

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

**SUBMISSION**

**NATIONAL FARMERS' FEDERATION**

Date: 15 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 by 4:00 pm on 14 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. The Commission granted the NFF an extension for filing to 4:00pm on 15 August 2017.
4. These submissions responds to that direction.

**Clause 17.2(c)(ii) of Pastoral Award (General)**

*Clause 17.2(c)(ii) – "second meal break"*

5. The NFF notes that under clause 17.2(c)(ii) an employer must provide a meal or pay an allowance where the employee is required to work overtime without having been given notice in two circumstance:
  - a. Two hours after ordinary ceasing time (**the Initial Meal/Allowance**); and
  - b. Where the "work extends into a second meal break" (**the Further Meal/Allowance**).

## IN THE FAIR WORK COMMISSION

6. The first point to make is that, in addition to the fact that it does not expressly create an entitlement to meal breaks, clause 17.2(c)(ii) merely provides the circumstances in which the right to a meal/entitlement accrues. The clause (and the Award more generally) does not specify when that meal must be provided (or allowance paid) to the employee. Thus it may be, for example, that a meal provided in accordance with the Initial Meal/Allowance can be provided after overtime hours are finished and the employee has ceased working.
7. Furthermore, clause 17.2(c)(ii) does not appear to anticipate a “meal break” when the entitlement to the Initial Meal/Allowance crystallizes<sup>1</sup>:
  - a. The ‘first’ meal break is provided for under clause 15.1(a); i.e. taken with the first 5 hours of commence work,
  - b. The Further Meal/Allowance is triggered where the “work extends into a second meal break”.
  - c. The entitlement to the Initial Meal/Allowance clearly crystallizes before the Further Meal/Allowance;
  - d. It follows that there is no meal break at the time the Initial Meal/Allowance is to be provided.
8. It may also be noted that clause 15.1(a) provides that the employee is entitled to one meal break each day. The clause does not expressly limit its operation to ordinary work hours and the Award does not expressly contemplate the provision of a meal break in any other circumstances or on any other occasion.<sup>2</sup> In the NFF’s submission it should follow that any reference to “meal breaks” in the clause 17.1(c)(ii) is referable back to the breaks contemplated by clause 15.1(a).
9. If this is correct then the “second meal break” will be the meal break which the employee is to be allowed under cl 15.1(a) on the next “day”. It follows that that is the time at which the second meal allowance is payable.
10. Of course, this approach does not sit particularly comfortably with the requirement of clause 15.1 that the meal break be taken “not later than 5 hours after commencing ordinary hours of work”. Clearly, where work has proceeded into a second “day” the second meal break will not be taken “5 hours after commencing”. However, it may be that this requirement applies only to the first of the meal breaks; i.e. once the first

---

<sup>1</sup> i.e. after two hours of over-time

<sup>2</sup> Save for at clauses which apply to piggery attendants: 35.6(b), which provides that an “employee must not be required to work for more than five hours without a break for a meal.” and 36.6 which provides that “before starting such overtime an employee will be allowed a meal break of 30 minutes which will be paid for at ordinary rates”.

## IN THE FAIR WORK COMMISSION

break has been provided this requirement has been satisfied and the words “5 hours after commencing” have no more ‘work to do’.

11. An alternative approach may be that clause 17.1(c)(ii) is premised on the notion that an employee is entitled to a meal once every five hours.
  - a. As noted above, clause 15.1(a) provides for one meal break during the first five hours of work.
  - b. Clause 17.2(c)(ii) grants an entitlement to the Initial Meal/Allowance 2 hours after “ordinary ceasing time”.<sup>3</sup>
  - c. As such, based on an average 8 hours day, the Initial Meal/Allowance accrues after roughly 10 hours of work; that is, roughly 5 hours after the time for provision of the meal break contemplated by clause 15.1(a).
  - d. It may follow that the “second meal break” accrues in a further 5 hours.

That is, the “second meal break”, and therefore the Further Meal/Allowance, is payable 15 hours after commencing work, which is after 7 hours of overtime.

### *Clause 17.2(c)(ii) — Additional observations*

12. Clause 17.2(c)(ii) states that an employer must provide the Initial Meal/Allowance where three conditions are satisfied:
  - a. The employee is required to work overtime;
  - b. The requirement extends for “more than two hours after the employee's ordinary ceasing time”; and
  - c. The employee was not notified of the requirement “before leaving work on the previous day”.
13. The first condition will be established in accordance with the relevant overtime provisions of the award: clauses 31, 36, and 42.
14. As to the second condition, the parties appear to be in agreement that the entitlement accrues where the employee is required to work overtime for any period exceeding 2 hours; i.e. 2 hours and 1 second (or less) would be sufficient. However, that requirement must extend “after the employee’s ordinary ceasing time”. The normal meaning of the expression, “ordinary ceasing time” is the time of the day at

---

<sup>3</sup> i.e. where it grants an entitlement to a meal allowance.

which employee ends an unbroken<sup>4</sup> period of work — e.g. the end of a shift — in accordance with the relevant provisions of the award or, if the award is silent, in accordance with usual practice. It follows that the entitlement only arises after the employee finishes a period of ordinary hours.

15. As to the third condition, the allowance accrues if the employee “was not notified of the requirement before leaving work the day before”. This provision is problematic as it assumes that the employee was working and/or at work the day before. The better approach is for the clause to require the employer to take reasonable steps to notify the employee 18 hours before the need for overtime arises.

**Clause 36 of Pastoral Award (Pig Breeding and Raising).**

16. Part 5 (clauses 33 to 38) covers the employment of employees by pig breeders and raisers. They apply to exclude the general provision of Part 1 to 3 (inclusive) to the extent of any inconsistency. It follows that clauses 36.5, 36.10 and 36.11 trump clause 17.2(c)

*Clause 36 — Competing operation of sub-clauses*

17. Clause 36.5, 36.10 and 36.11 each deal with the entitlement to a meal/allowance. However, at first blush they appear to establish competing criteria for awarding the entitlement.
  - a. Clause 36.5 provides that an employee must be given a meal/allowance “for the first and any subsequent meal” where the employee is required to work for more than 1.5 hours after their ordinary ceasing time on Monday through Friday.
  - b. Clause 36.10 provides that where the employee is not notified “the day or days beforehand” then the employer must provide a meal/allowance “after two hours of overtime if work will continue beyond the meal break.”
  - c. Clause 36.11 provides that no meal allowance is payable where the employee is given appropriate notice unless overtime is canceled.
18. In the NFF’s submission the terms of clause 36.11 are relatively clear and should be read to express an exclusion or “carve-out” from the default position, That is, the balance of the Award (and clause 36.5 and 36.10 in particular) notwithstanding, an employee is not entitled to a meal/allowance where he/she has been given proper notice.

---

<sup>4</sup> Save for meal breaks

## IN THE FAIR WORK COMMISSION

19. Clause 36.5 and/or 36.10 will then operate where proper notice has not been given. The two clauses very hard to reconcile. They deal with the same subject matter in a slightly different fashion. However, the NFF notes that while clause 36.5 is not expressly limited to occasions where notice was not provided, it otherwise has a more specific operation than clause 36.10. It may also be noted that if the .5 hour meal break contemplated by clause 36.6 is added to the 1.5 hours of overtime contemplated by clause 36.5, then the time at which the entitlement is triggered in clauses 36.5 and 36.10 is the same. As such, it may be that the clauses can be read in conjunction.

### *Clause 36.5 and 36.10 — Nature of entitlement*

20. It would appear that under both clauses 36.5 and 36.10 the entitlement to be provided with a meal or paid an allowance is triggered by the meal break.
- a. Clause 36.10 oblige the employer to provide a meal and/or pay the allowance where the employee works for more than 2 hours of overtime and work will continue “beyond the meal break”.
  - b. Clause 36.5 provides that the meal is given or allowance is payable for “the first and any subsequent meals”. Although not expressed as such, it appears probable that the Award contemplates the employee eating a “meal” at the time he/she has a meal break. It follows that the time contemplated by clause 36.5 is the time of the meal break.
21. The employee is entitled to a meal break pursuant to clause 36.6 “before starting such overtime”. The expression “such overtime” refers back to clause 36.5 and therefore a meal break must be allowed if the employee will work overtime of more than 1.5 hours “after working ordinary hours Monday to Friday”.
22. It follows that the employer must provide a meal or pay the allowance if the employee works overtime for more than 2 hours “after working ordinary hours Monday to Friday.
23. However, save with respect to “shift-workers not on continuous hours”, the award does not expressly provide for any further meal break other than, again at clause 15.1. As such, in the NFF’s submission those employees do not have an entitlement to further meal or allowance unless their overtime rolls into another “day”. Pursuant to clause 35.6(b) however, “shift-workers not on continuous hours” cannot “be required to work for more than five hours without a break for a meal.”

## IN THE FAIR WORK COMMISSION

24. The alternative view (similar to the logic expressed above at [11]) is that based on an 8 hour day<sup>5</sup>, the clause 36.6 meal break fall due after the second 5 hours of work. Therefore it may be possible to draw an inference that meal breaks must be allowed once within each 5 hours or work. Although the award does not expressly provide as much, that conclusion appears to be consistent with the apparent logic underlying clause 15.1 and the express provisions, with respect to “shift-works not on continuous hours” of clause 35.6(b).

### *Clause 36.5 and 36.10 — Notice Period*

25. The NFF notes that the period of notice which the employer is required to give under clauses 36.10 and 36.11 — “the day or days beforehand” — is very ambiguous.
26. The NFF submits that the employer should be required to give reasonable notice.

### **Clause 10.2(d)(ii) of the Exposure Draft**

27. The submission made above in respect of clause 17.2(c)(ii) of the Pastoral Award (paragraphs [5] to [15]) will apply to clause 10.2(d)(ii) of the Exposure Draft.
28. In particular,
- a. The preferred position is as follows:
    - i. The initial entitlement to a meal or allowance is payable if the employee has worked at least 2 hours of overtime after ordinary ceasing (in the exposure drafts case “finishing) time;
    - ii. The second entitlement is payable if the overtime rolls over into a second “day” and the employee is entitled to a meal break under clause 15.1(a)
  - b. Alternatively, the employee is entitled to a meal every 5 hours
    - i. The first meal (break) is taken with the first 5 hours
    - ii. The entitlement to a meal or allowance (but not a break) arises if the employee has worked 2 hours of overtime after ordinary hours, which corresponds with 10 hours of work total; and
    - iii. It may therefore be inferred that the “second meal break” arises if a further five hours have been worked; that is after 7 hours of overtime.
  - c. Furthermore, the NFF reiterates its submission that

---

<sup>5</sup> See, for example, clause 35.1 at the 3<sup>rd</sup> sentence and clause 35.5(c)(i).

## IN THE FAIR WORK COMMISSION

- i. The entitlement accrues where the employee has worked in excess of 2 hours overtime after the employee finishes a period of ordinary hours and does not arise, for example, simply because an employee works on a Sunday.
- ii. The qualification on the requirement to provide a meal or pay an allowance — i.e. that it only arises if the employee “was not notified of the requirement before leaving work the day before” — is problematic.

### **Clause 32.7(d) of the Exposure Draft**

29. With respect to clause 32.7(b) of the Exposure Draft, the NFF notes its submission in respect of clause 36.11 of the Pastoral Award (above at [18]) and says that where proper notice has been given the employer does not need to provide the employee with a meal or pay the allowance.
30. With respect to clause 32.7(a) of the Exposure Draft, the NFF notes that the clause could perhaps work with clause 32.8(a) such that one allowance is payable or meal provided where overtime extends at least 2 hours after ordinary hours.
31. However, the NFF noted that clause 32.8(a) does not tie the entitlement to the break to the employee’s working beyond ordinary finishing/ceasing hours. The NFF submits that this is an oversight, possibly occasioned by adopting clause 36.6 of the Pastoral Award without allowing for the fact that clause 36.5 was not also adopted. As noted above, at [21], clause 36.5 limited the circumstance in which the clause 36.6 break was provided to occasion on which overtime of more than 1.5 hours will be worked “after working ordinary hours Monday to Friday”. In the NFF’s submission clause 32.8(a) of the Exposure Draft should be amended accordingly.

### **Summary**

32. In summary the NFF submits that:
  - a. Clause 17.2(c)(ii) of the Pastoral Award provides for the employer to provide a meal or pay an allowance:
    - i. Firstly, if the employee works for more than 2 hours after ceasing ordinary hours; and
    - ii. Secondly,
      1. if the overtime extends into the subsequent day; or
      2. in the alternative, if the employee works for a further 5 hours.

IN THE FAIR WORK COMMISSION

- b. 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.
- c. Clause 36.5, 36.10 and 36.11 apply so that
  - i. There is no entitlement to a meal or allowance where adequate notice was provided by the employer.
  - ii. 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”.
- d. Clause 32.7(b) of the Exposure Draft should apply in the same circumstances as clause 36.5, 36.10 and 36.11.

**Ben Rogers**  
**General Manager, Workplace Relations & Legal Affairs**  
**National Farmers Federation**

**20 December 2016**