

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Supplementary Budget Estimates 2010-2011**

Agency - Fair Work Ombudsman

DEEWR Question No.EW0558_11

Senator Abetz asked on 20/10/2010, Hansard page 26.

Question

OVERTIME OF HORTICULTURE INDUSTRY AWARD.

Senator ABETZ—I am sure you will be just as obliging to small businesses that make errors and have difficulty in responding and coming to a position in relation to their requirements under the Fair Work Act. As I understand it, legal opinion in relation to this matter of overtime under the Horticulture Industry Award was obtained. Mr Wilson—I cannot recall specifically whether it was, but it would not be unusual for it to be obtained. Senator ABETZ—It could well have been obtained and I believe that that information could have just sat somewhere without being forwarded to the federation and neither was it reflected on your website. So you received some legal advice which led to your reconsideration of the entitlement to overtime of casual workers. How long did it take from receipt to the website being changed and the National Farmers Federation being told about that legal opinion? Mr Wilson—That one we need to consider for taking on notice. I am uncomfortable responding to the question because it invites a waiver of privilege, ultimately. I am apprehensive about that. Senator ABETZ—I am not asking for the legal advice. What I am asking is: when did you receive the legal advice, which I understand was the precipitator for changing the information on your website? Mr Wilson—I am not sure that it was the precipitator, but certainly we will take those issues on notice and provide a response. Senator ABETZ—Let me quickly backtrack. Let us be quite clear on this. I understand that the Farmers Federation was advised that legal advice was received early this year as a consequence of correspondence of 2 March that casuals were entitled to overtime but that information was never forwarded nor was it reflected in your own website material. That is in a letter dated 29 July 2010. Mr Campbell—As to the second thing, we do not have that information here right now, but we will take those issues on notice.

Answer

The Fair Work Ombudsman has provided the following response:

On 2 March 2010, the National Farmers Federation (NFF) wrote to the Fair Work Ombudsman stating the NFF had become aware of differing views relating to the interpretation of the *Horticulture Award 2010* in respect of the operation of the hours of work and overtime clauses for casuals. The NFF further advised that they were seeking to resolve this matter through discussion between the parties of the Horticulture Shared Compliance Program partnership process and also to raise the

prospect of whether there was a need to file an application to vary the award to resolve any uncertainty that may have arisen as a consequence of the decision of the Full Bench on 23 December 2009. Copies of this letter were sent to Australian Industry Group (AiG), Horticulture Australia Council (HAC), and Australian Workers Union (AWU).

On 12 March 2010, the Fair Work Ombudsman provided an email response to the NFF, AiG and HAC. The email stated that the Fair Work Ombudsman agreed that the interpretation was ambiguous and that this was the response Fair Work Ombudsman Contact Centre staff and Fair Work Inspectors would make until the matter was resolved. Fair Work Ombudsman recommended that the NFF make an application to Fair Work Australia (FWA) for clarification. The Fair Work Ombudsman further advised that it was endeavoring to have a conversation with the AWU. The AWU advised the Fair Work Ombudsman that they did not agree with the position put forward by the NFF and agreed that it would be a matter for FWA to determine.

On 29 July 2010, the NFF wrote to the Fair Work Ombudsman expressing their concerns that the letter of 2 March 2010 was not formally responded to. In addition, this letter raised NFF concerns that various operational areas within Fair Work Ombudsman were providing inconsistent advice on whether casuals were entitled to overtime under the Horticulture Award 2010.

Following the NFF's correspondence on 29 July 2010 internal legal advice was sought on the issue of whether casuals were entitled to overtime under the Award. The legal advice was provided on 30 July 2010. On 2 August 2010, a letter was sent to NFF and AWU confirming that it was Fair Work Ombudsman's preferred view that casuals were not entitled to overtime under the award.

The Fair Work Ombudsman's website has been updated to make it clear that casual employees are not entitled to overtime under the *Horticulture Award 2010*.

The Fair Work Ombudsman endeavours to provide timely responses to the correspondence it receives and acknowledges that on this occasion, the response time was significant.