

4 yearly review of modern awards – Horticulture Award

Matter No. AM2014/239

**NATIONAL FARMERS' FEDERATION**

**FURTHER SUBMISSIONS ON EXPOSURE DRAFT –  
PASTORAL AWARD 2010**

Date: 6 March 2018

1. On 9 February 2017 His Honour Justice Ross directed interested parties to file in the Commission on or before 4:00pm, Monday 5 March 2018 any written submissions and any evidence in relation to:
  - a. the intended operation of clause 17.2(c)(ii) of the Pastoral Award 2010, in particular when the second meal should be supplied or allowance is payable while working overtime;
  - b. the operation of the meal allowance provisions in clause 36, in particular the provisions contained at 36.5, 36.10, and 36.11; and
  - c. the operation of clauses 10.2(d) and 32.7 of the Exposure Draft.
2. His Honour subsequently granted an extension of time to make those submissions to 4:00pm, Tuesday 6 March 2018.
3. These submissions respond to that direction.

***Clause 17(c)(ii) of Current Award***

4. Clause 17.2(c)(ii) provides that:

*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 of \$13.07 for each meal not supplied.*

5. In its decision of 6 July 2017<sup>1</sup> (**the July Decision**) the Full Bench observed that:

*[143] It appears that clause 17.2(c) provides that an employee is entitled to a meal allowance in the following circumstances:*

- *the employee is required to work overtime after their ordinary 'ceasing time' on a particular day;*
- *the employee works 'more than two hours' overtime;*

---

<sup>1</sup> [2017] FWCFB 3433

- *the employee is not ‘provided free of cost with a suitable meal’; and*
- *the employee was not notified of the requirement to work overtime ‘before leaving work the previous day’.*

*[144] In addition, if the overtime work ‘extends into a second meal break’ then a further meal allowance would be payable (provided that the circumstances set out above have been met).*

The NFF accepts and agrees with the Full Bench’s observations.

6. The Full Bench then notes that two matters remained outstanding.
7. Firstly, the Full Bench queried the operation of the expression “for more than two hours after ceasing ordinary hours”, saying that it “simply begs the question, how much more?”<sup>2</sup> However, we note that the parties have agreed that expression operates to require the employer to provide the meal/allowance after an employee is required to work — and has worked — a period of at least two hours of overtime.
8. Secondly, the Full Bench queried where the ‘other’ meal allowance is to be provided.

*[145] ... Nor is it clear when an employee is entitled to a second meal allowance. The clause appears to provide for the payment of a further allowance in circumstances where the overtime ‘extends into a second meal break’, but it does not specify when overtime can be said to extend into a ‘second meal break’. Is it after a further two hours? Or a longer period?*

This issue is more intractable. However, in response the NFF made submissions on 15 August 2017 which were reiterated in our submission of 28 August 2017.

9. We continue to rely on these submissions. In summary, the NFF says the following.
  - a. Nothing in the award requires the provisions of the initial meal/allowance under clause 17.2(c)(ii)<sup>3</sup> to coincide with a meal break. Thus, the requirement that the employer provide a meal/allowance after the employee works at least 2 hours of overtime does not necessarily mean that the employer must also allow a meal break at the same time.<sup>4</sup>
  - b. The award only contemplates meal breaks at clause 15.1(a).<sup>5</sup> It follows that the “second meal break” must be a meal break provided in accordance with clause 15.1(a).
  - c. Clause 15.1(a) provides as follows:

*A meal break of not less than 30 minutes and not more than one hour will be allowed each day, to be taken not later than five hours after commencing ordinary hours of work. Provided that where there is agreement between the employer and an individual employee, the meal break may be taken at a time agreed.*

---

<sup>2</sup> Paragraph [145].

<sup>3</sup> i.e. which is paid where the “employee is required to work overtime for mot than 2 hours after ...ordinary ceasing time”

<sup>4</sup> Also, bearing in mind that “rest break” are provided for under clause 15.2, the fact that the employee does not get a meal break does not mean they have no opportunity to rest during work time.

<sup>5</sup> Save for clause 36.6 which we address below at paragraph [16], but note here that it clearly operates only with respect to *Part 5 — Pig Breeding and Raising* of the Award and has no effect on Part 3.

- d. In this context, the expression “commencing ordinary hours of work” must mean the time at which work would have *usually* commenced (even if, in this instance, it did not because the employee remained working an unbroken period of overtime).
  - e. It follows that the first meal break would be that which is taken within the first five hours of commencing a period of work or as agreed. The “second meal break” would be any further break which is allowed five hours after the usual commencing time or as agreed.
10. In the alternative, at paragraph 12 of the NFF’s submissions of 15 August 2017, we argue that clause 17.1(c)(ii) is premised on the notion that an employee is entitled to a meal break once every five hours.
- a. As observed 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”.
  - c. Based on the standard 8 hour day, this allowance accrues after roughly 10 hours of work; that is, roughly 5 hours after the meal break contemplated by clause 15.1(a).
  - d. It may follow that the “second meal break” — and therefore the other meal/allowance considered by clause 17.2(c)(ii) — is to be provided 15 hours after commencing work.

***Clause 10.2(d) of other Exposure Draft***

11. In our submission, clause 10.2(d) of the Exposure Draft should apply in the same way and circumstances as clause 17.2(c)(ii) of the current award.

***Clauses 36.5, 36.10, and 36.11 of the Current Award***

12. Clause 36 relevantly provides as follows:

*36.5 If an employee is required to work overtime after working ordinary hours on Monday to Friday (except where the period of overtime is less than one hour and a half) the employee will be paid \$13.07 for the first and any subsequent meals. Alternatively the employer may supply the employee with a meal.*

...

*36.10 Where overtime is unplanned and not notified the day or days beforehand, a payment will be made of \$13.07 after two hours of overtime if work will continue beyond the meal break. Alternatively the employer may supply the employee with a meal.*

*36.11 An employee notified the day or days prior to an overtime day must not be paid a meal allowance unless the overtime is cancelled. Should cancellation occur the employee will be paid a meal allowance for the meal prepared if notice of cancellation is not given at least the day before the planned overtime.*

13. In respect of clause 36.10 the Full Bench observed in the July Decisions that:

*[146] Clause 36.10 also lacks clarity. It appears to provide for the payment of a meal allowance in circumstances where an employee is not notified of the request to work*

*overtime ('the day or days beforehand') and the employer does not provide the employee with a meal.*

14. Again, the NFF supports these views and would say that they apply to all meal/allowance entitlements which are provided under clause 36; that is, where notice is given or a meal is provided then no allowance is payable.

15. The Full Bench then observes two apparent concerns in relation to clause 36.10.

*[146] ....[T]he amount of overtime required to be worked to qualify for payment of the meal allowance is unclear. The clause states that the allowance is payable 'after two hours of overtime if work will continue beyond the meal break'. What this means is anyone's guess. The award is silent on when 'the meal break' would be required and hence one cannot determine whether the overtime 'will continue beyond the meal break'.*

16. In our earlier submissions<sup>6</sup> we indicated that:

- a. Clause 36.11 is relatively clear: it specifies what occurs where notice of overtime was provided to the employee, and what occurs if that overtime is cancelled after notice was given.
- b. Clause 36.5 operates where the employee is working overtime “after working ordinary hours Monday to Friday”.
- c. Clause 36.10 operates on other occasions. That is where the employee has not worked “ordinary hours Monday to Friday” — for example when working overtime on a Saturday — and the work will continue beyond the “the meal break”.
- d. We note our submission at paragraph [7] above.
  - i. Save for clause 36.6 the award only contemplates a “meal break” at clause 15.1;
  - ii. Clause 36.6 clearly refers back to the overtime contemplated by clause 36.5 and therefore has no relevance with respect to clause 36.10;
  - iii. Clause 15.1(a) requires an employee to be allowed a meal break “not later than five hours after commencing ordinary hours of work” or by agreement; and
  - iv. The expression “five hours after commencing ordinary hours of work” can be read to mean five hours after the ordinary commencing time.
- e. With regards to clause 36.5, it follows, in our submission:, the “first meal” during overtime is the meal which may be taken during the meal break contemplated by clause 36.6, and the “subsequent meals” referred to by clause 36.5 would be the meals which may be taken during any further the meal break provided for under clause 15.1.
- f. Similarly, with regards to clause 36.10 the “meal break” referred to is any meal break provide under clause 15.1.

---

<sup>6</sup> Dated 15 August 2017 and 28 August 2017

***Clause 32.7(b) of other Exposure Draft***

17. Clause 32.7(b) of the Exposure Draft should apply in the same way and circumstances.

***Alternative Approach***

18. As canvased during our previous submissions, the NFF suggests an alternative approach may be to exclude payment of an overtime meal allowance where an employee could reasonably return home for a meal. Attachment D to the July Decision summarizes 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 Pastoral Award usually applies and the fact that frequently employers supply 'on-site' accommodation in most cases it will be more convenient for the employee to return home than to find a retail food outlet. The award should accommodate this practice.

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