(d)); likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (subsection 134(1)(f))

129. The common claims made by the ACTU in these proceedings are inconsistent with flexible modern work practices and the efficient and productive performance of work. The common claims made by the ACTU in these proceedings will adversely affect business by reducing efficiency, productivity and flexibility while increasing employment costs and the regulatory burden.

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86 ABS Catalogue 6359.0 - Forms of Employment, Australia, November 2013

87 Department of Employment *Trends in Enterprise Bargaining Report* September 2015

130. Minimum engagement: a minimum period of four hours will stifle employment growth, and mean that employees are required to stay at work after they have completed their allocated tasks so that they can meet the four hour minimum. The alternative is to take longer to complete the allocated tasks, to avoid being idle. This is the very opposite of efficient and productive work performance. In the agriculture sector, work continues until it is done or can no longer be done (because of weather or because the sun comes down) – whichever happens first. Once the work is done, it suits both employers and employees to go home.

131. Casual conversion: complex technical processes requiring employers to notify casual employees of their right to convert to permanent employment are the antithesis of flexible modern work practices and efficient and productive work performance. The evidence confirms that only a rare few employees ever exercise the choice to convert from casual to permanent employment. Where this does occur, it is usually done informally, by arrangement directly between the employer and employee. Despite this evidence, the proposed casual conversion term would impose a significant regulatory burden on employers, including tracking each employee's anniversary and providing the requisite notice in a timely way.

132. No employment to avoid award obligations: as discussed further below, there are already penalties in the FW Act for modern award breaches. Imposing new 'double jeopardy' provisions duplicates the regulatory burden on employers and is not an appropriate exercise of the Commission's powers.

133. Restricting new casual and part-time employment: granting this claim would impose a significant regulatory burden on employers, as they would lose the capacity to engage new staff for short periods without first having to go through a process of offering opportunities to existing staff and awaiting their response. This could take time and in the meantime, interested applicants would fall away while employers were required to manage workforce shortfalls, placing undue pressure on the business.

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

134. The common claims made by the ACTU in these proceedings will achieve this outcome by requiring employers to pay additional remuneration for work that is either

not done, or not required to be done, just to meet a four hour minimum engagement. Otherwise, this criteria is neutral in relation to the ACTU claim.

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

135. This criteria is neutral in relation to the ACTU common claims.

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))

136. The common claims made by the ACTU in these proceedings are inconsistent with the need to ensure a simple, easy to understand, stable and sustainable modern award system. The proposed casual conversion is technical and complex, as outlined above.

137. In applying this criterion, the Commission should also seek to avoid unnecessary overlap between modern awards and the FW Act. The statutory scheme implicit in the FW Act clearly separates the functions of the legislative safety net (including the National Employment Standards, Part 2-9 and Part 3-5) and modern awards (see Division 3 of Part 2-1). There is no need for modern awards to replicate provisions of the FW Act.

138. The same applies in relation to the compliance and enforcement regime. Existing protections and penalties for modern award breaches should not be duplicated in modern awards: firstly, there is no utility in such an approach given that penalties already apply for breaches of that kind; and secondly, imposing new 'double jeopardy' provisions is not an appropriate exercise of the Commissions modern award powers and functions where Parliament has determined a comprehensive penalties regime.

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

139. There is significant growth potential in parts of the Australian agriculture sector.

140. A growing Asian middle class, rapid urbanization and an increasing demand for clean, sustainable produce create a favourable environment in which Australian

farmers can explore new opportunities (such as new markets), prompting some analysts to comment on the "growth potential" of the sector.[88]

141. That potential, however, can only be achieved with the right regulatory settings in place. Regulation needs to support farmers to be competitive in both global and domestic markets. This means being sufficiently flexible to encourage job creation, to accommodate the variability of agricultural production and to allow farmers to make a profit.

142. To the extent that there is a positive outlook for horticulture, it comes from potential exports, which can only be achieved by focussing on niche premium markets and containing labour costs.

143. Without the right trading environment, the growth potential of the sector will fail to be realized. Australian agriculture will miss the range of opportunities ahead as new markets are crowded out by our South American and Eastern European competitors (for example, Brazil, Argentina and Uruguay).[89]

144. Labour regulation is a key barrier to growth and productivity. As the Productivity Commission recently noted in its draft report on Regulation in Australian Agriculture:

> "Labour costs, flexible workplace arrangements and being able to access workers in rural and remote areas are important for the competitiveness of farm businesses."[90]

145. In addition, Australia has some of the highest labour costs in the world. It has the one of the highest average annual wages in the OECD[91]; in 2015, it had the second highest real minimum wage in the OECD behind Germany.[92] As one of the more labour intensive industries within the agriculture sector, labour cost increases are of particular significance to the horticulture industry.

146. As a result of high labour costs, horticulture is relatively uncompetitive on the world market except in the case of premium market niches.

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88 Tab 8 of Exhibit 186 (AWU bundle), Country News 'Leave Trade Deals Alone' 5 July 2016.

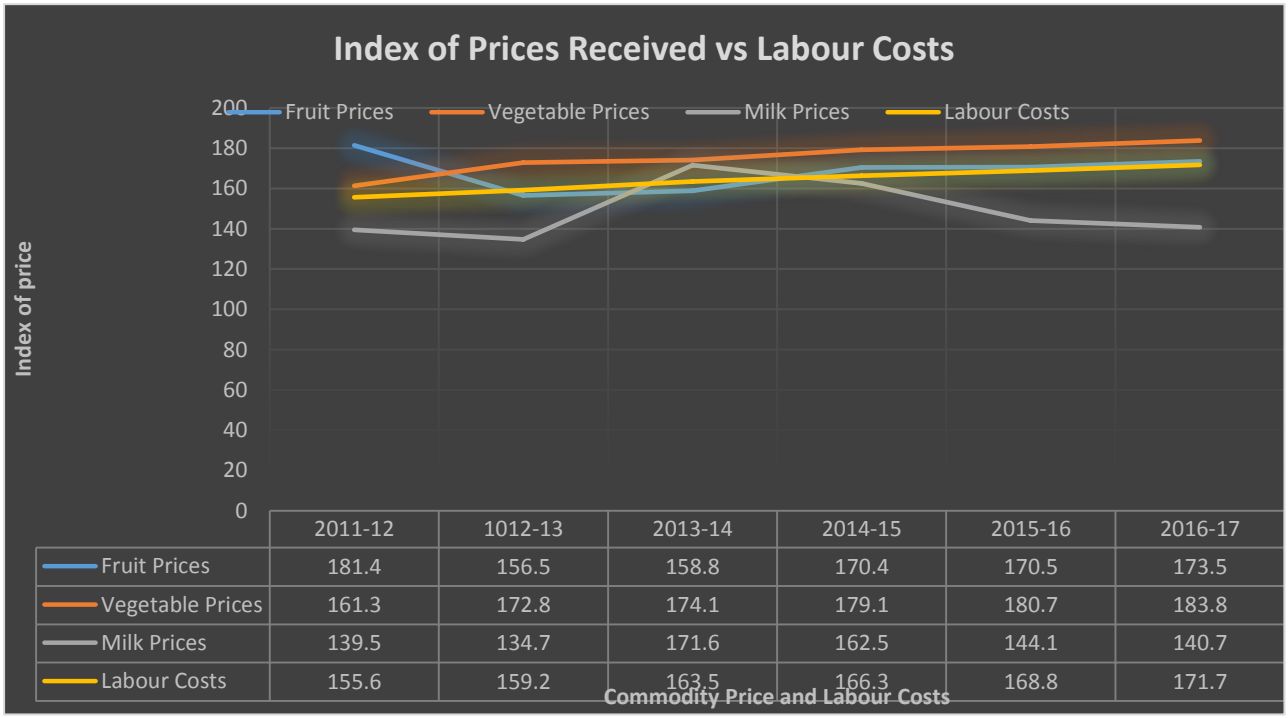
89 Australian Farm Institute, *China beef reality check highlights challenges ahead for the dining boom*, Mick Keogh, June 27, 2016

90 http://www.pc.gov.au/inquiries/current/agriculture/draft/agriculture-draft.pdf

91 Organisation for Economic Co-operation and Development (OECD), (2015); *Average Annual Wages* <http://stats.oecd.org/Index.aspx?queryname=343&querytype=view>

92 OECD (2015), *Real Minimum Wages*, <http://stats.oecd.org/Index.aspx?queryname=343&querytype=view>

147. According to statistics released by the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES)[93] (filed in the proceedings on 11 July 2016), agricultural labour costs 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.



	2011-12	1012-13	2013-14	2014-15	2015-16	2016-17
Fruit Prices	181.4	156.5	158.8	170.4	170.5	173.5
Vegetable Prices	161.3	172.8	174.1	179.1	180.7	183.8
Milk Prices	139.5	134.7	171.6	162.5	144.1	140.7
Labour Costs	155.6	159.2	163.5	166.3	168.8	171.7

148. As the graph above shows, agricultural labour costs have risen faster than the price received by farmers for horticultural commodities covered by these statistics. As NFF witness Ms Shearman (dairy) put it:

> "It might not be significant, but it certainly makes a difference."[94]

149. Individual events can influence aggregated statistics and provide a misleading picture of price indexes at any given time. Mr Dollisson gave the example of Cyclone Yasi[95], which destroyed the bulk of the banana crop in 2011-12 and created an artificial price spike. While this may have increased the overall "price received" by banana farmers for a period, it could not be said that for all other commodities sold over that same period, farmers also benefited from higher prices.

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93 See Tab 3, page 148 and 149 of Exhibit 186 (AWU bundle) – ABARES 'Agricultural Commodities – vol 6 no 2 June quarter 2016.

94 Transcript, 11 July 2016, PN228.

95 Transcript, 11 July 2016, PN882

150. As Mr Dollisson explained in his evidence, data collected by ABARES only reflects certain, better performing, horticultural commodities. It covers both growing (production at farm gate) and grower-owned post-harvest activity in pack sheds. Growers who do not pack their own produce pay significant packing and sales margins and as a result, receive about half the wholesale price of those who do.

151. The common claims made by the ACTU in these proceedings will impede employment growth and the sustainability, performance and competitiveness of the national economy.

Conclusion

152. The evidence in these proceedings does not support the granting of the ACTU common claims. Each of the claims should be dismissed.

153. The evidence in these proceedings supports a reduction in the minimum engagement from three hours to two hours in the dairy industry. This claim should be granted in full.

Objections

154. We confirm our objections to evidence filed by the AWU in October 2015 and seek that the offending paragraphs not be read as evidence in the proceedings:

Name	Statement date	Objection	Nature of objection
Adam Algate	13/10/15	Paragraphs 7 – 12	Relevance: content does not go to any issue in the proceedings and should be given no weight.
Keith Ballin	9/10/15	Paragraphs 5-9; 16-17; attachment "KB1"	Relevance: content does not go to any issue in the proceedings and should be given no weight; the attachments have no bearing on issues in the proceedings and cannot be verified.
Ron Cowdrey	13/10/15	Paragraphs 4-5, 7, 9-11	Relevance: content does not go to any issue in the proceedings and should be given no weight.

Sarah McKinnon
General Manager, Workplace Relations & Legal Affairs
5 August 2016