

**4 yearly review of modern awards
Award stage – Sugar Industry Award 2010**

Matter No. AM2017/56

SUBMISSIONS

NATIONAL FARMERS' FEDERATION

Date: 7 June 2018

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.
2. In accordance with directions made by the Fair Work Commission as amended on 30 May 2018, this submission outlines the NFF's response to item 17 of the summary of submissions which was a concern raised by the Fair Work Ombudsman regarding the *Sugar Industry Award 2010 (the Sugar Award)*:

Query whether the calculation of the minimum piece rate (clause 20.2) for casual employees should include the casual loading and, if so, how the casual loading and the additional 20% piecework loading interact.

3. The query appears to have two aspects.
 - a. Firstly, is a casual employee covered by the Sugar Award who is working under a piecework agreement entitled to the casual loading?
 - b. Secondly, if the pieceworker is entitled to the casual loading, then does the piecework loading and the casual loading compound such that the 25% casual loading is factored into the base rate of pay for the purposes of calculating the 20% piece work rate loading?

Are casual pieceworkers entitled to both casual and piece rate loadings?

4. With regards to the first question, the NFF notes the decision of the Full Bench of the Australian Industrial Relations Commission in 23 December 2009, where the Commission determined that:

IN THE FAIR WORK COMMISSION

In our view employees engaged on piecework should be entitled to the casual loading as compensation for the absence of service-related entitlements. Such a provision is appropriate in a safety net award.¹

5. That decision was made in respect of the *Horticulture Award 2010*. However, without more the rationale which the Full Bench expressed² appears to apply generally; i.e. it is not specific to piece rate arrangements made under the Horticulture Award.

Furthermore, there appear to be limited basis under the Sugar Award to distinguish the decision

6. If this is correct then it follows that casual employees covered by the Sugar Award who work under piecework agreements are entitled to the casual loading and, in principle, the NFF would not oppose a variation to the Award to clarify that position.

Does the Casual and Piecework Rates Compound?

7. The second issue is with respect to how that piecework loading should be calculated.
8. In substance the question is which of these two methods is to be adopted?

	<i>Hourly rate</i>	<i>Casual loading</i>	<i>Causal Rate</i>	<i>Piecework loading</i>	<i>Piecework Rate</i>
<i>1. Compounding</i>	\$23.08	\$5.77 (\$23.08 x 25%)	\$28.85	\$5.77 (\$28.85 x 20%)	\$34.62
<i>2. Not Compounding</i>	\$23.08	\$5.77 (\$23.08 x 25%)	\$28.85	\$4.62 (\$23.08 x 20%)	\$33.47

9. As indicated at paragraph [35] of the NFF’s submissions dated 14 April 2016:

*[I]n our view the loadings payable to a casual pieceworker are separate and distinct amounts. Both the 25 % casual loading and the 20% piecework loading are calculated on the minimum hourly rate and added to any other penalty payable (for example, overtime) but are **not compounded**.*

10. We maintain this view.
11. In short, the rationale which underpins granting employees the respective entitlements generally, together with both the history and language of the Sugar Award all support a conclusion that the entitlements were not intended to be calculated separately; i.e. should not compound.

¹ [2009] AIRCFB 966 at [18]

² i.e. in the quote.

No correlation between loadings

12. The logic underpinning the requirement to pay a casual loading is that it compensates casual employees in place of leave entitlements.³ The piecework loading, on the other hand, is designed to incentive faster/harder work, so as to encourage and enhance productivity.
13. In order for one form of loading to, in effect, include the other⁴ those logical underpinnings should interact. That is, for the piece-rate calculations to include the casual loading, the pieceworkers' productivity should affect their leave entitlements — i.e. when a non-casual pieceworker works faster/harder they should be entitled to more leave — or vice-versa. However, they do not. The two concepts are unrelated and distinct. As such, the loadings should be separately calculated.

History and modernisation of award

14. Contrary to the contemporary position, under the Queensland *Sugar Industry Award 2005* — the pre-modernisation award which covered the majority of field workers in the sector — pieceworkers did not receive annual⁵ or sick⁶ leave. In lieu of those (and other) entitlements the pieceworker was paid the 20% loading.⁷
15. The Queensland Award provisions relating to pieceworkers, including the 20% loading, were imported without significant change in the Modern Award.
16. However, under the NES — and therefore the Modern Award — all employees except causals are entitled to annual and sick leave.
17. As such, while retaining the 20% loading under the Modern Award, pieceworkers who are full or part-time employees also picked-up the usual leave entitlements.

³ And a more limited right to claim unfair dismissal

⁴ i.e. for the piece rate calculations to include the casual loading

⁵ Clause 7.1.1

⁶ Clause 7.2.1(a)

⁷ It is worth noting that there was no concept of a 'casual' employment under the Queensland Award; in place, the award provides employees to be engaged under piece rate arrangements and/or on a 'Single contract Hourly rate' basis, with the latter being the closest analogue to casual employment.

IN THE FAIR WORK COMMISSION

18. Given that history, it is at least arguable that a piecework loading set at 20% is in itself a form of ‘double-dipping’; i.e. given that under the modern system a pieceworker who is not casual gets both that piecework loading and annual and sick leave.
19. In the NFF’s submission this case of ‘double dipping’ is exacerbated if the piecework rate is factored into the casual loading, such that a component of the piecework loadings (i.e. the difference of \$1.15 given in the example at paragraph [8] above) is solely attributable — and is in actuality just — the casual loading.

Language of Award

20. Finally, in the NFF’s submission the language of the award does not provide any basis to conclude that the casual loading should be factored into the piece rate loading. In fact, the language of the clause points to the conclusion that it should not.
21. Clause 11.3 of the Sugar Award provides the framework for the employment of casual employees. Subclause 11.3(a) provides that:

A casual employee is an employee engaged as such. They must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed, plus a casual loading of 25%. This loading is instead of entitlements to paid leave and other matters from which casuals are excluded by the terms of this award and the NES. The casual loading does not constitute part of the casual employee’s all purpose rate.

22. The ‘all purpose rate’ is the rate which is used to calculate entitlements, such as overtime and other penalties, which are determined by reference to pay.
23. Although not expressed as such it may be assumed that the piecework rate follows this convention and is calculated on the all purpose rate. Clause 11.3(a) expressly states that the casual loading is not part of the all purpose rate. Accordingly, the piecework loading should not be based on a figure which includes the casual loading.
24. In support of this conclusion we note the Australian Industrial Relations Commission Award Modernisation decision of December 2008⁸ where it determined that, as a general rule, penalties and the casual loading are both to be calculated separately on the employee’s ordinary hourly pay:

[50] In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading

⁸ [2008] AIRCFB 1000 at [50]

will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.

25. Finally, we note that clause 20.2 of the Sugar Award provides the framework for piece rate arrangements. Subclause 20.2(e) provides that:

The full rate of pay in relation to entitlements under the NES for an employee on a piecework rate is the minimum wage identified in clause 38 for the employee's classification level plus a loading of 20%.⁹

The clause does not make reference to the casual loading for the purpose of calculating the piecework rate, either directly or by reference to clause 38.¹⁰



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

⁹ Sub clause 20.2(d) takes the same approach with respect to the base rate of pay.

¹⁰ i.e. given that clause 38 makes no reference casual loading.

