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5 May 2016

Re: AM2014/239 AWU submissions on the Exposure Draft for the *Pastoral Award 2016*

Background

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

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

   - National Farmers' Federation (NFF);

   - Australian Business Industrial and The NSW Business Chamber Ltd (ABI);

   - Australian Federation of Employers and Industries (AFEI); and

   - Business SA.

NFF

GENERAL POINTS

Commencement clause

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

Definitions

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

NES

3. Clause 2: These provisions have already been debated and determined by the Full Bench on a general level.[1] We are particularly concerned at the NFF's proposal that the Exposure Draft be amended to state: "The NES and this award contain the minimum conditions that **apply** to the employment of employees covered by this award". This amendment would conflate the concept of an award "covering" employees and an award "applying" to employees. There is an important distinction between these terms because an award will often "cover" an employee but will not "apply" because an enterprise agreement is in operation.[2] The provisions in the Exposure Draft should not be amended.

Coverage

4. Clause 3.3: We rely upon paragraph 4 of our submission dated 17 April 2016 in relation to a potentially better approach to draft the exclusions from coverage including for the wine industry. If this proposal is not adopted, we agree to the amendment proposed by the NFF.

5. Clause 3.4 (a), 3.5 and 3.6: We don't think these amendments are justified and note similar wording has been adopted across most exposure drafts.

Facilitative provisions

6. Clause 5: The inclusion of a facilitative provisions clause is another matter that has been debated and determined on a general level in earlier proceedings.[3] We see no need to depart from the general approach in this Exposure Draft.

7. We are not opposed to the inclusion of additional references to clauses 6.4 (d) and 30.3 in the table of facilitative provisions.

8. However, we do not consider it appropriate to refer to the Award Flexibility clause because this operates independently to the facilitative provisions and

[1] *4 yearly review of modern awards* [2014] FWCFB 9412 at [21] to [29]
[2] See s 57 of the *Fair Work Act 2009*
[3] *4 yearly review of modern awards* [2014] FWCFB 9412 at [37] to [43]

on different terms. We also do not think it is helpful to refer to the dispute resolution clause.

9. Clause 6.1: We support the inclusion of this term and note it will enhance consistency with other exposure drafts.

10. Clause 6.3 (a): The insertion of reference to "an average of" 38 hours per week appears to reflect other conditions in the Exposure Draft. The only potential ambiguity concerns Part 8 – Shearing Operations which does not allow for the averaging of the 38 ordinary hours for Shearers and Crutchers. However, all employees aside from Woolclassers and Shearing Shed Experts are employed on a casual basis under clause 39.2 and Woolclassers and Shearing Shed Experts are generally engaged by the day under clause 40.9 (d) (iv).

11. However, as stated at paragraph [6] of our 17 April 2016 submission, the clause should be amended to refer to "38 ordinary hours". With the NFF amendment, this would read: "A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week".

12. Clause 6.3 (b): We agree with the NFF's proposed amendment to replace the reference to a "pay scale" with "applicable rate of pay".

13. Clause 6.4: We agree with both of the proposed amendments.

14. Clause 6.5 (a): We support the second amendment suggested by the NFF which is: "A casual employee is an employee engaged and paid as a casual employee". This is preferable because a part-time employee could also be considered as being "paid by the hour".

15. Clause 6.5 (c) (i): The amendment proposed by the NFF appears substantively the same as we proposed at paragraph [9] of our 17 April 2016 submission.

16. Clause 6.6: We think the wording in the Exposure Draft is clearer than clause 10.5 of the *Pastoral Award 2010* (the Award) and should be retained.

17. Clause 7.1: We are not opposed to the amendment suggested by the NFF on the basis that it reflects clause 15.1 (b) of the Award.

18. Clause 10: We disagree with the NFF submission. The new sentence is helpful and should be retained.

19. Clause 10.1 (a) (iii): The definition of "all purpose allowance" is settled and the amendment proposed by the NFF would be contrary to a previous Decision by the Full Bench.[4]

20. Clause 10.1 (a): We accept the travelling allowance cannot sensibly operate as an all-purpose allowance.

21. Clause 10.1 (d): We agree with both of the proposed amendments.

22. Clause 10.2 (e): This is incorrectly referred to as "Clause 10.1 (e)". We are not opposed to the amendments proposed.

23. Clause 10.2 (a): We see no significant difference between the NFF's proposed wording and the wording in the Exposure Draft and hence will accept either.

24. Clause 10.2 (b): We are not opposed to the suggested amendment given clause 17.2 (b) of the Award uses the term "instructs".

25. Clause 10.2 (c): We disagree that the meal allowance has no relevance in this industry and rely upon paragraph [14] of our 17 April 2016 submission in relation to how the provision should be amended.

26. We note, for example, that the ordinary hours of work for a farm and livestock hand are fixed by agreement under clause 26.1 albeit they can be averaged over a 4 week period. Hence there would be occasions whereby an employee works beyond their usual finishing time and hence would be entitled to a meal allowance.

27. Clause 14.4 (a) (ii): We agree the clause reference should be 14.4 (a) (i).

28. Clause 18.2 (b): We agree with the amendment proposed.

29. Clause 23: We are not opposed to replacing references to "QA Programs" with "Quality Assurance Programs" and replacing references to "OH&S procedures" with "work health and safety procedures".

30. Clause 24.2: We are opposed to this amendment because the "adult rate" may encompass more than the "wage" rate in clause 24.1.

31. Clause 24.3: We support the amended wording as per paragraph [20] of our submission dated 17 April 2016.

[4] *4 yearly review of modern awards* [2015] FWCFB 6656 at [110]

32. Clause 25.3: We rely upon paragraph [22] of our submission dated 17 April 2016.

33. Clause 26.3: We agreed no change should be made to this provision at paragraph [23] of our submission dated 17 April 2016.

34. Clause 27.1: We agree the reference to “clause 26.1” should be “clause 26”.

35. Clause 27.5: We prefer the amendment suggested at paragraph [26] of our submission dated 17 April 2016.

36. Clause 27: The NFF’s general submission about the expression of overtime conditions in the Exposure Draft is misconceived. For example, it is clear that a piggery attendant could receive overtime rates for working outside the span of ordinary hours in clause 30.3, in excess of 8 hours on a day under clause 30.3, more than 10 hours on a shift under clause 31.2 (e) and outside the set shift times in clause 31.1. Similarly, a farm and livestock hand will have their regular hours fixed by agreement in accordance with clause 26.1. Hours outside of the fixed hours are overtime. The amendments proposed by the NFF should not be made.

37. Clause 27.6: We agree with this correction.

38. Clause 29.2: We are opposed to this change for reasons set out above in relation to clause 24.2.

39. Clause 30: We prefer the amendment to clause 30.2 contained at paragraph [27] of our submission dated 17 April 2016. We are not opposed to the amendment suggested by the NFF to clause 30.3.

40. Clause 31: We rely upon our submission dated 17 April 2016 from paragraph [28] to [31] regarding the shift work definitions. We are not opposed to amendment suggested by the NFF to clause 31.6.

41. Clause 32 and 33: We don’t agree with any of the amendments suggested by the NFF and rely upon our submissions dated 17 April 2016 from paragraph [33] to [38].

42. Clause 34.1: We submit it is illogical and unfair for overtime hours on a public holiday to be paid at a lower rate than ordinary hours. The rate should be 250% of the ordinary hourly rate for all hours worked.

43. Clause 36.2: We are opposed to this amendment as per our submissions above regarding clause 24.2 and 29.2.

44. Clause 38: We agree the heading should be amended to “Overtime and public holidays”.

45. Clause 40.2: We agree the heading should be amended to “Other shearing rates” and agree with the amendments proposed to the table in clause 40.2 given they reflect clause 45.1 of the Award.

46. Clause 40.3 (a) and Schedule A.2: We agree with the amendments proposed by the NFF to clarify there are separate rates for crutching and shearing.

47. Clause 40.3 (b): We agree with the amendment proposed by the NFF to confirm the allowance is in addition to the piecework rates.

48. Clause 40.3 (c): We agree with the amendments proposed by the NFF.

49. Clause 40.4: We note the NFF’s concern about potential inappropriate use of capital letters in this industry but believe the references should remain as “Shed hands” given a capital letter is used in clause 39.

50. Clause 40.9 (f): Noting the NFF’s concern, we propose the preamble sentence be amended to read: “Allowances included in the Woolclassers’ weekly rate are calculated in accordance with the following formula…”

51. Clause 41: We are satisfied with the newly drafted provision subject to the amendment suggested to clause 41.2 as per paragraph [44] of our submission dated 17 April 2016.

52. Clause 42.3 (a) (ii): We hold great fears regarding a debate about religion with the NFF and on that basis agree to their proposed amendment which does reflect clause 47.3 (a) of the Award.

53. Clause 43.2: We agree with the amendments proposed.

54. Clause 44.2 (b): We agree with the amendment proposed.

55. Clause 44.7 (b): This is consistent with paragraph [45] of our submission dated 17 April 2016.

56. Clause 45.1: We don’t agree these proposed amendments would make the Exposure Draft any clearer.

57. Clause 45.5: We are not opposed to this amendment.

58. Clause 46.1 (b): We also submitted this clause applies to Woolpresser shed-hands at paragraph [46] of our 17 April 2016 submission.

59. Clause 46.1 (c): We also identified this error at paragraph [47] of our submission dated 17 April 2016. However, the NFF's proposal to insert reference to 2.6% involves opportunistic rounding – the more accurate percentage would be 2.63%.

60. Schedule A.1.1: We are not opposed to the insertion of "Rates for flock sheep (wethers, ewes and lambs)".

61. Schedule A.1.2: We see no issues with the wording in the Exposure Draft.

62. Schedule A.4: We agree with the amendments proposed.

63. Schedule B.1: We don't agree with the proposed amendments. The Exposure Draft reflects the approach adopted across numerous other exposure drafts.

64. Schedule B.2.3: We agree reference to a "With keep" deduction should be deleted.

65. Schedule B.3.3: We agree reference to a "With keep" deduction should be deleted.

66. Schedule B.4: We are not opposed to the inclusion of junior rates for Piggery attendants.

67. Schedule B.6.2: We don't agree that reference to Overtime "worked after 152 hours in any 4 week period" should be inserted as this may not be the only circumstance where overtime is payable. For example, a full-time poultry worker may have a set roster which involves them working an average of 38 hours over a 4 week period. If this is the case, overtime may arise when in excess of the rostered hours are worked.

68. Schedule B.7.2: We are not opposed to the inclusion of rates tables but accept they may require further refinement. We agree that rates for the crutching of rams and ram stags should be inserted.

69. Schedule C.1: We agree the leading hand rates from clause 10.1 (b) of the Exposure Draft have not been accurately reflected in the Schedule.

70. Schedule C.2.2 (b): We are not opposed to the suggested amendments.

71. Schedule G: We are opposed to the suggested amendment to the definition of "all purposes" – this matter has already been determined by the Full Bench.

ABI

72. Clause 3.3 (a): We have proposed an amendment to a similar effect at paragraph [4] of our submission dated 17 April 2016.

73. Clause 10.1: We have agreed in relation to this issue above.

74. Clause 23.2: We have agreed in relation to this issue above.

75. Clause 24.3: This is consistent with our position at paragraph [20] of our submission dated 17 April 2016.

76. Clause 25: We rely upon paragraph [22] of our submission dated 17 April 2016 which states the disability allowance in clause 25.3 should apply equally to any employee who performs this work.

77. Clause 26.3: We don't think any amendment is required to this clause.

AFEI

78. Clause 10.1 (b): The expression of a leading hand allowance as a weekly rate is common in many industries and no change is warranted to the Exposure Draft.

Business SA

79. Clause 3.1 and 3.3: These matters are dealt with above.

80. Clause 14.7: This submission is incorrect, the NES Inconsistencies Full Bench only determined to remove clause 23.7 (a) from the Award.[5]

81. Clause 6.5 (c) (i): We are not opposed to the amendment suggested by Business SA and accept it is probably clearer than what we proposed at paragraph [9] of our submission dated 17 April 2016.

82. Clause 10.1 (a) (iii): We have accepted above that the travelling allowance cannot operate on an all-purpose basis.

[5] See https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/PR568677.pdf

83. Clause 10.2 (c): We propose this clause be amended as per paragraph [14] of our submission dated 17 April 2016.

84. Clause 23.2 (b): We have agreed regarding these issues above.

85. Clause 24.3: We have agreed regarding this issue above.

86. Clause 25.3: As discussed above, we see no reason why the allowance in clause 25.3 shouldn't apply to any employee who encounters these disabilities.

87. Clause 26.3: We have agreed above that these provisions should not be amended.

88. Clause 31.1: We are opposed to the inclusion of a "day shift". This would amount to a substantive change as opposed to a technical or drafting issue. The change would undermine the day work span of ordinary hours which is Monday to Friday unless otherwise agreed.

89. Clause 34.1: We have addressed this issue above. It is absurd for the overtime rate to be lower than the ordinary hours' rate. The rate for all work on public holidays should be 250%.

90. Clause 40.3 (b): As stated above, we don't believe this clause needs to be amended.

91. Clause 46.1: We have agreed on this point above.

92. Schedule G: The "keep" provisions do not apply to employees covered by Part 8 – Shearing Operations. The "found" provisions apply to these employees.

Stephen Crawford
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