THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

The Hon Justice GM Giudice
President
Australian Industrial Relations Commission
GPO Box 1994
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Dear President

I am writing in regard to a number of issues that have arisen in the course of the award modernisation process.

I have received representations from several stakeholders relating to a number of awards dealt with by Australian Industrial Relations Commission. Following these representations, I asked my Department to examine these concerns and provide me with advice on any implications regarding the Government's policy relating to award modernisation.

My examination of this information has led me to amend my award modernisation request as attached. I also take this opportunity to provide further submissions to the Commission regarding the Government's award modernisation policy as it relates to a number of issues.

Horticulture

I have received representations from organisations representing employers in the horticulture industry regarding the piece rate, hours of work and related provisions in the Horticulture Industry Award 2010.

I note that the majority of federal awards and NAPSAs in the horticulture sector have long provided for piece rates for casual employees, rather than the minimum wage and incentive payment system as included in the modern award made by the Commission.

Representatives of the industry have advised that they are concerned that this change would have a major impact upon the composition of the seasonal casual workforce that works in harvest periods. They have said that the change would make it unviable for the industry to employ some people (such as inexperienced young people, older people and people whose position in the labour force is tenuous) who currently engage in occasional casual work in the sector. The industry representatives also argued that this change would result in additional complexity with regard to supervision and record keeping.

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A further concern raised by the industry concerns the hours of work and related provisions for picking and packing of produce included in the award. A majority of the federal awards and NAPSAs applying in the industry currently allow for ordinary hours of work to be worked in a cycle, such as 152 hours over a four week period or 114 hours in a work cycle not exceeding 15 days in a 21 day period. The industry representatives have argued that this flexibility is needed given the seasonal nature of the industry (with more intensive work periods at harvest time) and because of restrictions on when work can be performed that result from weather conditions.

A further issue has been raised by the industry concerning the need to provide for additional flexibility on the hours that can be worked as ordinary hours in relation to those parts of the industry that have perishable produce, for example, produce that needs to be picked in the evening given its fragile nature and the climate of the region in which it is grown. The industry representatives have suggested, for example, that it may be appropriate to provide for a shift arrangement to allow for picking into the evening for some parts of the industry.

I have considered these issues in light of the legislative scheme for modern awards and the factors set out in my award modernisation request. As a result, I have varied my award modernisation request to:

- request that the Commission 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;

- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting hours of work provisions for employees who pick and pack such produce; and

- provide for roster arrangements and working hours in the horticulture industry that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

Call centres

I have received representations from unions representing employees in the clerical and banking and finance industries concerning provisions of the Clerks - Private Sector Award 2010 and the Banking, Finance and Insurance Award 2010 that apply to employees performing work that involves receiving calls, using call centre technology and entering and retrieving data.

In making of the stage 2 awards, the Commission has imported into the Clerks - Private Sector Award 2010 and the Banking, Finance and Insurance Award 2010 hours of work and penalty rate provisions that are the same as those that apply to employees covered by the Contract Call Centre Award 2010.

I am advised that the Contract Call Centre Award 2010 is based on a federal award developed in the late 1990s in response to the growth of outsourcing of call centre work to businesses performing call centre work for multiple clients. The earlier call centre

award contained specific flexibilities concerning hours of work that recognised the diverse range of industries from which such work is drawn including industries which operate seven days a week.

However, employees in the clerical and banking and finance industries performing work that involves receiving calls, using call centre technology and entering and retrieving data have always been paid under the same award as other workers in the relevant industry.

The decision of the Commission to import the hours of work and penalty rate provisions from the Contract Call Centres Award and apply them to employees in the clerical and banking and finance industries would substantially reduce the existing safety net applying to these employees.

I am concerned that this decision is not consistent with the terms of my award modernisation request, in particular, the objective that award modernisation is not intended to disadvantage employees.

I am therefore amending my award modernisation request to provide that where a modern award applies to employees performing the work of receiving calls, using call centre technology and entering and retrieving data, the Commission should establish working hours and penalty rates arrangements that are substantially based upon those that presently apply to those employees within the industry in which they work.

Retail and Pharmacy

With regard to the retail and pharmacy industries, I have received a number of representations regarding penalty rate and hours of work provisions in these industries.

I note that in relation to Sunday penalty rates for the retail sector, the Commission has chosen a standard for the modern award of 200 per cent, having regard to the range of provisions that presently exist in the States. I note that Queensland (for some parts of the industry), New South Wales and the ACT currently have a 150 per cent penalty rate, while South Australia has 160 per cent penalty rate, some parts of the Queensland retail industry have a 175 per cent penalty rate and Victoria, Western Australia and Tasmania have a 200 per cent penalty rate.

I note that the Commission has had to consider the question of Sunday penalty rates in a range of other industries that operate seven days per week and, based on the relevant history of state and federal award coverage, has determined Sunday penalty rates of either 150, 175 or 200 per cent, with the significant majority of such awards including a penalty rate of 200 per cent.

I note that for those states that currently observe a 150 per cent penalty rate, the shift to a 200 per cent penalty rate on a major trading day will be a significant change. I believe it is imperative that this change is carefully and gradually phased in to ensure that its impact is reduced, particularly in light of forecast economic conditions.

Accordingly, I strongly urge the Commission to utilise the full 5 year period that is available to it to effect the transition from the Sunday penalty rates that currently apply

in some states to the modern award standard. I also note the previous submissions of the Australian Government that noted the range of approaches available to the Commission when setting transitional arrangements.

A further issue that has been raised by employer representatives for the retail and pharmacy industries is the provision by the Commission of relevant overtime penalty rates (that is 150 per cent for the first two or three hours and 200 per cent thereafter) where a part-time employee works hours in excess of the hours he or she has contracted to work.

I am concerned that this provision could operate in such a way that an employer would be reluctant to offer additional hours of work to a part-time employee if trade increased, or discourage employers from engaging employees as part-time employees rather than as casuals. At the same time, as is provided for in the National Employment Standards (NES), employees who are contracted to work only a certain number of hours each week should be entitled to reasonably refuse to work additional hours. I note in this regard that a modern award cannot exclude the NES or any provision of the NES but may provide ancillary or incidental detail in relation to the operation of an entitlement under the NES.

It has become apparent that there are different views as between the Shop, Distributive and Allied Employees Union and some employer organisations about the practical operation of this provision and that the industry would benefit from some clarification.

Having regard to all of the above, I am of the view that it would be desirable for the Commission to re-examine these provisions with the assistance of the industry stakeholders in both the Pharmacy Award and the General Retail Award and awards in other industries the Commission views as relevant.

Accordingly, I have amended my award modernisation request to ask the Commission to ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and other industries the Commission views as relevant do not operate to discourage employers from:

- offering additional hours of work to part-time employees; and
- employing part-time employees rather than casual employees.

Transition arrangements – 'outlier' states

I note that in all of its award modernisation activities, the Commission has endeavoured to strike a fair balance by selecting the new standard to apply in the modern award standard from within the range of conditions that presently apply in the various state instruments.

I also note the Australian Government's submissions of 29 May 2009 and 1 July 2009 urging the Commission to use the full 5 year transitional period available to it to transition from a lower state award to any higher standard that may result from a modern award and to have regard to funding arrangements in particular sectors when determining transitional arrangements.

I note that in a small number of cases, the relevant state based NAPSA provides for terms and conditions that are markedly different to the conditions applying in the rest of the nation, that is, the state is effectively an 'outlier'.

I wish to draw the Commission's attention to three such cases where a state NAPSA presently provides conditions that are markedly lower than those presently applying elsewhere in the country and lower than those that will apply in the new modern award:

- the Queensland fast food industry;
- the South Australian aged care industry; and
- the Western Australian hotel industry.

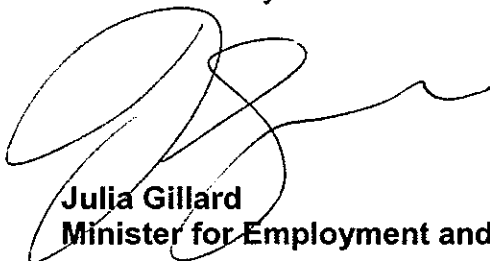
In these cases, and in other similar cases that may arise, I strongly urge the Commission to provide for transitional provisions that utilise the full five year period that is available to it to ensure an orderly phase in of the new modern award standard and that reduce the impact upon employers.

In conclusion, I note that to date the Australian Industrial Relations Commission has published 44 modern awards in stages 1 and 2 and a further 50 exposure drafts of awards in stage 3. With a further 30 industries scheduled for stage 4, the Commission is on track to deliver the important national reform of award modernisation to commence on 1 January 2010.

At the conclusion of the process, more than 2,500 state and federal instruments, many of which are outmoded, arcane, overlapping or redundant will be reduced to approximately 130 modern awards. The new modern awards will operate nationally and will be easy to find, read and apply and greatly benefit employers and employees across the nation, particularly those who operate across state borders.

I am aware that members of the Commission, unions and employer organisations are working tirelessly to deliver this reform and I once again thank each of them for those efforts.

Yours sincerely



Julia Gillard
Minister for Employment and Workplace Relations