4 yearly review of modern awards – Pastoral Award

Matter No. AM2014/239

NATIONAL FARMERS' FEDERATION

FURTHER SUBMISSIONS ON EXPOSURE DRAFT – PASTORAL AWARD 2010

Date: 13 April 2018

1. On 9 February 2018 His Honour Justice Ross published a report which, inter alia, indicated the next steps with respect to certain items of the 4 yearly review do the Pastoral Award 2010:
   a. *Definition regarding non-continuous work (inserted at clause 31.1 of the exposure draft)*; and
   b. *Proposal to amend footnotes in clause B.4.2 and B.4.5 of the exposure draft*.
2. His Honour indicated that it was agreed that the Commission would provide a plain language draft of clause 35.9 of the current award to the parties for consideration.
3. On 15 March 2018 His Honour Justice Ross published a statement which attached a proposed redrafted of clauses 30 and 31 of the exposure draft preared by the Commission's plain language expert.
4. His Honour invited interested parties to make any comments by 5 April 2018 with liberty to apply. These submissions respond to that invitation.

Proposed Clause 30

5. As described above, it was the NFF's understanding that the plain language expert was considering the "continuous work" provisions at clause 31 of the exposure draft, together with the footnote referring to those provisions at clauses B4.2 and B4.5.
6. However, the proposal includes a major redraft of the "ordinary hours of work provision" at clause 30 of the exposure draft.
7. So far as the NFF is aware, there have been no instances in which this clause has caused difficulty in practice, none of the representative parties have raised a concern regarding the clause through the course of this 4-yearly review, and it has not been the subject of any discussion or submissions. This clause was not under scrutiny and the NFF can see no basis for changing a clause which is comprehendible in its existing form.

8. As such, the NFF sees no reason for a redraft at this late stage in the 4 yearly review proceedings and implores the Commission to retain the existing language.[1]

9. On its face much — but not all — of the substance of the redraft *appears* to be largely consistent with the existing clause. However, it is quite possible that changes — for example the introduction of vague language such as "normally" or the substitution of "employee" for "piggery attendant" — may have an impact on the operation of the clause or, at the very least, cause confusion where none presently exists.

10. Furthermore and more critically, proposed clause 30.2 requires the employer to pay the "employee" for a 38 hour week irrespective of the hours the "employee" actually worked. The corresponding clause 35.1 of the current award (and clause 30.2 of the exposure draft) merely requires the employer to "use its best endeavours" to pay for 38 hours.

11. This proposed clause could have significant consequences where, for example, the employee works part-time, on occasion when the employee takes unpaid leave, or where the employee works more than 38 hours one week but less than 38 hours the next as anticipated by the 4 weekly averaging.

Proposed Clauses 31 to 34.

12. The NFF's previous submissions with respect to clause 31 of the exposure draft were that any alterations to clause 35 of the current award are unnecessary and could result in confusion and unforeseen substantive effects.[2]

13. In the NFF's view these submissions carry even greater weight with respect to clause 31 to 34 of the proposal, which constitute a complete redraft and redesign of these provisions. As a result, in our submission there is considerable likelihood that they will cause confusion and unforeseen consequences. Again, the NFF implores the Commission not to adopt this new clause but to retain the language of the current award.

14. Indeed, our reading of the new clauses has identified a number of differences which depart from the current award (and the exposure draft) and could have a significant impact. We provide seven examples below. However, we stress that it is likely that other substantive changes will emerge if the proposal is given effect.

    a. Clause 35.5(a) of the current award is expressed to apply merely to "workers on continuous work". Clause 31.1 of the proposal applies to the entire "workplace that operates on a continuous work basis". It may therefore have a different application.[3]

    b. Clause 35.3(b) of the current award defines "continuous work" to mean (inter alia) working consecutive shifts for "at least" 6 days. Clause 31.2 of the proposal defines the term to mean working consecutive shifts for (exactly) 6 days.

---

[1] It may be noted that the language of the exposure draft is identical to the current award, albeit the existing clause has been broken into subclauses.

[2] Paragraphs [43] to [45] of the NFF's submissions of 26 October 2016.

[3] In our submission there is also considerable ambiguity around where a "workplace" can be said to operate on a "continuous work basis".

c. Clause 35.6(a) of the current award expressly provides for meal breaks to be taken at the discretion of the employer. Although it may be implied, clause 32.5 of the proposal removes that express reference to the employer's discretion.

d. Clause 35.7 of the current award provides for a roster to specify the finish and start time of the "respective shift". Clause 33.1 of the proposal requires the roster to specify start and finish times of "each shift"; i.e. a roster may now be defective if it is not comprehensive.

e. Clause 33.2 of the proposal is entirely new and its consequences are uncertain.

f. Clause 35.8(b) of the current award provides 'co-existing' alternative ways to vary the start and finish times by an hour. Under clause 33.3(b)(ii) of the proposal the employer's power to make a decision is arguably only enlivened where it has been through a failed negotiation process with the employees.

g. Clause 34.2 appears to qualify the employee for the penalty rate when they work just one shift which satisfies the definition rather than when they have completed a series of shifts.

15. In short, and, given that the current provisions are not a source of any debate or dispute, adopting a new clause is not just unnecessary, it is very potentially risky. Indeed, given that there is presently no dispute around the operation of the current award, with respect, it is difficult to identify a strong rationale for introducing a new provision which may promote confusion and dispute or have other unforeseen consequences.

Ben Rogers
General Manager, Workplace Relations & Legal Affairs
National Farmers' Federation