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Fair Work Act 2009
FAIR WORK COMMISSION

s. 156: 4 Yearly Review of Modern Awards

AM2014/239

Pastoral Award 2010

REPLY SUBMISSIONS FROM THE AUSTRALIAN WORKERS' UNION – 'LEARNER SHEARER' TERMS

Background

1. On 24 December 2015 a Full Bench of the Fair Work Commission issued a Decision in relation to the 4 yearly review of the *Pastoral Award 2010*[1] (the Award) and accompanying Directions regarding a claim by The Australian Workers' Union (AWU) to insert new terms dealing with 'learner shearers'.

2. In accordance with these Directions, the AWU filed submissions in support of the inclusion of the proposed 'learner shearer' provisions on 5 February 2016.

3. The following organisations have subsequently filed submissions opposing the inclusion of the 'one in four stands' aspect of the 'learner shearer' conditions:

   - National Farmers' Federation (NFF): 4 March 2016;
   - Australian Business Industrial and the NSW Business Chamber Ltd (ABI): 24 March 2016; and
   - Shearing Contractors Association of Australia (SCAA): 4 March 2016.

4. The AWU's submissions in reply to those filed by the NFF, ABI and SCAA appear below.

NFF

Career structures and piece rates

[1] *4 yearly review of modern awards – Pastoral Award 2010* [2015] FWCFB 8810

5. The NFF submit at paragraph [31]:

> *The 'one in four' term is not about career structures. Properly characterised, it is a term about limiting work areas to a particular use. It is a term about where work can be performed by learner shearers, and where no other work can be performed.*

6. Further, at paragraph [43] the NFF distinguish the 'one in four' term from clause 49.7 in the Award which states:

> *The employer may nominate the stand or stands to be occupied by learners. Subject to the foregoing, lots will be drawn for the stands in the presence of the overseer before work is commenced at a shearing or crutching, and the employees will abide by the result of the drawing.*

7. According to the NFF submission at paragraph [43], the distinguishing feature between the proposed 'one in four stands' term and clause 49.7 of the Award is that under clause 49.7: "all stands of the shed can be used for each run".

8. The NFF's submissions appear to assume that something other than shearing will be occurring at the stands allocated to a 'learner shearer'. This is obviously incorrect.

9. Contrary to the NFF's submission, the 'one in four' term does not prevent all stands being used for shearing on each run. The AWU agreed to amend its proposed clause, at the request of employer groups, to specifically clarify that no stands should be left vacant because of the 'learner shearer' provisions. This means each stand can be filled by either a 'learner' or fully-fledged shearer on each run.

10. What the 'one in four' term does potentially do is determine *which employee* will perform work in a particular area.

11. In this regard, it does not appear distinguishable from clause 49.7 in the Award and we note the NFF do not identify in their submission which part of section 139 of the *Fair Work Act 2009* (the Act) permits the inclusion of the existing clause 49.7.

12. The NFF's contradictory position on these matters demonstrates the inherent danger in adopting a restrictive construction of section 139 of the Act as sought by the NFF and ABI in these proceedings.

13. A restrictive approach can result in terms which all parties agree form part of a fair and relevant safety net of conditions in a particular industry, which seems

to be the case with clause 49.7 of the Award, potentially being removed because of an overly literal interpretation.

14. This outcome is contrary to the object of the Act which is *inter alia* to provide a safety net of <u>fair, relevant</u> and enforceable minimum wages and conditions.[2]

15. In any event, a restrictive construction of section 139 of the Act has been rejected by a previous Full Bench[3] and that Decision should be followed in the absence of cogent reasons for not doing so[4].

16. For the record, we consider clause 49.7 of the Award may be included pursuant to s 139 (1) (a) (ii) because it is a term “about piece rates”.

17. This arises because one of the practical effects of the piece rates payment system in the pastoral industry, as acknowledged by the NFF in their submission, is that disputes can arise about which employee works at a particular stand because some stands may be perceived as offering a chance for higher earnings than others.

18. Clause 49.7 of the Award deals with this practical reality by prescribing a process for allocating stands (including to ‘learner shearers’). Hence it is fair to describe the term as being “about piece rates”.

19. Similarly, the ‘one in four’ term deals with the practical reality that the piece rates payment system can lead to a ‘learner shearer’ being overlooked for work because they will generally take longer to shear sheep.

20. This is a problem which has been acknowledged in the pastoral industry since 1917 when Higgins J determined:

> ***Learners***
>
> *In order to keep up the supply of competent shearers, both sides desire that compulsory provision should be made for the employment of a certain proportion of ‘learners’ – lads who have not shorn at three sheds. The clause which I have framed, for one pen in every ten to be given to or reserved for a learner, is consented by both sides.*[5]

21. In this context, the ‘one in four stands’ term is essentially “about” mitigating the unwanted effects of the piece rates system and ensuring there is a

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[2] See s 3 of the *Fair Work Act 2009*

[3] Modern Awards Review 2012 – Apprentices, Trainees and Juniors [2013] FWCFB 5411 at [95]

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

[5] *Australian Workers Union v Pastoralists’ Federal Council of Australia and others* (1917) 11 CAR 409

structure in place to produce competent shearers in Australia. Hence the term can be fairly characterised as being “about skill-based classifications and career structures” and “about piece rates”.

22. The NFF’s submission that the ‘one in four stands’ term is only “about” restricting work areas to a particular use is analogous to suggesting drink-driving laws are solely “about” imposing punishments on people who are caught drink-driving. Whilst drink driving laws are in part “about” punishing people who break them, on a broader level, they are essentially “about” trying to improve road safety.

23. Similarly, whilst the ‘one in four stands’ provision is in part “about” determining who can work in a particular work area, on a broader level, the term is essentially “about” ensuring there is a supply of competent shearers.

24. It is this broader purpose which makes the term “about skill-based classifications and career structures” and “about piece rates”.

Type of employment

25. We note the NFF concede at paragraph [37] that “terms which specify who is a learner shearer for the purposes of the Award may be about type of employment” but go on to suggest the ‘one in four’ term falls into a different category.

26. The concession that a ‘learner shearer’ may be a “type of employment” as contemplated by s 139 (1) (b) of the Act is significant given the range of provisions which can be included in an award once a “type of employment” exists as demonstrated by the following provisions in the *Manufacturing and Associated Industries and Occupations Award 2010* for apprentices:

- Prohibition on payment by results: clause 15.13;

- Access to training consistent with the training contract without loss of pay: clause 15.14; and

- Restrictions on the working of overtime and shift work: clause 15.15.

27. In the 2012 Transitional Review – Apprentices case the Full Bench specifically determined: “Award clauses dealing with the circumstances in which training is to be provided to apprentices, and will continue, are terms about that type of employment”.[6]

[6] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [97]

28. The 'one in four stands' term can be fairly described as a term requiring training to be provided to a 'learner shearer' and hence is also "about that type of employment".

ABI

The interpretation of "about" in s 139 (1) of the Act

29. ABI's submissions deal extensively with what the term "about" means in the context of s 139 (1) of the Act.

30. The following Macquarie Dictionary definition of "about" is cited at paragraph 5.16 of the ABI submission:

> *1. Of, concerning, in regard to… 2. Connected with…*

31. This definition demonstrates the word has a broad meaning which is presumably why it has been included as a preposition to the general subject matters identified in s 139 (1) of the Act.

32. The ABI submissions subsequently suggest that for a term to be included in an award under s 139 (1) of the Act "the essence of the subject matter of the term [must be] one which falls within the scope of section 139"[7] and then that the term would have to be "closely connected"[8] to the relevant matter identified s 139 (1).

33. We submit the adoption of either of these tests would lead to jurisdictional error.

34. As the 2012 Transitional Review – Apprentices Full Bench has previously determined in relation s 139 (1) of the Act:

> *The terms of the section are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them.*[9]

35. This approach is consistent with the beneficial construction rule as referred to below.

[7] ABI submission at paragraph 5.30
[8] ABI submission at paragraph 6.6
[9] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95]

36. We particularly note that a “close connection” to the subject matter could not possibly be required for the word “about” when courts have previously determined that only a “relevant relationship, having regard to the scope of the Act”[10] is required for the term “in relation to” and only “a sufficient link for the purposes of the legislation”[11] is required for the term “in respect of”.

37. There is certainly no reference to a “close connection” or “essence” in the dictionary definition of “about” cited by the ABI in their own submissions.

38. We also note that s 513 of the repealed *Workplace Relations Act 1996* as it existed following the ‘Work Choices’ amendments used the word “about” when prescribing allowable award matters.

39. The Regulation Impact Statement in the Explanatory Memorandum for the Workplace Relations Amendment (Work Choices) Bill 2005 stated the following in relation to the allowable award matters in s 513:

> *Under Work Choices, awards can continue to contain provisions <u>dealing with</u> the following matters…*[12] (our emphasis)

40. The use of the term “dealing with” in the Explanatory Memorandum is another factor which suggests the word “about” is not intended to confine the Commission’s jurisdiction to the extent suggested by ABI.

41. In any event, even if ABI’s proposed tests were accepted by the Commission, they should not lead to the conclusion that the ‘one in four stands’ term cannot be included in the Award under s 139 (1).

42. For example, the “essence” of the ‘one in four stands’ provision as identified way back in 1917 by Higgins J is “to keep up the supply of competent shearers”. In other words, to ensure that ‘learner shearers’ are provided with the opportunity to progress to being a fully competent shearer and hence supply the market. It is well established that the reason for concern about a supply of competent shearers is the effect of the piece rates payment system whereby there can be an incentive to engage only fully competent shearers.[13]

43. When viewed in this context, the “essence” of the term can be fairly described as being “about skill based classifications and career structures” and “about piece rates”.

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[10] *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 per Dawson J at [1]
[11] *J & G Knowles v Commissioner of Taxation* [2000] 96 FCR 402 at [23]
[12] See http://www.austlii.edu.au/au/legis/cth/bill_em/wracb2005428/memo_0.html
[13] For example, see the Statement of Danny O’Hare at paragraph [28]

44. Further, as ‘learner shearer’ is a “type of employment” because it takes “its character from the rights, duties, obligations and privileges that attach to it”[14], the “essence” of the ‘one in four stands’ term is also “about [a] type of employment”.

45. If the “essence” of the ‘one in four stands’ term is “about” these identified matters, it most follow that the term is also “closely connected” to them.

46. Finally, we note ABI’s submission refers to s 139 (1) (a) of the Act being “squarely aimed at the inclusion of competency based structures in a modern award that allows an employee through accruing experience, responsibility and qualifications to progress”.[15]

47. This submission perfectly captures the intent of the ‘learner shearer’ provisions sought by the AWU (and agreed by the NFF on a merit level) including the ‘one in four stands’ term. They are simply directed at allowing a ‘learner shearer’ to accrue experience and progress to being a fully competent shearer.

Beneficial legislation

48. The ABI submission at paragraph 5.11 reads:

> *The requirement to interpret a provision consistently with a beneficial intent does not mean that an interpretation which is not borne out by the ordinary meaning of the words can be preferred, merely because of the beneficial effect it may have for those who are affected by its operation.*

49. This submission mischaracterises the argument contained in our submission dated 5 February 2016. Paragraphs [17] to [22] of this submission clearly referred to the fact that the beneficial interpretation rule does not have work to do if the words being interpreted “admit only one outcome”.

50. Our argument is that the interpretation of whether a term is “about career structures”, “about skill-based classifications”, “about type of employment” or “about piece rates” is inherently discretionary and hence not a task that will “admit only one outcome”. This means the beneficial interpretation rule can be relied upon to “give the fullest relief that a fair meaning of its language will allow”.[16]

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[14] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [97]
[15] ABI submission at paragraph 6.11
[16] *Bowker* [2014] FWCFB 9227 at [26]

SCAA

51. The SCAA submission at paragraph [9] criticised the proposed 'one in four stands' provision on the basis that there is no "compulsion for an employer to engage a learner shearer" and hence the term is "ineffectual and an unnecessary complication".

52. However, at paragraph [11] the SCAA submission is critical of the AWU's proposed wording because it "is effectively forcing the employer to take on any person who presents themselves… as the learner shearer".

53. This leads the SCAA to firstly propose that the AWU's term be amended so an employer only has to give or reserve a stand for a "suitable" learner.

54. For the record, the SCAA submission at paragraph [11] captures the intent of the term proposed by the AWU. That is, an employer is compelled to provide one in four stands to an available learner shearer.

55. We note the term initially proposed by the AWU on 4 June 2015 did not include reference to an "available" learner shearer.[17] The AWU agreed to insert this reference because employer parties raised concerns that the wording could lead to stands being left vacant.

56. The SCAA submission at paragraph [12] states "the alternative to 'suitable and available' is to redefine a learner". The definition proposed by the SCAA at paragraph [13] is:

> *A learner shall mean a shearer or intending shearer who has effectively shorn more than the equivalent 20 sheep but not yet shorn five thousand sheep*

57. The AWU is opposed to both of the amendments suggested by the SCAA.

58. The problem with inserting reference to a "suitable and available" learner is precisely that identified in paragraph [9] of the SCAA submission – it will remove the compulsion on an employer to provide one in four stands to learner shearers because they will be able to arbitrarily determine if each learner is "suitable". This will make the term "ineffectual" which is a concern specifically identified by the SCAA at paragraph [9] of their submission.

[17] See https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014239-draftdet-AWU-040615.pdf

59. The definition of a ‘learner shearer’ proposed by the SCAA would create an absurd situation whereby a person who has shorn 1000 sheep would be considered a ‘learner shearer’ but a person who has shorn less than 20 sheep would be treated as a fully-fledged shearer.

60. This means the proposed protection of a minimum wage for a ‘learner shearer’ and the requirement to keep records in a prescribed form would not apply to a person who has not yet shorn 20 sheep.

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