

Special Edition

Award Modernisation Update

The HAC Award Taskforce met again this week to discuss the analysis undertaken by Donna Mogg (many thanks again to our colleagues in Growcom for their magnificent in-kind support). This analysis is reproduced below, and at Attachments B & C.

The Taskforce discussed some apparent anomalies in the AIRC Decision, and will liaise with NFF/AiG about seeking clarification of these with Fair Work Australia (**FWA** - this is the body that took over the functions of the AIRC on 1 January 2010). The Taskforce also discussed a range of strategies to continue the fight into the longer-term, to ensure that the new modern award, the Horticulture Award 2010, meets the needs of both employers and employees.

In this issue, we discuss the implementation of:

1. aspects of the *Fair Work Act 2009* (Commonwealth), particularly the minimum employment entitlements under the National Employment Standards (**NES**); and
2. the commencement of the Horticulture Award.

Unincorporated entities in Western Australia

As a starting point, unincorporated entities (eg, sole traders and partnerships) operating in **Western Australia** will not be affected by the NES or the Horticulture Award because Western Australia has not referred its IR powers to the Commonwealth. The remainder of this issue of *Drip Feed* does not apply to these WA entities.

Introduction of NES

Every private sector employer in the federal system is now required to comply with the provisions of the NES. The NES are summarised at Attachment A.

Implementation of the Horticulture Award

The most important piece of advice we can offer to growers at this point is: **DON'T PANIC!** Not all enterprises will be immediately affected by the implementation of the Horticulture Award.

When will the Horticulture Award apply to my enterprise?

The timing for when the Horticulture Award will cover your enterprise depends on the industrial arrangements in place immediately before 1 January 2010. In general, if immediately before 1 January 2010:

- your enterprise was covered by a **federal enterprise agreement**, that agreement continues to operate and the Horticulture Award will not apply to your enterprise while it is on foot.
- your enterprise was covered by a **state agreement**, that agreement continues to operate and the Horticulture Award will not apply while the agreement is on foot. However, state agreements will only operate for a time until 1 January 2013 after which the Horticulture Award will apply.

- your enterprise was covered by a **state award** (but not a state agreement or a state enterprise award) immediately before 1 January 2010, that award will continue to apply but the Horticulture Award will cover your enterprise from 1 January 2011.
- your enterprise was covered by a **state enterprise award**, that award will continue to apply until 1 January 2014, after which the Horticulture Award will apply.
- none of the above scenarios apply to your enterprise, the Horticulture Award will apply to you from 1 January 2010.

There are some exceptions to the general positions outlined above, so if you have queries about when the Horticulture Award will apply to your operations, we suggest you obtain advice.

What aspects of the Horticulture Award apply from 1 January 2010?

For those enterprises who will be covered by the Horticulture Award from 1 January 2010, only the **non-monetary** components of the Horticulture Award (ie, components other than those relating to wage rates, loadings, allowances, penalties, etc), and the provisions of the NES, apply from 1 January 2010.

Phasing in of monetary increases

The commencement of the monetary components of the Horticulture Award will be **phased in from 1 July 2010**. However, for those enterprises which remain covered by a federal enterprise agreement, state agreement, state award or state enterprise award, the phasing in of the monetary components of the Horticulture Award will not have any relevant application until the Horticulture Award commences to apply to them. The precise phasing in of the monetary components of the Horticulture Award is still to be clarified by FWA.

The HAC Award Taskforce considers this phase in gives HAC some scope to submit a further Application to Vary the Horticulture Award as part of the Review process in 2012.

In the unlikely event that your enterprise employs employees who were not covered by any industrial instrument before 1 January 2010 but who are now covered by the Horticulture Award, the monetary components of the Horticulture Award will apply to these employees from 1 January 2010.

Helpful summaries

This extended edition of *Drip Feed* contains the following further details relating to the significant changes which commenced on 1 January 2010:

- **Attachment A** - a summary of the provisions of the **National Employment Standards**;
- **Attachment B** - a table outlining the **comparisons** of key provisions between the **previous awards that applied prior to 1 January 2010 and the Horticulture Award**, with some attached notes for clarification;
- **Attachment C** - a summary of the **key clauses in the Horticulture Award** which employers (in various stages of implementation) will need to adhere to.

The new Horticulture Award can be found [HERE](#).

Provisions of the Horticulture Award 2010 requiring clarification

An analysis of the Horticulture Award has revealed a number of questions relating to the interpretation and application of important provisions on hours of work and overtime. We must have clarification of those issues to enable us to provide accurate and clear advice on the new provisions and to assist our Horticulture employers with implementing this Award. To this end, we plan to write to the President of FWA, Justice Giudice, seeking clarification on four distinct matters relating to hours of work and overtime.

Those awaiting approval of an enterprise agreement (who do not already have an enterprise agreement in place)

Employers waiting for their enterprise agreement to be approved by FWA will need to implement the Horticulture Award (as set out above) until the enterprise agreement comes into operation (unless the employer already has a previous enterprise agreement in place).

Horticulture Industry Partnership Program

The initial stages of the Horticulture Program we hope will comprise an extensive information and awareness-raising program to alert individual enterprises (particularly for those impacted from 1 July 2010) to the likely impacts on their business of the new Horticulture Award. HAC has made a submission for funding a national roll-out of the education and awareness component to growers. This phase will be followed by an initial round of visits from FWO to answer questions, point out any non-compliance, clarify confusion, etc; and then the final phase will be actual Compliance (i.e. enforcement) activity.

An employer self-assessment audit against the provisions of the NES and the Horticulture Award has now been developed in conjunction with the Fair Work Ombudsman's Office. We envisage this will prove to be an extremely valuable tool for individual enterprises.

Other valuable sources of information are expected to be available from early in the new year (eg printed material and a DVD, a FWA Hotline for individual growers to ring with specific questions about their own business, on-line materials, etc). PIBs should receive requests from the FWO's Office at the end of January to assist with the distribution of this information to their constituents.

The 10 National Employment Standards

*The National Employment Standards (NES) are set out in the Fair Work Act 2009 (Cth) and replace the Australian Fair Pay and Conditions Standard. The NES comprise 10 minimum standards and commence operation from 1 January 2010, at the same time as the modern Horticulture Industry Award. The majority of these minimum entitlements are covered by the modern Award, either by expanded clauses, or by reference back to the NES. **The NES are minima and as such will override any lesser provision in an Award or workplace agreement.***

The NES should be made available, in an accessible place, to all employees, along with the relevant modern Award.

In summary, the NES involve the following minimum entitlements:

1. **Maximum weekly hours of work** – 38 hours per week, plus reasonable additional hours. Employees can refuse to work additional hours if these hours are not reasonable.
2. **Requests for flexible working arrangements** – allows parents or carers of children under school age or of a child under 18 with a disability, to request a change in working arrangements to assist with the child's care.
3. **Parental leave and related entitlements** – Employees with at least 12 months continuous service are entitled to up to 12 months unpaid parental leave plus a right to request an additional 12 months unpaid leave.
4. **Annual leave** – provides 4 weeks paid leave per year (5 weeks for shift workers) which accrues progressively. Casual staff are not eligible for paid annual leave.
5. **Personal / carer's leave and compassionate leave** – provides for 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casuals) as required. Casual staff are not eligible for paid personal/carer's leave.
6. **Community service leave** – An employee who undertakes a community service that meets the eligibility definition is entitled to unpaid absence from work. For jury service, employers must pay the first 10 days of jury duty with payment being the difference between what the employee was paid for jury duty and the employee's base rate of pay.
7. **Long service leave** – Existing entitlements, including under award and agreement derived terms, form part of the NES and continue to apply.
8. **Public holidays** – Christmas Day, Boxing Day, New Year's Day, Australia Day, Anzac Day, Queen's birthday, Good Friday and Easter Monday. A substitute public holiday under a state/territory law. Any other public holiday under a state or territory law including regional and show holidays. Employees are entitled to be absent from work on a public holiday in the place where they are based for work. However employers may make 'reasonable' requests for work on a public holiday.
9. **Notice of termination and redundancy pay** – up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay, both based on length of service. Exceptions include that notice and redundancy provisions do not apply to casuals, employees on a fixed-term contract, a seasonal employee, an employee serving a period of probation, or one terminated for serious misconduct, unless provided for specifically in an award or agreement.
10. **Provision of a Fair Work Information Statement** – employers must provide this statement to all new employees. It contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, rights of entry, transfer of business, and the respective roles of FWA and the Fair Work Ombudsman.

The National Employment Standards can be found on the HAC website:

http://www.hac.org.au/news_and_events/news/; OR

Fair Work Australia: <http://www.fairwork.gov.au/Pay-leave-and-conditions/Conditions-of-employment/Pages/National-Employment-Standards.aspx>



HORTICULTURE INDUSTRY AWARD 2010 – AWARDS COMPARISON

Provision	Horticulture Award	HIA 2000 (AWU)	Qld Fruit & Veg	N.T. AFPCS	NSW Hort Award
Base Rate	\$14.31	\$14.31	\$14.31	\$14.31	\$14.86 - \$16.94
Casual Loading	25%	25%	23%	20%	15%
Piecework Loading	15%	12.5%	20%	n/a	15%
Casual Piecework	Loadings compounded i.e. 15% payable on top of casual rate of 25%	?	20%	n/a	n/a
Shift Work Loading	15%	15% (A, B & C resp)	n/a	n/a	n/a
Annual Leave Loading	17.5%	17.5%	17.5%	n/a	17.5%
Ord Hours of Work	152 hrs / 4 wks 8 per day unless by majority agreement	SCHEDs A, B, C <i>On Blocks</i> : 8 hrs day <i>Packing House</i> : 8 hrs (Sched B&C can extend by majority agreement)	40 hours per week	38 per week	38 hours per week 10 hours per day
Span of Hours (non shift – worker)	Mon-Fri 6am-6pm unless by majority agreement	SCHED A: <i>On Blocks</i> : 40 hours/5 days or 5½ Dec-May <i>Packing House</i> : Mon-Fri 6am-6pm SCHED B & C: 152 hrs / 4 weeks Mon-Fri 6am-6pm	5 out of 7 days	n/a	Mon-Sun 5am-8pm Mon-Fri 7am-5pm for Bunch Top Detectors
Saturday Penalty	150% unless majority agmt as ordinary hours	SCHED A: 100% unless overtime SCHED B/C: 150% for 1 st 2 hours, then 200%	n/a	n/a	n/a
Sunday Penalty	200% (unless harvest period) unless majority agmt to treat as Sat	200%	n/a	n/a	n/a

Provision	Horticulture Award	HIA 2000 (AWU)	Qld Fruit & Veg	N.T. AFPCS	NSW Hort Award
Public Hol Rate	200% or TOIL	200% or TOIL [Casuals less 25% loading]	250% Min 4 hrs	n/a	250% Min 4 hrs
Overtime Rates	150% 200% on Sun Or TOIL [except during harvest where 1 st 5 hrs can be paid at 150% in certain circumstances]	150% for 1 st 2 hrs 200% for all hrs after	150% for 1 st 3 hrs 200% for all after	Ordinary rate	150% for 1 st 2 hrs 200% all hours after or TOIL at 'ee election
Leading Hand All	4 levels	4 levels	1 level	n/a	2 levels

Provision	Horticulture Award	NSW Mushroom Award	WA Fruit Growing & Packing Award	Tasmanian Farming & Fruit Growing Award
Base Rate	\$14.31	14.31	14.31	14.31
Casual Loading	25%	15%	20%	20%
Piecework Loading	15%	15%	20%	12.5% of Level 2 rate
Casual Piecework loading	Loadings compounded i.e. 15% payable on top of casual rate of 25%	15%	20%	20%
Shift Work Loading	15%	15%	n/a	n/a
Leave Loading	17.5%	17.5%	17.5%	17.5%
Ord Hours of Work	152 hrs / 4 wks 8 per day unless by majority agreement	38 week 5 or 5½ days	40 week 8 per day	38 week
Span of Hours	Mon-Fri 6am-6pm	Mon-Sun 5am-8pm	Picking: No span Packing: Mon-Fri 7am-5pm	Mon-Fri 6am-6pm
Saturday Penalty	150% Or majority agreement as ordinary hours	125%	Sat before noon: 150% Sat after noon: 200%	Perm: 150% for 1 st 3 hrs 200% all after Casuals: 100% for 1 st 4 hrs 150% after
Sunday Penalty	200% (unless harvest period); Or majority agreement to treat as Sat	150%	200%	200% Casuals: 150% for 1 st 4 hours, then 200%
Public Hol Rate	200% or TOIL	250%	250%	250%

Provision	Horticulture Award	NSW Mushroom Award	WA Fruit Growing & Packing Award	Tasmanian Farming & Fruit Growing Award
-----------	--------------------	--------------------	----------------------------------	---

Overtime Rates	150% 200% on Sun or TOIL [except during harvest where 1 st 5 hrs can be paid at 150% in certain circumstances]	150% for 1 st 2 hrs 200% for all after All overtime Sunday 200%	<i>Packing & Sorting:</i> 150% for 1 st 2 hrs 200% for all after Sat before noon 150% Sat after noon & Sunday 200% Picking – flat rates 40-52 hrs 150% Over 52 hrs 200%	<i>Perm:</i> 150% for 1 st 3 hrs 200% all after <i>Casual:</i> 100% for 1 st 4 hrs 150% all after
Class Levels	5	4	<i>Packing/Sorting:</i> 3 <i>Picking:</i> 2 n/a	Farm/Orchard Hand: 4 Mech/Plant Operator: 2 4 levels
Leading Hand All	4 levels	n/a		

Prepared by Donna Mogg
HR/IR Manager, Growcom
dmogg@growcom.com.au

Notes to comparison table

This briefing is not a comprehensive overview of all pre-existing provisions and is not intended to act as formal advice to employers. It is written at the request of the HAC Award Modernisation Task Force to provide a briefing to industry bodies to assess the way forward.

Overview

The Horticulture Award introduces a range of new provisions for the majority of growers around the country. These include an increase to the casual loading of between 2-10%, the double loading for casual pieceworkers of approximately 44%, reduced flexibility in when work can be performed, the introduction of a 200% Sunday penalty (other than during the harvest period) and a 5 level classification structure and 4 levels of leading hand allowance. The introduction of a shift worker category carries with it a 15% loading and will be new to the majority of growers.

Award clauses requiring clarification

However, there are a number of questions relating to the interpretation of this Award which require **urgent** attention if we are to assist growers with the new systems. We are currently considering these issues and the Taskforce intends to write to FWA seeking clarification. Specifically these relate to:

- The inclusion of clause 24.3 which sets out overtime to be paid for “packing house employees”; and similarly clause 24.4 which states that all employees required to work *overtime* on a Sunday will be paid for a minimum of 4 hours. Paragraph 25 of the AIRC Full Bench Decision of 23 December states “*We shall vary the modern award to give effect to the joint application [(ie NFF/AiG)] save that the loading in cl. 15.2 will be 15%.*” That joint application did not include clauses 24.3 or 24.4, so it is reasonable to assume that these clauses should not be there.
- There is also potential confusion around the wording of clause 24.2(d) in that it refers to “*the first eight hours*” of overtime including five hours on a Sunday at the 150% rate during the harvest period. However if a pay week runs from Monday to Sunday and those first 8 hours are performed before Sunday, it is unclear whether those 5 hours can still be paid at 150% - ie they may not be the *first* 8 hours of overtime in the week, but the *last* 8 hours of overtime during that pay week.
- There is also a need for clarification around the issue of overtime for casuals (other than casual pieceworkers). We will also be seeking clarification from FWA to eliminate the ambiguity surrounding this issue.

General Comments – comparison table

While the Monday to Friday 6am – 6pm span of hours is more restrictive in most cases, there is potential within the agreement to vary hours of work by majority agreement, or via the individual flexibility arrangement in the award, the latter of which *must* deliver an overall improvement to the individual’s conditions of employment.

Not surprisingly, growers who were previously covered by the HIA 2000 [AWU] are least impacted, particularly those who were covered by Schedules B or C. This includes growers in Tasmania, Victoria and some in NSW and South Australia. The new Horticulture Award largely reflects the provisions of the HIA 2000 [AWU] with some changes, and the AIRC Full Bench remained firm in its determination to use the HIA as the starting point for award modernisation for horticulture. However, the impacts will vary relevant to pre-existing conditions which are largely derived from state-based awards.

Clearly the hardest hit will be growers in the Northern Territory. NT growers have not previously been subject to an award, and have operated under the former Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS, providing a basic set of minimum standards including a 38 hour week, 10 days personal leave, a 20% casual loading, and 12 months unpaid parental leave, has now been replaced by the 10 NES and the Horticulture Award.

Northern Territory growers will face increases across the board, including: a 5% increase to the casual loading, a new 15% piecework loading, a compounded loading for casual pieceworkers, 150% and 200% rates for operating outside the span of hours as well as for hours over 38 per week, and the 200% Sunday penalty rate. The introduction of five classification levels and the 4 leading hand allowances will also add to wage costs for NT employers.

For Queensland growers, it is a case of swings and roundabouts, with a 2% increase to casual loadings, the 200% Sunday penalty, and the new classifications and allowances all adding to costs. A reduction in the piecework loading of 5% is significantly affected by a requirement to compound the casual and piecework loadings to casual pieceworkers. The introduction of the Monday to Friday span of hours is more restrictive than the previous open span, although overtime rates are capped at 150%, except for work on Sundays which is set at 200% (other than during the harvest period), and the rate for working on a public holiday drops from 250% to 200%. If casuals are excluded from overtime rates, this will go some way towards alleviating the cost issues.

Assuming WA eventually refers its IR powers to the Commonwealth, Western Australian growers will also face a 5% hike in their casual loading and a more restrictive span of hours.

Growers operating under the Tasmanian Farming and Fruit Growing Award face an increase to their casual and piecework loadings and NSW Mushroom growers a 10% increase to their casual loading, a more restrictive span of hours and increased weekend penalty rates.

Higher wage rates with the new five level classification structure will affect NT, Qld, NSW Mushroom, WA, and Tasmanian growers where levels vary from one to four, and the four leading hand allowances will also add to wage costs in most cases.

*Prepared by Donna Mogg
HR/IR Manager
Growcom 6/1/10*

Horticulture Award 2010 – KEY PROVISIONS

COMMENCEMENT [Clause 2]

The Award commenced on 1 January 2010 with some elements not due to take effect until 1 July 2010 – these elements are mainly related to increases/decreases to wages and piecework rates, and loadings and penalties.

COVERAGE [Clause 4]

As an industry Award, the Horticulture Award covers employers and their employees engaged in work as defined by the classifications in Schedule B. It does not cover wine, silviculture, sugar, cotton, plant nurseries, or broadacre farming. With mixed farming businesses, the appropriate Award is the one which applies best to the type of work being performed.

NATIONAL EMPLOYMENT STANDARDS [Clause 6]

The NES are the 10 minimum conditions of employment that must be met by all employers in the federal system. These apply as default provisions, so even if an agreement contains a lesser provision, the NES will prevail.

AWARD FLEXIBILITY [Clause 7]

This is a new provision which allows the employer and an individual employee to agree to vary the application of certain Award provisions to meet individual needs. A flexibility arrangement is restricted to **five** listed items (working days/hours, overtime rates, penalty rates, allowances, and leave loading).

Any agreement must be genuinely made, must be in writing and state each term being varied, how the term is varied and how the agreement results in the employee being **better off overall**. Flexibility arrangements can be terminated by either employer or employee with 4 weeks' notice or as agreed.

TYPES OF EMPLOYMENT, TERMINATION & REDUNDANCY [Clause 10]

Employees will be employed as either:

- **Fulltime**, working an average of 38 hours per week.
- **Part-time**, working less than 38 hours per week. The employer must notify the employee of their ordinary hours of work (days and start/finish times). Overtime is payable for hours in excess of those stated ordinary hours.
- **Casual**, ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. A casual loading of 25% is paid in lieu of annual leave, personal leave, notice, redundancy benefits and "other entitlements". The question of overtime rates for casuals is one awaiting clarification.

JOB CLASSIFICATIONS, WAGES & HIGHER DUTIES [Clauses 13/14/18 and Schedule B]

Sets out job descriptors and typical duties for Levels 1 to 5:

Classification	Min Weekly	Min Hourly
Level 1:	543.90	14.31
Level 2:	560.50	14.75
Level 3:	577.20	15.19
Level 4:	600.10	15.79
Level 5:	637.60	16.78

Higher Duties: Employees engaged at a higher level for more than 2 hours during one day or shift must be paid the higher minimum wage for all time worked that day or shift. If 2 hours or less is worked, the higher rate must be paid for those hours.

PIECEWORKERS [Clause 15]

This provision sets the piecework loading for permanent, full-time or part-time employees at 15%. Casual pieceworkers are to be paid both piecework loading and casual loading – approximately 44% for the “average competent employee

This rate is paid instead of the minimum hourly wage rates – ie the Award states “*nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time weekly or hourly wage.*”

LEADING HAND ALLOWANCE [Clause 17]

In charge of	% of standard rate <u>per week</u> ('standard rate' is Level 2 hourly rate)	
2 – 6 employees	115%	\$16.96 per week
7 – 10 employees	134%	\$19.77
11 – 20 employees	191%	\$28.17
More than 20	240%	\$35.40

ORDINARY HOURS OF WORK, BREAKS [Clause 22/23/24]

Hours of Work

Full-time: Maximum of 152 hours over 4 weeks
 Monday to Friday (can be Monday to Saturday by majority agreement)
 6.00am to 6.00pm span (can be varied by majority agreement)
 8 hours max per day except by majority agreement up to 12 per day

Part-time: As above, plus all hours in excess of set hours are overtime

Shiftworkers: Afternoon Shift: finishes after 6.00pm and at or before midnight
Night Shift: finishes after midnight or at or before 8.00am
 Cannot exceed 8 hours without payment of overtime
 Are paid a 15% loading whilst on afternoon or night shifts

OVERTIME [Clause 24]

- Provides for Time Off In Lieu (TOIL) on an hour for hour basis
- Employees can elect to be paid at overtime rates provided this election is made known at time overtime is offered
- Overtime rates Monday to Saturday (unless agreed as ordinary hours) are 150%
- Overtime Sunday rate 200% (other than during harvest period)
- Majority of employees rostered to work Saturday can elect to swap for Sunday and be paid Saturday rate
- During harvest period (as defined) first 8 hours of overtime per week can include 5 Sunday hours at 150%
- All Sunday work after the 8th overtime hour in the week or over 5 hours on Sunday payable at 200%
- All employees required to work Sunday paid a minimum of 3 hours
- Meal Allowance payable if more than 2 hours overtime worked without notification - \$9.65

The following provisions require clarification from the AIRC:

- Packing House employees – 150% for first 2 hours, then 200% after (this appears to be a hangover from the April draft – awaiting clarification).

- All employees required to work Sunday overtime paid minimum of 4 hours (this appears to be a hangover from the April draft – awaiting clarification).

Schedule A: TRANSITIONAL PROVISIONS

Provides for increases/decreases to monetary elements to apply **from 1 July 2010**, phased in at the rate of 20% per year for up to 5 years. Includes increase or decrease to wages (classification structure), loadings (casual, piecework, shiftwork), penalties (Sunday, public holiday rates) relevant to prior standard.

Provision of Fair Work Information Statement

Employers must provide this statement to all new employees. It contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, rights of entry, transfer of business, and the respective roles of FWA and the Fair Work Ombudsman.