

23 November 2016

Award Modernisation Team
Fair Work Commission
Level 10, Terrace Tower, 80 William Street
EAST SYDNEY NSW 2011
By email: amod@fwc.gov.au

Re: 4 yearly review of modern awards – *Pastoral Award 2010* (AM2014/239)

Background

1. The President, Justice Ross, issued Directions on 5 October 2016 for the filing of additional material by interested parties in the 4 yearly review of the *Pastoral Award 2010* (the Award).
2. The Australian Workers' Union (**AWU**) make the following reply submissions in accordance with Direction 3.
3. The submissions are in response to the:
 - National Farmers' Federation's (**NFF**) submission dated 26 October 2016¹;
 - Shearing Contractors Association of Australia's (**SCAA**) submission in reply dated 20 October 2016²;
 - Fair Work Commission's 'Potential inconsistencies between the General Employment Conditions and streams in the *Pastoral Award 2010*' dated 6 October 2016³;
 - Overtime meal allowance issues raised in the Fair Work Commission's 'Summary of parties' respective positions in relation to items 30 and 62 of the revised summary of submissions' dated 6 October 2016⁴; and
 - Fair Work Commission's 'Comparison document – annual leave loading provision' dated 14 October 2016⁵.

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-rep-sub-nff-261016.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-rep-sub-scaa-211016.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-fwc-inconsistencies-071016.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-fwc-summary-071016.pdf>

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-summary-annualleaveloading-141016.pdf>

4. The submissions below refer to clauses in the latest exposure draft of the Pastoral Award 2016 (Exposure Draft) published by the Commission on 17 August 2016 unless otherwise stated.⁶

NFF submission

Hours of work – various clauses

5. The NFF's submissions provide significant detail about the justification for flexible working hours in the pastoral industry.
6. The AWU does not dispute that ordinary hours can currently be worked on the weekend in the broadacre farming and livestock and poultry farming streams.
7. However, ordinary hours cannot be worked on the weekend by piggery attendants who are day workers (subject to an agreement) or by employees working in the shearing operations stream.
8. In relation to overtime, the NFF appears now to have accepted that piggery attendants can receive overtime rates in circumstances other than when they work more than 152 hours in a 4-week period.⁷ This is clearly correct given there is a day work and shift-work span of ordinary hours and maximum daily/shift hours for this stream.
9. However, the NFF still appears to be seeking the insertion of new general provisions stating that overtime is only payable when an employee works more than 152 hours in a 4-week period.
10. The AWU does not support the inclusion of these provisions because they will create confusion and ambiguity.
11. For example, even in the broadacre farming and livestock and poultry farming streams, overtime can also be payable:
 - When a part-time employee works more than their agreed hours of work⁸; and/or
 - When an employee in the broadacre farming and livestock stream works more than the agreed ordinary hours⁹.
12. The current provisions are sufficient to determine when overtime rates are payable and the amendments sought by the NFF will complicate rather than clarify their operation.

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014239-exposure-draft-170816.pdf>

⁷ Paragraphs [7], [40] and [41] of the NFF submission.

⁸ Clause 6.4 (d) of the Exposure Draft.

⁹ Clause 26.1 of the Exposure Draft.

Types of employment – clause 6.1

13. The NFF appears to be attempting to expand the scope of the current piecework provisions via their suggested amendments to the Exposure Draft.
14. The Award and the Exposure Draft currently deliberately confine piecework arrangements to casual shearers, crutchers and woolpressers.¹⁰
15. The NFF's suggested amendments to clauses 6.5 (a) and (b) of the Exposure Draft will create ambiguity regarding which employees covered by the Award can work on a piecework basis.
16. It is important to ensure the term "casual pieceworker" is used in clause 6 of the Exposure Draft as opposed to just "pieceworker" because "casual pieceworker" is a term defined in Schedule H.
17. The purpose of this definition is to confine piecework arrangements to shearers, crutchers and woolpressers engaged on a casual basis.
18. In this context, piecework is not a distinct type of employment but rather a method of payment for an employee engaged on a casual basis in the prescribed occupations.

Station cooks – weekly or hourly rate – clause 26.3

19. The NFF's position on this issue is not entirely clear. The AWU's understanding is the FLH1 ordinary hourly rate would be the full rate before any deduction is made for keep.
20. In any event, the AWU does not consider it *necessary* to alter the existing references to various proportions of the appropriate weekly rate in clause 26.3 of the Exposure Draft.
21. The agreed amendments to clause 27.5 and 24.3 are helpful in terms of clarifying how keep deductions operate – that is, the deduction is in recognition of living expenses so the amount is fixed and does not increase via a compounding effect when overtime or penalty rate calculations are undertaken.
22. However, it would further assist to insert the words: "No keep deduction applies to Station Cooks" at the end of clause 24.3 given all parties appear to accept this is correct.

Shiftwork definitions for piggery attendants – clause 31.1 and 31.5

23. The AWU and NFF appear to agree that the Exposure Draft has inadvertently altered the effect of the corresponding provisions in the Award.

¹⁰ Clause 3.1 and 10.4 (b) of the Award and Schedule G and clause 6.5 (d) (i) of the Exposure Draft.

24. In attempting to simplify the current Award provisions which do generally repeat for continuous and non-continuous work, the Exposure Draft has conflated the concepts of non-continuous work and non-successive shifts.
25. Continuous and non-continuous work refers to the nature of the employer's operations – specifically, whether they operate continuously for at least six consecutive days or not.
26. In contrast, the higher shift work rates in clause 31.5 are related to the disability an employee experiences from working different shifts during a week. An employee can be entitled to these higher rates regardless of whether their employer operates continuously for at least six consecutive days or not. The issue is whether the employee works the relevant number of successive afternoon or night shifts.
27. The AWU's view remains that the simplest approach to fixing the problem is replacing the term "Non-continuous work" in clause 31.1 (c) of the Exposure Draft with "Non-successive shifts" and making this same change in the table in clause 31.5.

Overtime and penalty rates for piggery attendants – clause 32 and 33

28. The AWU is opposed to the amendment suggested by the NFF to clause 32.1 of the Exposure Draft. The deletion of these words makes the clause less clear in terms of clarifying that overtime can be paid when an employee works outside the span of ordinary hours or maximum daily hours on a day. Overtime is also payable when an employee works more than the maximum weekly ordinary hours.
29. The AWU does not oppose the NFF's suggested amendments to clause 32.7 (b).
30. The NFF's proposed amendments to the table in clause 33 of the Exposure Draft should not be made.
31. The relevant overtime rates for piggery attendants are in clause 32, clause 33 is concerned with penalty rates for ordinary hours.
32. The NFF's proposed amendments do not make sense in that context.
33. Similarly, the NFF's proposed amendments to the table in clause 32.2 should not be made.
34. Piggery attendants can be entitled to overtime payments when they have not worked 152 ordinary hours in a 4-week period. Overtime is payable for working outside the span of ordinary hours for day workers or shift workers and for working more than the maximum daily ordinary hours.

35. Clause 32.3 of the Exposure Draft should not be moved to clause 33 as suggested by the NFF. The minimum engagement concerns overtime worked on the weekend and the overtime rates are in clause 32 and not clause 33.

Public holidays for piggery attendants – clause 34

36. Whilst it is unfair and absurd, the Award and Exposure Draft do currently appear to allow an employee working on a public holiday to reduce to a lower rate when they work more than the usual rostered hours on a public holiday.
37. The Award and Exposure Draft lack a provision stating overtime on a public holiday is paid at the rate of double time and a half.

Home or usual place of residence – clause 41

38. The AWU accepts the word “home” appears in the Award and is not opposed to it being inserted into the Exposure Draft on that basis.

Acts of God – clause 42.3 (a) (ii)

39. Whilst the NFF’s submission does refer to an agreed position between it and the AWU, upon reflection the AWU is concerned that the proposed amendment unreasonably confines an employee’s entitlements for idle time.
40. The deletion of the word “natural” would mean an employer does not have to pay the 10% daily amount if there are “other unforeseen causes” for the delay in commencing work.
41. An unscrupulous employer could use these words to deny the 10% payment to an employee for causes largely within their control - such as failing to keep machinery properly maintained or ensuring there are adequate staffing levels – provided there is something unforeseen about the cause.
42. The words “such as fire, flood or earthquake” do give an indication of the intent of the provision but would not necessarily prevent a broad interpretation of the term “other unforeseen causes”.
43. The NFF has identified deliberately lit fires as an example of a problem with using the term “natural”. However, an employee should not forfeit the 10% daily payment because they are prevented from working by a deliberately lit fire.
44. Further, determining whether a fire is deliberately lit or not may take the legal system a lengthy amount of time. Having an industrial entitlement contingent on a guilty verdict in criminal proceedings is far from ideal.
45. It is also reasonably unlikely that an employee would subject themselves to potential criminal prosecution via deliberately lighting a fire to receive a 10% daily payment when they could otherwise have avoided exposure to prison and received a 100% payment.

46. For these reasons, the AWU's position is the word "natural" should not be deleted.

Found deduction – Schedule A.1.2 and clause 40.3 (d)

47. The AWU accepts the 'if found' deduction is incurred daily.

Rate for crutching rams and ram stags

48. The AWU agrees that the rates tables need to be updated to reflect the double rates payable for crutching rams and ram stags as per clause 40.3 (c) of the Exposure Draft.

SCAA reply submission

49. Whilst the SCAA submission is labelled a 'Submission in reply' it proposes at least three new substantive variations to the Award.

50. This is regrettable given the AWU and other interested parties including the SCAA and the NFF spent a considerable amount of time discussing substantive variations to the Award and ultimately arrived at an agreed position¹¹. The SCAA endorsed the agreed position.¹²

51. Whilst the AWU does briefly respond in relation to these new claims below, its primary position is that the Commission should not deal with these new claims during the current 4 yearly review process. A vast amount of time and resources has already been spent by the parties and the Commission in reviewing the Award and the identified dates for raising substantive issues have long since passed.

52. Fortunately for the SCAA, the initial 4 yearly review process has "flown by" and another 4 yearly review of awards is scheduled to commence in just over 12 months.¹³ This would be the fair and appropriate time to agitate the new claims.

Stud comb – SCAA 1

53. The SCAA has suggested amendments to the Exposure Draft should be considered to distinguish between entitlements for the provision of "stud combs" and "cover combs".

54. The AWU's view is this change is not *necessary*. There is no doubt the 25% additional rate in the Award currently covers a shearer being required to provide what the SCAA refers to as "cover combs". The AWU has not

¹¹ This was subject to the Commission determining which 'learner shearer' terms could be included in the Award based on the content rules in the *Fair Work Act 2009*.

¹² *4 yearly review of modern awards – Pastoral Award 2010* [2015] FWCFB 8810 at [5].

¹³ Section 156 (1) of the *Fair Work Act 2009*.

previously been informed about any practical problems with the interpretation of the current provision.

55. However, to alleviate the SCAA's concerns, the AWU would not be opposed to relevant current references in the Exposure Draft to "stud comb" being amended to read "stud/cover comb".
56. The AWU would strongly oppose any claim to introduce a lower rate for what the SCAA refers to as the provision of "cover combs".
57. The introduction of a lower rate would constitute a very significant change to a longstanding condition in the Award and would need to be supported by a substantial amount of probative evidence.¹⁴
58. We also note an employer already has the option of providing combs for the employees and presumably could then claim an appropriate tax deduction.

Quoting of additional rates – SCAA2

59. The AWU does not see the need to vary the expressions used in these longstanding provisions.

Shed hand weekly rate – SCAA3

60. The AWU is opposed to the variations suggested by the SCAA to the current per run and weekly rate conditions for shed hands.
61. The current conditions were established following significant debate during the award modernisation process which involved reducing ordinary hours to 38 per week.¹⁵ These conditions should not be disturbed lightly.
62. Further, the SCAA submission does not seem to contemplate an increased per run rate for 19 runs per week. This appears necessary given a divisor of 20 runs per week is used to determine the per run rate as per Schedule A.3.1 of the Exposure Draft.

Sleeping quarters allowance – SCAA4

63. The AWU is strongly opposed to the variations raised by the SCAA regarding the sleeping quarters allowance provision.
64. The issues raised by the SCAA demonstrate there are currently some compliance and enforcement issues as opposed to any problems with the actual Award provisions.
65. Any changes to the current provisions would be substantive and would require a significant evidentiary case from the SCAA.

¹⁴ *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

¹⁵ *Award Modernisation* [2009] AIRCFB 345 at [58].

FWC Potential inconsistencies between the General Employment Conditions and streams

(NOTE: The references here are to clauses of the Award not the Exposure Draft)

Station cooks – part time rates – clauses 10.3 and 30.1

66. The AWU considers a part-time station cook would be entitled to overtime as per clause 10.3 (f) and clauses 31.1 and 31.2 of the Award.
67. Clause 31.1 defines overtime and indicates it applies when in excess of the ordinary hours in clause 30.1 are worked. Station cooks are not excluded from clause 30.1 – they are only excluded from clause 30.2.
68. Given a station cook is classified as a Farm and livestock hand Level 1 – they are not prevented from accessing the overtime rates in clause 31.2. The definition of “Farm and livestock hand” in clause 3.1 of the Award also does not exclude a station cook.

Provision of a saddle – clauses 17 and 29

69. A station hand who is required to supply their own horse and saddle must be reimbursed for the cost of supplying the horse and saddle under clause 17.2 and then paid the weekly allowances prescribed in clause 29.1.
70. Clause 17.2 is concerned with the cost of supply and clause 29.1 is concerned with the additional task of finding one’s own horse and saddle.

Overtime meal breaks for piggery attendants – clauses 17.2 and 36.10

71. Clause 36.10 does not appear limited to one allowance or meal as suggested in the Commission’s document.
72. When unplanned overtime is worked, an employee receives a payment or a meal after two hours of overtime if work will continue beyond the meal break. This applies after each two hours of overtime if work will continue after the meal break.

Sleeping quarters not provided for shearers – clauses 17.4 and 46

73. An employee receiving the allowance in clause 46.1 (b) of the Award would not ordinarily then be reimbursed for accommodation under clause 17.4 (c) (iii).
74. However, the employee may be entitled to the allowance and reimbursement if they are directed to travel again during the shearing or crutching meaning they cannot stay in the sleeping quarters they have obtained and payed for.

Public holidays for piggery attendants – clauses 26 and 38.3

- 75. Clause 26 determines when a public holiday is observed.
- 76. Clause 38 is concerned with payment for public holidays for piggery attendants.
- 77. Clause 38.3 allows a TOIL system to be applied for work on public holidays by agreement.
- 78. If the TOIL system is agreed, the individual employee can then determine whether to utilise it and when to take the time off.
- 79. There does not appear to be any conflict amongst these provisions.

Overtime meal allowance – Commission summary regarding items 30 and 62 of the revised summary of submissions

- 80. The AWU relies upon its proposal cited in paragraph 2 of the Commission's summary document but notes the reference to the meal allowance for piggery attendants should be clause 32.7 instead of clause 32.8.

Annual leave loading – Commission Comparison document – annual leave loading provision

- 81. The AWU relies upon its proposal cited on page 2 of the Commission's document but notes the words "worked between Monday and Friday" appearing in the second dot point in clause 23.5 (b) (i) should also be deleted.

END

Australian Workers' Union