

Submission

27 November 2009



Horticulture Australia Council

Submissions

Modern Horticulture Industry Award

The nature of the proceedings

1. As noted in HAC's submissions filed 23 October 2009 ("the October submissions"), if factual assertions are not put in issue they may be regarded as evidence. The AWU has not put the factual assertions advanced by HAC in the October submissions in issue despite being given the opportunity to do so by the Commission (see paragraph [101], decision of the Full Bench 2 September 2009). On that basis, it is submitted that, having regard to the statutory conditions, the Commission is bound to accept all of the factual material contained in HAC's submissions as they stand, as that material is not challenged and not contradicted. Further, and in any event, the AWU's submission addresses itself to what flows from those asserted facts.
2. The AWU misapprehends the nature of the proceedings. The Commission's decision referred to above and the Ministerial request dated 26 August 2009 make it abundantly clear that the Commission is undertaking an exercise of review with respect to the subject matter of HAC's application. The AWU contend that it is HAC that attempts to define the nature and scope of these proceedings when, in reality, that task has been the province of the Commission itself:

"[W]e have concluded that a number of the modern Award provisions may require re-examination. We mention in particular the piece work provisions and provisions relating to hours of work, overtime and penalties."

[2009] AIRCFB 800 (2 September 2009)

The appropriate starting point

3. In seeking to justify the most appropriate starting point for the making of a modern award for the horticulture industry, HAC has consistently submitted that the *Horticulture Industry (AWU) Award* [AP784867] does not have the coverage and thus the standing to be that starting point. There simply is no one award (or NAPSA) that is truly representative of existing terms and conditions across the horticulture industry. HAC has not "cherry picked" award provisions in support of that contention. HAC has provided a thorough analysis of the award provisions applicable in the industry throughout Australia by reference to actual employment data to underpin the contention that in varying the award the Commission must account for the conditions covering the "critical mass" of employees. The economic data underpinning the analysis provided by HAC is unrebutted, indeed, unchallenged. In these circumstances, it is submitted, the analysis is compelling.
4. The Commission has previously held that the approach adopted by HAC in its analysis is sound. In determining an application to vary the Clerks Award ([2009] AIRCFB 922) the Full Bench held (at [23]):

Freehills

The dilemma faced by us in formulating the terms of the modern award is the widely divergent provisions in clerical instruments and in particular the existence of exemption or annual salaries provisions in clerical awards and NAPSAs in New South Wales, Queensland, Australian Capital Territory, Western Australia and Tasmania. Inserting or omitting an exemption provision will have an impact where the resultant provision is not consistent with the terms of the current instrument. We considered that adopting a provision which reflected the terms of the instrument applying widely in the largest state, where similar provisions of one sort or another apply in four of the six states and one of the two territories, was consistent with our approach in award modernisation of generally adopting appropriate minimum provisions applying to the critical mass of relevant employees.'

See also section 4 of the October submissions and the Commission's decision at ([2009] AIRCFB 800) paragraph 4:

The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise disadvantage to employees and increases in costs for employers we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation. However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.

Appropriate response to issues identified

5. HAC's application is not "opportunistic" nor is it beyond the scope of the varied Request. The application concerns piecework rates of pay, ordinary hours of work and rostering and overtime within the industry. To the extent that the HAC submission attempts to "revisit debates" as alleged by the AWU, it does so in accordance with the very substance of the varied Request which included specific reference to piecework terms and conditions within the context of the nature of the horticulture industry. (See 50 and 51 of the variation Request made on 26 August 2009.) Moreover it is entirely consistent with the earlier decision of the Commission inviting such an application.
6. HAC's application to vary the modern award with respect to piecework provisions is not "offensive" nor is it "extremist". Indeed the application reflects the exact issue first raised by the Minister in the varied Request, namely that:

*'The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, **as opposed to a minimum rate of pay supplemented by an incentive based payment**'*

(Emphasis added).

To argue, as the AWU does, that piecework provisions must "preserve the integrity of a minimum safety net" is in fact completely at odds with the express intention disclosed in the Minister's Request. All of

Freehills

the supporting material relied upon by HAC underscores the need for the flexibility sought in the application to pay piece rates of pay in a way that will not harm the viability of employers in the sector. Indeed the varied Request underlines the need for the Commission to consider the specific nature of the industry: see paragraph 51 of the varied Request. The AWU's submission citing piece rate provisions within awards outside the horticulture industry is irrelevant and gives no work to the express intention outlined in the varied Request.

7. Further, the construction of the piecework provision (page 8 of the AWU's submissions) found in the various instruments cited by HAC in its October submissions is a construction that cannot be preferred. It is clear on the face of the provision that when piece rates apply, time rates do not. There is no need to "imply" any words into the clause whatsoever. The provision's meaning is clear. The AWU contends for an interpretation to award provisions different to that which has been applied. In any event, nothing in the submission of the AWU takes away from the analysis of existing provisions discussed at 3.3 of the October submissions. What is sought by the AWU is to have the Commission vary the award to maintain the non genuine piece rate clause introduced (so it is submitted) for the first time in the Modern Award. Such a provision breaks the nexus between labour cost and output. It does nothing to overcome the unchallenged cost imposts introduced under the Modern Award, the subject of the Commission's earlier Decision inviting the HAC application. Moreover it is an approach which the AWU does not even attempt to justify under the terms of the amended Request.
8. The AWU invokes the concept of the "safety net", and asserts that the piece rates proposed would undermine that concept. Such a proposition is misplaced as a matter of law and logic. The piece rate is expressly calculated in such fashion as to make routinely available to the average worker, earnings above safety net levels. The fact that it is acknowledged that the industry engages in part a workforce who may choose to work below the level of the average worker and to whom the concept of a "safety net" is largely irrelevant cannot undermine the fact that earnings above safety net levels are expressly provided by the proposed provision.
9. Together with these submissions, HAC relies upon the October submissions and those filed on 13 November 2009.