

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

6 March 2018

Re: AM2014/239 Pastoral Award 2010

BACKGROUND

1. The President, Justice Ross, issued Directions on 9 February 2018 for interested parties to file written submissions regarding the operation of clauses 17.2(c)(ii) and 36 of the *Pastoral Award 2010* (**Pastoral Award**) and clauses 10.2(d) and 32.7 of the Exposure Draft for the Pastoral Award 2010 (**Exposure Draft**).
2. The submissions of the Australian Workers' Union (**AWU**) are below.
3. The AWU has previously filed submissions¹ and reply submissions² discussing the operation of the clauses in question. The present submissions are largely intended to further develop those previous submissions. However, any inconsistencies between the present and former submissions are to be resolved in the favour of the present submissions.

SUBMISSIONS

Clause 17.2(c)(ii) of the Pastoral Award

4. Clause 17.2(c)(ii) of the Pastoral Award states:

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-sub-awu-150817.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014-239-sub-reply-awu-300817.pdf>

“(ii) An employee required to work overtime for more than two hours after the employee’s ordinary ceasing time without having been notified before leaving work on the previous day that the employee will be required to work overtime, will 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 is entitled to a payment on \$13.07 for each meal not supplied.”

5. The issue for consideration with this particular provision of the Pastoral Award is that whilst it grants an employee an express entitlement to a second meal or meal allowance, the provision does not explicitly provide an associated length of time that must be worked in order for that entitlement to crystallise.
6. Unfortunately, although clause 15.1 of the Pastoral Award does pertain to meal breaks, it cannot provide any guidance on the interpretation of clause 17.2(c)(ii) due to the scope of clause 15.1 being limited to determining when an employee’s *first* meal break must be taken *during ordinary hours*.
7. As clause 17.2(c)(ii) is wholly concerned with an allowance paid for meals during *overtime* (which necessarily fall outside of an employee’s ordinary hours), and the meal break on which the second overtime meal allowance is payable is at least the *third* meal break of the day in question, clause 15.1 has no application and provides no insight.
8. We additionally note that although it may seem convenient to translate the five hour period stated in clause 15.1 to fill the gap in clause 17.2(c)(ii), the language used in clause 15.1 sets the fifth hour as the *outer limit* of when an employee’s first meal break during ordinary hours must be taken and not as a specific period of time that must be worked in order for an entitlement to crystallise, which is what the Fair Work Commission is now attempting to determine.
9. Also unfortunate for the present purpose is that although the origins of clause 17.2(c)(ii) are quite clear³, the pre-modern awards in which these clauses exist generally suffer the same problem as 17.2(c)(ii) – the second overtime meal break is not defined relative to a period of time.

³ See *Pig Breeding and Raising (AWU) Award 1999*, s.10.4.3; *Breeding and Raising Pigs Employees (State) Award* s.18

10. However, one pre-modern State Award contains both an overtime meal allowance *and* an explicit period of time after which the employee will be entitled to a second overtime meal allowance, and this is after four hours of total overtime worked⁴. In this award, the first overtime meal allowance accrues at one and a half hours overtime worked, the second after an additional two and a half hours overtime is worked.
11. Although the corresponding clause in the *Poultry Farm Employees (State) Award (Poultry Award)* is clear as to when the second overtime meal allowance is payable, we note that this doesn't necessarily inform the interpretation of clause 17.2(c)(ii) of the Pastoral Award. As only one of many reference instruments used in the drafting of the Pastoral Award, clause 8(ii) of the Poultry Award cannot be used on its own to determine when a second overtime meal allowance is payable under clause 17.2(c)(ii) of the Pastoral Award.
12. In the absence of definitive guidance external to the clause – both in the remainder of the Pastoral Award and outside of the award altogether – the AWU submits that the content of clause is itself capable of resolving the present ambiguity.
13. The AWU submits that although clause 17.2(c)(ii) does not *explicitly* state when the second overtime meal break occurs, the words used in the provision make it relatively clear that the second overtime meal break is to occur two hours after the first.
14. On an ordinary reading of the clause, 17.2(c)(ii) sets the timing of the initial meal break at two hours after the overtime work begins – the clause explicitly states “two hours” and not any other period. This evinces a clear intention that the entitlement to the overtime meal allowance will crystallise only once an employee has worked two hours of overtime. We don't believe that such a view is controversial.
15. It follows, therefore, that in the absence of a separate qualifying period such as in clause 8(ii) of the Poultry Award referenced above, in the present case the same period of overtime worked that qualifies an employee to an initial overtime meal allowance – two hours – would entitle an employee to a second overtime meal allowance.

⁴ *Poultry Farm Employees (State) Award, s.8(ii)*

16. For completeness, clause 17.2(c)(ii):

16.1. Establishes two hours as the period of overtime an employee must work to qualify for an overtime meal allowance;

16.2. In the absence of anything to the contrary, establishes two hours as the qualifying period for meal breaks during overtime generally;

16.3. Does not introduce a different period of time when referring to the second meal break but merely uses the words, "...a second meal break";

16.4. Does not otherwise indicate that an employee must work for a longer period to become entitled to the second overtime meal allowance; and

16.5. Therefore imports the period of time established for the first meal break into the entitlement for the second meal break.

17. The AWU notes that clause 17.2(c)(i) suffers from the same perceived ambiguity and can be resolved in the same manner. We further note that under clause 17.2(c)(i), the entitlement to an overtime meal allowance crystallises sooner than under clause 17.2(c)(ii) – after one and a half hours of overtime worked. We have not been able to find a reason as to why these entitlements have different periods attached but with that being said see no reason to amend the clauses for the purposes of uniformity.

18. Proposed amendments to clauses 17.2(c)(ii) and 17.2(c)(i) in order to clarify the timing of the second overtime meal allowance in each clause are found in the Draft Determination attached to these submissions.

Clauses 36.5, 36.6 & 36.10 of the Pastoral Award

19. Clause 36 of the Pastoral Award requires redrafting for two reasons: avoiding an ambiguity of application between clauses 36.5 and 36.10, and resolving the conflict between clauses 36.5 and 36.11.

20. Additionally, clause 36.5 of the Pastoral Award in isolation suffers from the same perceived ambiguity as clause 17.2(c)(ii) above – the entitlement to a

second overtime meal allowance is explicit, but the period of overtime required to be worked for that entitlement to crystallise is not.

21. That being the case, the AWU submits that this ambiguity is resolved in the same way and for the same reasons that the ambiguity of clauses 17.2(c)(i) and (ii) should be resolved as expressed above.
22. Clause 36.5 read in conjunction with the entirety of clause 36 suffers from an ambiguity of application with clause 36.10. Although ostensibly drafted to apply to two discrete circumstances, currently both clause 36.5 and 36.10 overlap in their application, which creates confusion for the reader.
23. The confusion occurs when a reader of the Pastoral Award attempts to determine the entitlement to overtime meal allowances for Pig Breeding and Raising employees for unplanned overtime on Monday to Friday. Clause 36.5 pertains to (ostensibly all) overtime after ordinary hours Monday to Friday, and clause 36.10 pertains to (ostensibly all) unplanned overtime. As such, it is unclear which of the two clauses should apply to unplanned overtime on Monday to Friday. Adding to the confusion is clause 36.11, which revokes the entitlement to an overtime meal allowance for employees working planned overtime, and therefore seemingly making clause 36.5 completely redundant.
24. Clause 36.6 of the Pastoral Award entitles employees working overtime to a paid 30-minute break before starting overtime. However, the use of the phrase “such overtime” in clause 36.6 may introduce some doubt as to the scope of the entitlement.
25. Reading clause 36 in ascending order may lead the reader to believe that the phrase “such overtime” refers to the overtime described immediately before clause 36.6, which is overtime worked after working ordinary hours Monday to Friday, therefore limiting the scope of clause 36.6 to that *type* of overtime. However, we believe that this narrow application of clause 36.6 is incorrect.
26. There is no justification as to why just the specific type of overtime as described in clause 36.5 entitles an employee to a meal break before commencing overtime, and it is unlikely that such an intent existed in drafting the clauses. For the reason of logic alone, the entitlement in clause 36.6 should apply to all Pig Breeding and Raising employees before commencing overtime.

27. Additionally, as discussed above, an overlap of application between clauses 36.5 and 36.10 exists. The reading down of the scope of the entitlement in clause 36.6 to only circumstances as those described in 36.5 has the potential to result in the entitlement being restricted even further.
28. For example, for unplanned overtime on Monday to Friday, currently an employer may select which of clauses 36.5 and 36.10 is to apply. Applying clause 36.10 denies an employee the explicit entitlement to a second meal break, and also potentially the entitlement to a 30-minute paid meal break before commencing overtime under clause 36.6 if a restrictive interpretation of 36.6 is followed.
29. There is again no justification or ostensible reason as to why only Pig Breeding and Raising employees who work overtime as characterised in clause 36.5 would be entitled to a second overtime meal allowance, and not those employees who perform unplanned overtime as characterised in clause 36.10.
30. A proposed amendment to clauses 36.5, 36.6, 36.10 and 36.11 are found in the Draft Determination attached to these submissions.

Clause 10.2(d) of the Exposure Draft

31. Clause 10.2(d) of the Exposure Draft suffers the same perceived ambiguity as its corresponding clause in the Pastoral Award, clause 17.2(c), which is the lack of a clear time period for the entitlement to a second overtime meal allowance to crystallise.
32. As discussed above, this ambiguity can be resolved with the small amendments to clause 17.2(c) contained in the Draft Determination attached to these submissions. Clause 10.2(d) of the Exposure Draft may then be amended accordingly to reflect the current amended award provision.
33. We also note that the current layout of clause 10.2(d)(i) may result in an incorrect interpretation of an employee's entitlement to an overtime meal allowance, specifically concerning the substitution of the meal allowance with a meal.

34. Currently, the employer supplying an employee with a meal as a substitution for the overtime meal allowance is located at a separate bullet point under clause 10.2(d)(i) of the Exposure Draft. The first bullet point under clause 10.2(d)(i) of the Exposure Draft entitles an employee to an allowance of \$13.07 for the first *and any subsequent meals*. The second bullet point, however, only entitles the employee to *a meal* as a substitution.
35. The AWU submits that it may be incorrectly inferred from this formatting that the provision of a *single* meal by an employer will discharge an employer's obligations under clause 10.2(d)(i) notwithstanding that the employee may have worked enough overtime to qualify for more than one meal allowance.
36. For this reason, the AWU submits that the words, "a meal" in the second bullet point of clause 10.2(d)(i) are replaced by the word, "meals".
37. The AWU additionally submits that the layout of clause 10.2(d)(ii) of the Exposure Draft is slightly cumbersome. We suggest that the first two bullet points below clause 10.2(d)(ii) are combined and amended to reflect the phrasing of the first bullet point below clause 10.2(d)(i). We suggest the following as the content of the first bullet point below 10.2(d)(ii):

"will be provided with a suitable meal free of cost for the first and any subsequent meal break; or..."

Clause 32.7 of the Exposure Draft

38. During the Exposure Draft process, the content clause 36.5 of the Pastoral Award has been removed – it does not feature in the Exposure Draft. As we have noted previously, this is apparently because of the conflict between clauses 36.5 and 36.11 of the Pastoral Award.
39. The exclusion of the entitlements in clause 36.5 of the Pastoral Award has the effect of restricting an overtime meal allowance to being payable only for unplanned overtime, or if overtime has been planned and subsequently cancelled.

40. 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, despite this entitlement existing in the Pastoral Award.
41. The Pastoral Award currently makes provision for the payment of meal allowances (initial and subsequent) for planned and unplanned overtime, albeit with a conflicting clause (36.11). The Exposure Draft does not.
42. As we have submitted previously, the removal of the entitlement under clause 36.5 of the Pastoral Award is without merit, and although it is in conflict with another clause, such a removal will result in a substantive change to the conditions currently under the award.
43. The AWU submits that the conflict between the entitlements under clauses 36.5 and 36.11 of the Pastoral Award must be resolved in the favour of clause 36.5.
44. It is somewhat bizarre that an employee would be entitled to a meal allowance when overtime is planned and subsequently cancelled, but not if the planned overtime work is actually worked, especially considering that the entitlement to a meal allowance if overtime is cancelled is a direct recognition of the cost of preparing an extra meal.
45. Further, it beggars belief that an award would have two clauses that each addresses a discrete type of overtime, but also a third clause that effectively blocks the operation of one of those clauses. To be clear:
- 45.1. Clause 36.5 ostensibly applies to *all* overtime worked after an employee works ordinary hours Monday to Friday;
- 45.2. Clause 36.10 ostensibly applies to *all* unplanned overtime; and
- 45.3. Clause 36.11 removes an employee's entitlement to an overtime meal allowance for working *planned* overtime; however
- 45.4. Clause 36.10 is couched in terms wide enough to apply to unplanned overtime worked after an employee works ordinary hours Monday to Friday.
46. It is hardly controversial to propose that clause 36.5 of the Pastoral Award was *not* drafted with the intent that its effect be completely overridden by another

clause. Therefore an amendment to clause 36.11 is required to resolve this conflict.

47. As mentioned above, a proposed amendment to clause 36.11 is found in the Draft Determination attached to these submissions.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'ZD', written over a horizontal line.

Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 Yearly Review of Modern Awards

4 Yearly Review of Modern Awards

(AM2014/239)

PASTORAL AWARD 2010

[MA000035]

Agricultural industry

JUSTICE ROSS, PRESIDENT

MELBOURNE, XX XX 2018

4 yearly review of modern awards – Pastoral Award 2010 – ‘overtime meal allowances’

A. Pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, the *Pastoral Award 2010* is varied as follows:

[1] By deleting clause 17.2(c) and inserting the following:

(c) Meal allowance

- (i) If an employee is required to work overtime after working ordinary hours, the employee will be paid a meal allowance of \$13.07 after every one and a half hours of overtime worked. The employer may supply the employee with a meal as an alternative to the payment of this allowance.
- (ii) If an employee is required to work overtime after the employee’s ordinary ceasing time without having been notified before leaving work on the previous day, the employee will be provided with a suitable meal free of cost for every two hours of overtime worked. If the employer does not provide a meal, the employee will be paid an allowance of \$13.07 for each meal not supplied.

[2] By deleting clause 36.5 and inserting the following:

36.5 If an employee is required to work overtime after working ordinary hours on Monday to Friday, the employee will be paid a meal allowance of \$13.07 after every one and a half hours of overtime worked. The employer may supply the employee with a meal as an alternative to the payment of this allowance.

[4] By deleting the word ‘such’ appearing in clause 36.6.

[5] By deleting clause 36.11 and inserting the following:

36.11 If an employee is notified of an overtime day the day or days prior and the overtime day is then cancelled, the employee will be paid a meal allowance of \$13.07 if the notice of cancellation was less than a day before the planned overtime day.

B. This determination comes into operation from XX XX 2018. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after XX XX 2018.

PRESIDENT