

Fair Work Commission
Level 10, Terrace Tower, 80 William Street
EAST SYDNEY NSW 2011
Via email: AMOD@fwc.gov.au

15 August 2017

Re: AM2014/239 Pastoral Award 2010

BACKGROUND

1. The President, Justice Ross, issued a Statement on 24 July 2017 that included directions for interested parties to file written submissions in relation to the operation of particular clauses in both the *Pastoral Award 2010* ('Pastoral Award') and the Exposure Draft for the Pastoral Award ('Exposure Draft').
2. The Australian Workers' Union (AWU) make the following submissions in accordance with these directions.

DRAFTING AND TECHNICAL ISSUES

General Employment Conditions – overtime meal allowance

3. The overtime meal allowance provided in clause 17.2(c) of the Pastoral Award and clause 10.2(d) of the Exposure Draft is confusing and lacks clarity.
4. Firstly, it is confusing and seemingly illogical that an employee who has not been given the advantage of preparing for overtime must complete more overtime before being eligible for a meal allowance than an employee who has been given the advantage of advance notice.
5. Secondly, although there are two qualifying periods stated for the first meal break dependent on notice, it is not stipulated when a 'subsequent' or 'second'

meal break is to take place.

6. The AWU submits that there is no guidance in these clauses or the remainder of the Pastoral Award on when the second meal allowance provided in these clauses becomes payable.
7. Clause 15 of the Pastoral Award (clause 7.2 of the Exposure Draft) in particular provides no useful guidance. This clause pertains to ordinary hours of work and refers to only one meal break per day. Being that overtime necessarily falls outside of ordinary hours of work and parties have been directed to make submissions on when the second overtime meal allowance becomes payable (which is the third meal break of the day), clause 15 has no work to do or insight to offer in the current issue.
8. The AWU attempted to locate the origin of clause 17.2(c) of the Pastoral Award in the pre-modern pastoral instruments and failed. However, clause 17.2(c) of the Pastoral Award is found – almost verbatim – at 20.1(b) of the *Nursery Award 2010* ('Nursery Award'). Similarly, there is no guidance in this award on when the second meal allowance becomes payable – like the Pastoral Award the breaks clause is restricted to ordinary hours and one meal break per day. However, unlike the Pastoral Award, the pre-modern instruments for the Nursery Award are capable of providing some assistance regarding the period of time before the second meal allowance becomes payable.
9. In a 2009 Decision, the full bench of the Australian Industrial Relations Commission (AIRC) listed the award-based transitional instruments relevant to the Nursery Award¹.
10. Of the six instruments listed, five contain a provision for an overtime meal allowance. Of these, two prescribe a time for when the second meal allowance is payable, and for both it is four hours after the first meal break². The other three do not specify a period of time before in between the first and second meal.
11. We note that a second overtime meal break occurring after a further four hours of overtime is generally consistent with a number of other awards according to the contents of 'Attachment D' to the Group 3 Full Bench Decision of 6 July

¹ [2009] AIRCFB 896 at [5].

² *Nurseries Employees (State) Award* (New South Wales) cl.18, *Nursery Award – State 2003* (Queensland) cl.6.4.2.

2017³.

12. The AWU submits that in light of the above, it is likely that the second allowance was intended to become payable four hours after the first.

13. Additionally, The AWU submits that the length of overtime worked in order for an employee to be eligible for this allowance should be uniform for both planned and unplanned overtime. In the alternative, The AWU submits that the shorter length of time – one and a half hours – should apply to those employees who are required to work unplanned overtime. The longer length of time – two hours – should apply to those employees who have been given advance notice of the overtime. We suggest the following amendment to clause 10.2(d) of the Exposure Draft:

(d) Overtime meal allowance

~~(i) — If An employee is required to work overtime after working ordinary hours (except where the period of overtime is less than one and a half hours);~~ **is entitled to a meal allowance of \$13.07 or a meal supplied by the employer at the completion of one and a half hours of overtime and every four hours thereafter.**

- ~~• the employee will be paid \$13.07 for the first and any subsequent meals; or~~
- ~~• the employer will supply the employee with a meal.~~

~~(ii) — An employee required to work overtime for more than two hours after the employee's ordinary finishing time without having been notified before leaving work on the previous day that they will be required to work overtime:~~

- ~~• will be provided with a suitable meal free of cost; and~~
- ~~• if the work extends into a second meal break, another meal; or~~
- ~~• in the event of the meal not being supplied the employee is entitled to a payment of \$13.07 for each meal not supplied.~~

Pig Breeding and Raising – overtime meal allowance

14. The same issues stated above affect the overtime meal allowance provided in clauses 36.5 and 36.10 of the Pastoral Award, plus an additional issue – the

³ [2017] FWCFB 3433, Attachment D “Overtime meal allowance provisions”

clauses have the potential to overlap in their application.

15. The AWU notes that these two clauses purport to cover two separate situations. However, the clauses overlap in their application and create confusion. Clause 36.5 pertains to (assumedly all) overtime after ordinary hours Monday to Friday, and clause 36.10 pertains to (assumedly all) unplanned overtime. It is unclear which of the two clauses should apply to unplanned overtime on Monday to Friday.
16. The Exposure Draft has attempted to reconcile the conflicting provisions of the Pastoral Award and simplify the overtime meal allowance clause. However, this process has caused the content of clause 36.5 of the Pastoral Award to be excluded from the Exposure Draft. This is seemingly because the entitlement in clause 36.5 is contradictory to the entitlement in clause 36.11, which has been included in the Exposure Draft.
17. This exclusion has the effect of restricting the overtime meal allowance to being payable only for unplanned overtime, or if overtime has been planned and subsequently cancelled. Additionally, it restricts the allowance to being payable only once – there is no provision for a subsequent meal allowance in clause 32.7 of the Exposure Draft. The Pastoral Award makes provision for the payment of meal allowances (initial and subsequent) for planned and unplanned overtime. Restricting the application of this allowance in the Exposure Draft amounts to a substantive change, and one without merit.
18. The AWU submits that the tension between clauses 36.5 and 36.11 should be resolved with the exclusion of 36.11, not 36.5.
19. The AWU proposes the following amendment to clause 32.7 of the Exposure Draft:

32.7 Overtime meal allowance

- (a) **An employee required to work overtime after ordinary working hours is entitled to a meal allowance** ~~Where overtime is unplanned and not notified the day or days beforehand, a payment will be made of \$13.07~~ **or a meal supplied by the employer at the completion of after two an hours and a half of overtime and every four hours thereafter.** ~~if work will continue beyond the meal break. Alternatively the employer may supply the employee with a meal.~~

~~(b) Where an employee is notified the day or days prior to an overtime day, the meal allowance is not payable unless the overtime is cancelled. Where cancellation occurs and notice of cancellation is not given at least the day before the planned overtime, the employee will be paid the meal allowance.~~

Yours faithfully,

A handwritten signature in black ink, appearing to read 'ZD', with a long horizontal flourish extending to the right.

Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union