

**4 yearly review of modern awards
Award stage – Pastoral Award 2010
Matter No. AM2014/239**

SUBMISSION IN REPLY

NATIONAL FARMERS' FEDERATION

Date: 28 August 2017

Introduction

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. On 24 July 2017, the Fair Work Commission (**the Commission**) made Directions requiring interested parties to file written submissions in chief by 14 August 2017, and submissions in reply by 28 August 2017 in respect of the 4 yearly review of the Pastoral Award 2010 (**the Pastoral Award**) and the Exposure Draft Pastoral Award 2016 (**the Exposure Draft**).
3. On 15 August 2017 (a day late with the Commission's leave) the NFF filed submission (**Submission in Chief**) in response to that direction to file submission in chief.
4. These submissions responds to that direction to file submission in reply .

AWU Submissions of 15.08.17 — cl 17.2(c) of the Pastoral Award

5. The AWU states that it is "confusing and seemingly illogical" that an employee who is not given notice of the requirement to work overtime needs to work ½ hour more overtime before he/she is granted a meal allowance than an employee who is given notice. In the NFF's submission there is nothing illogical in this arrangement: where the employer was not aware that overtime would be required (and therefore did not give notice of the requirement) it follows that the employer does not know and cannot plan for the extent of the requirement. In those circumstances the award allows the employer a small amount of flexibility — hence a slightly longer period of overtime — before the requirement to provide a meal (entitlement) is enlivened. For

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this reason, contrary to the AWU's submissions¹ there is no reason to modify this approach.

6. The AWU also submits that the Pastoral Award should be read to, in effect, incorporate requirements of two pre-modernisation awards covering employers and employees in the nursery industry, to the effect that an employee is granted a meal or allowance after two and a further four hours of overtime.
7. In the NFFs' submission the Commission should not accept this approach.
 - a. The AWU has identified nothing in the text of the Pastoral Award which would allow such an approach. The language which the AWU cites was not (expressly) adopted by either of the modern Pastoral Award or the *Nursery Award 2010*. Furthermore, the AWU cites nothing which may imply that the Commission intended for those pre-industrial awards to affect the interpretation or operation of the Pastoral Award
 - b. Furthermore, at least one of the six pre-modernisation nursery awards referred to in the AWU's submissions², the *Horticultural (Nursery) Industry Award No. 30 of 1980 (Western Australia)*³, appears to be inconsistent with the AWU's contention⁴. That nursery award provides that:
 - i. Ordinary hours of duty are, roughly, 8 hours per day;⁵
 - ii. An employee must not be required to work for more than five hours without a meal break;⁶
 - iii. A meal allowance is granted after working 2 hours of overtime; i.e. at the 10 hour mark;⁷ and
 - iv. A further meal allowance is granted where "the amount of overtime required to be worked necessitates a second or subsequent meal...".⁸

In short, the Award contemplates a meal break and meal/allowance once every five hours of work: during the first five "ordinary hours"; again at 10 hours (i.e. after two hours of overtime); and — following cl 11(1)(b) — again after a further five hours at the 15 hour mark.

¹ At [4] and [13] of the AWU's submissions in AM2014/239 dated 15 August 2017

² And cited by the Full Bench in [2009] AIRCFB 896 at [5].

³ AN160158.

⁴ And consistent with the NFF's submission in the alternative regarding the operation of clause 17.2(c); see [11] of the NFF Submissions in AM2014/239 dated 15 August 2017.

⁵ Cl 10.1 and 2

⁶ cl 11(1)(b)

⁷ cl 11(3)(a)

⁸ cl 11(3)(b)

- c. That's said, as was observed during the award modernisation hearings⁹, the nursery industry and the pastoral industries are quite different. It follows that the pastoral sector and nursery sector may have very different labour requirements and therefore very different terms and conditions in their awards. It is therefore of little assistance to consider the provisions of those pre-modernisation awards covering employment in nurseries.
- d. Indeed, it may also be noted that other, more relevant, pre-modernisation awards provide for the employee to be granted a meal allowance after two and then a further five hours of overtime worked. For example, the *Pig Breeding and Raising Award - State 2003*¹⁰ provided at clause 5.3.2(a)

Employees required to continue working for more than 2 hours after their ordinary ceasing time shall be provided by the employer with a reasonable meal or paid a meal allowance of \$9.60.

If the overtime continues for a further 5 hours beyond the second hour worked, a further meal shall be provided or meal allowance paid after each additional 5 hours worked.

- e. That said, it is the NFF's submission that regard to the pre-modernisation Nursery Award, or indeed any pre-modernisation award, is of very little assistance on the question of the operation of cl 17(2)(c)(ii). Provisions in very similar language to cl 17.2(c)(ii) pre-date the *Pastoral Award 2010* by many decades. For example, the Industrial Agreement made on 30 May 1946 between the South Australian Railways Commission and the AWU (Adelaide Branch) provides at cl. 3(1)(B) that:

Any employee required to work overtime for more than two hours after his ordinary ceasing time without having been notified before leaving his work on the previous day that he would be required to work overtime, shall be provided free of cost with a suitable meal, and, if the work extends into a second meal break, another meal: Provided that in the event of the meal not being supplied the employee will be entitled to a payment of 2s. for each such meal not supplied.¹¹

Notably, that Labour Agreement only expressly provided for the employee to be allowed one meal break per day.¹² It did not specify when the second meal break will be provided.¹³

⁹ Transcript of Proceedings, 27 November 2008, at pargrpahs [803] – [804].

¹⁰ AN140210

¹¹ Emphasis added. Accessed here http://www.austlii.edu.au/au/other/sa_gazette/1946/25.pdf (on 23 August 2017).

¹² At clause 4(c).

¹³ Although, s. 359 of the legislation enabling the Industrial Agreement, the *Industrial Code 1920* (SA), provides that at least in respect of factory workers: "No employee shall, except where the operation of this section is suspended, employ continuously in any factory for more

ABI Submission of 14 August 2017 — clause 17.2(c) of the Pastoral Award

8. Save as outlined below, the NFF makes no comment in respect of the submissions made by ABI and NSW Business Chamber (**the ABI Submissions**) regarding clause 17.2(c) of the Pastoral Award or clause 10.2 of the Exposure Draft.
9. While the NFF reiterates and does not withdraw its submissions at [23] of its Submission in Chief, if the Commission is minded to grant an additional meal break during overtime (i.e. in addition to the meal break after 2 hours of overtime) then the NFF would support the submission at paragraphs 20 of the ABI Submissions and the proposed redraft of clause 15.1(a).¹⁴
10. The NFF agrees with and adopts paragraph 25 of the ABI Submission. The NFF further notes that the amount of the meal allowance enables the employee to purchase a full (albeit inexpensive) meal.¹⁵ It would be illogical for the Award to provide for an employee to have a full meal — i.e. breakfast, lunch or dinner— once every two hours, particularly given that during “ordinary work time” the award only contemplates one meal in five hours.

AWU Submission of 15 August 2017 — cl 36.5, 36.10, 36.11 of the Pastoral Award

11. The AWU submits that the Commission should redraft clause 36 to mirror its proposed draft 10.2(d) of the Exposure Draft, so that an employee is granted a meal allowance at 1 ½ hours of overtime and then at each additional 4 hours of overtime.
12. There is very little substance to the AWU’s submission, save for observing that clauses 36.5 and 36.10 of the Pastoral Award are seemingly inconsistent and that the exposure draft resolves this conflict by rejecting 36.5.
13. The NFF’s notes that the AWU’s proposal will:
 - a. Grant the employee an entitlement where notice of the requirement to work overtime was provided; and
 - b. Grant more than one overtime meal entitlement.
14. In the NFF’s submission this represents a significant departure from the position established by the Pastoral Award.

than five hours, without an interval of at least half an hour for a meal, any woman, young persons or child.” Accessed here: http://www.austlii.edu.au/au/legis/sa/num_act/ica1453o1920207/ (on 23 August 2017)

¹⁴ Clause 7.2(a) of the Exposure Draft

¹⁵ The amount of \$13.07 will purchase a complete meal at “take-away and fast food” prices (as clause 17.1(b)) suggests.

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- a. The effect of clause 36.11 cannot simply be disregarded; it must have ‘work to do’ and that ‘work’ is, unambiguously, to provide that “an employee must not be paid a meal allowance unless the overtime is cancelled.”
 - b. There is no express entitlement to more than one meal/allowance.
 - i. It may be that such an entitlement can be inferred from the language of clause 36.5: “any subsequent meals”.
 - ii. However, the better view is that this language merely creates the potential for the payment of a meal/allowance.
 - iii. That potential is not realized unless and until the employee has an actual entitlement to a “subsequent meal” established elsewhere in the Award.
15. It may also be noted that the AWU’s position — in simply replicating the clause found in the general provisions of the Award — would render the overtime meal allowance provision in the “Part 5 — Pig Breeding and Raising” of the Pastoral Award wholly redundant and unnecessary. That would be a significant departure from the historical position, which accepts that labour needs of piggeries are different to those of other sectors, even sectors within the pastoral industry, and therefore employees and employees in the piggery sector should be covered by different award terms. Indeed, it appears that Part 5 was adopted from the *Pig Breeding and Raising (AWU) Award 1999*¹⁶ (the **Pig Breeding Award 1999**) without significant amendment.¹⁷

ABI Submission of 14 August 2017 — cl 36.5, 36.10, 36.11 of the Pastoral Award

16. As to the ABI Submissions at paragraph [30], the NFF’s notes that the requirement to provide the first meal allowance, at 2 hours, does not coincide with the requirement to provide a crib break at 4 hours. As such, accepting the ABI Submission at paragraph [30] will create a logical inconsistency.¹⁸
17. The NFF agree with the ABI Submissions at paragraphs 32 to 34.

NFF Reaffirms Submission in Chief

18. It follows, that the NFF reaffirms its Submission in Chief.

¹⁶ AP793680

¹⁷ Part 5 of the Pastoral Award in effect replicates sections 9 to 15 of the Pig Breeding Award 1999. In particular, clause 36.5 of the Pastoral Award corresponds with sections 10.4.3(a) and 14.5 of the Pig Breeding Award 1999; clause 36.6 of the Pastoral Award with clauses 14.6 of Pig Breeding Award 1999; clause 36.10 of the Pastoral Award with clauses 10.4.36(b) and 14.10 of Pig Breeding Award 1999, and clause 36.11 of the Pastoral Award with cl 14.11 of Pig Breeding Award 1999. Clause 36.5 is also found at cl 18 of the *Breeding and Raising Pigs, &c., Employees (State) Award (NSW)* (AN120084), while clause 36.6 of the Pastoral Awards is at cl 18 of that NSW Award.

¹⁸ Albeit one which confirms that an employee is allowed a paid break from work despite the fact (in the NFF’s submissions) he/she has no entitlement to a further meal break or allowance.

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19. The effect of clause 17.2(c) is:
 - a. Firstly, to grant the employee a meal or allowance if the he/she works for 2 hours (or more) overtime after ceasing ordinary hours; and
 - b. Secondly, if the overtime extends into the subsequent day or, in the alternative, if the employee works for a further 5 hours.
20. Clause 10.2(d)(ii) of the Exposure Draft should apply in the same circumstances as clause 17.2(c)(ii) of the Pastoral Award.
21. While seemingly inconsistent, clauses 36.5, 36.10, and 36.11 the Pastoral Award are not irreconcilable and can apply so that
 - a. There is no entitlement to a meal or allowance where adequate notice was provided by the employer; and
 - b. Where no/inadequate notice was provided, the employee is entitled to a meal or allowance if he/she works overtime of more than 2 hours “after working ordinary hours on Monday to Friday”; and
22. Clause 32.7(b) of the Exposure Draft should apply in the same way and circumstances.

Alternative Approach

23. An alternative approach may be to exclude payment of an overtime meal allowance where an employee live in reasonable proximity to work and could reasonably return home for a meal. Attachment D to the Full Bench’s decision of 6 July 2017 summarized the overtime meal allowance provisions in Modern Awards. Twenty one of those Awards provide that an allowance is not granted where the employee could reasonably return home for a meal. It is submitted that, given the remoteness of the working locations where the award usually applies — or that the frequently employer supplies ‘on-site’ accommodation — in many cases it will be more convenient for the employee to return home than to find a retail food outlet. It is submitted that the award should accommodate this practice.

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