

Fair Work Act 2009
FAIR WORK COMMISSION

s. 156 - 4 yearly review of modern awards

AM2014/196 and AM2014/197

**4 YEARLY REVIEW OF MODERN AWARDS - COMMON ISSUES –
CASUAL AND PART-TIME EMPLOYMENT**

**NFF CLAIM REGARDING REDUCED MINIMUM ENGAGEMENT FOR DAIRY
OPERATORS IN THE *PASTORAL AWARD 2010***

CLOSING SUBMISSIONS

Background

1. The National Farmers' Federation (NFF) has sought in the Common Issue - Casual and Part-time Employment proceedings to reduce the minimum engagement for casual and part-time dairy operators in the *Pastoral Award 2010* (the Award) from three hours to two hours.
2. The Australian Workers' Union (AWU) is opposed to this claim and has previously filed submissions on 22 February 2016¹ and led evidence from an Organiser, Kim Shepherd.²
3. The AWU also tendered some Australian Government economic material during a Hearing on 11 July 2016 which is relevant to the dairy industry.³
4. The AWU's closing submissions in response to this claim appear below.

Relevant industry facts

¹ See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014196-197-sub-awu-220216.pdf>

² Exhibit 172

³ See ABARES 'Australian farm survey results 2013-14 to 2015-16' – TAB 1 of Exhibit 186 and ABARES 'Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14' – TAB 2 of Exhibit 186

5. The following points are particularly relevant to the Commission's assessment of the NFF's claim to reduce the minimum engagement for dairy operators in the Award:

- Productivity growth in the dairy industry was 1.6% per year between 1978-79 and 2013-14 which is faster than the broadacre sector as a whole⁴. This is hardly an indicator that the industry faces a significant problem finding enough work for employees to perform for the duration of the current minimum engagement period;
- Labour costs comprise a small proportion of total costs for employers in the dairy industry with the figure ranging from 4.3% to 10%. Fodder is the largest expense for employers in this industry by a considerable amount⁵;
- Farm business profit figures for the dairy industry fluctuate dramatically from year to year and on a State-by-State basis even though the minimum engagement periods in the Award are the same across Australia⁶. This indicates the minimum engagement period has very little to do with the success or failure of dairy farms in Australia;
- Contrary to evidence led by the NFF from individual farmers in these proceedings, the average time required to undertake all tasks associated with milking is in excess of four hours even for smaller dairy farms⁷. Whilst the NFF have made a relatively desperate attempt to cast doubt on these figures by suggesting they are on a 'per day' as opposed to 'per milking' basis⁸, ABARES has recently confirmed the figures are 'per milking' – their response is attached to these submissions and marked "A";
- There is currently a significant labour shortage in the dairy industry⁹; and
- Working conditions in this industry are unpleasant and don't appeal to many people.¹⁰

⁴ ABARES 'Australian farm survey results 2013-14 to 2015-16' – page 62, TAB 1 of Exhibit 186

⁵ ABARES 'Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14' – Appendix A pages 24 to 31, TAB 2 of Exhibit 186

⁶ ABARES 'Australian farm survey results 2013-14 to 2015-16' – page 39, TAB 1 of Exhibit 186

⁷ ABARES 'Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14' – page 20, TAB 2 of Exhibit 186

⁸ See paragraph [88] to [92] of the NFF submission dated 5 August 2016

⁹ See 'Dairy Australia – Stakeholder consultation for Labour Agreement' - Attachment 1 to our submission dated 22 February 2016 and the evidence of Susan Wearden during cross-examination – Transcript for 11 July 2016 at PN389 to PN390

¹⁰ See Statement of Susan Wearden – page 1 of Exhibit 178

The modern awards objective

(a) relative living standards and the needs of the low paid

6. Dairy operators with less than 12 months of experience in the industry can be paid at the Farm and Livestock Hand Level 1 rate in the Award.¹¹ This rate is the same as the National Minimum Wage which is \$17.70 per hour.
7. In addition, dairy operators are not entitled under the Award to any weekend penalty rates and do not receive any additional amounts for working early in the morning or into the evening.
8. On this basis, dairy operators paid under the Award would have to be amongst the lowest paid workers in Australia.
9. Casual adult dairy operators are currently guaranteed a payment of \$66.38 each time they attend work under the Award. The amount for a part-time adult employee is \$53.10.
10. If the NFF claim is successful, this guaranteed amount will reduce to \$44.25 for a casual employee and \$35.40 for a part-time employee.
11. These amounts are clearly inconsistent with the requirement to provide a fair and relevant safety net of employment conditions for low paid workers who work:

*... early mornings, often dirty, split shifts and other tasks that may not appeal to many.*¹²

(b) the need to encourage collective bargaining

12. If the current minimum engagement period is such a problem, employers could negotiate an enterprise agreement to vary this condition subject to the Better Off Overall Test (BOOT).
13. However, the NFF has previously identified that enterprise bargaining is rare in the agricultural industry.¹³
14. Reducing the minimum engagement periods will only further discourage employers from collective bargaining because there would then be no conceivable additional flexibility that an employer could seek given the lowest

¹¹ See clause 27.1 (f) of the *Pastoral Award 2010*

¹² Statement of Susan Wearden – page 1 of Exhibit 178

¹³ See paragraph [51] of the NFF Submission dated 12 October 2015

wage rate reflects the National Minimum Wage and there are no penalty rates or shift loadings in the Award.

15. In any event, as stated at paragraph [42] of our 22 February 2016 submission, the two enterprise agreements we were able to locate for the dairy industry had minimum engagement periods of three and four hours respectively.

(c) the need to promote social inclusion through increased workforce participation

16. We refer to paragraphs [28] to [33] of our submissions filed on 22 February 2016.

17. Those submissions compare what a person can receive via the Newstart Allowance with guaranteed earnings if the minimum engagement periods are reduced to two hours.

18. On this basis, we submit reducing the minimum engagement periods may discourage workforce participation in this industry for local workers who are otherwise eligible to receive a Newstart Allowance.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

19. We don't accept the evidence led by the NFF to the effect that the current minimum engagement periods result in employees being paid for 3 hours of work when there are not duties to perform for this entire period.

20. The Australian Government data referred to above demonstrates the dairy industry has been embracing modern work practices already and that productivity levels in the industry have been increasing consistently since 1978-79.

21. Further, data collected by the Australian Government indicates the average time taken for all tasks associated with the milking process exceeds four hours even on smaller farms.¹⁴

22. Whilst the NFF have made a relatively desperate attempt to cast doubt on these figures by suggesting they are on a 'per day' as opposed to 'per milking' basis¹⁵, ABARES has recently confirmed the figures are 'per milking' – their response is attached to these submissions and marked "A".

¹⁴ ABARES 'Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14' – page 20, TAB 2 of Exhibit 186

¹⁵ See paragraph [88] to [92] of the NFF submission dated 5 August 2016

23. This ABARES survey data is clearly more relevant than the CowTime survey relied upon by the NFF¹⁶ because:

- the ABARES data was collected from 2011-12 to 2013-14 whereas the CowTime survey was undertaken in 2009;
- the sample size for the ABARES survey was three times greater than the CowTime survey¹⁷; and
- the ABARES total hours for milking figure includes time taken for cleaning whereas the CowTime total milking time data “does not include vat cleaning, shed or yard” .¹⁸

24. The ABARES data supports increasing the minimum engagement periods to four hours as opposed to reducing them to two hours.

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours;

or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts;

25. This appears to be a neutral factor.

26. However, we note in relation to a general assessment of whether the Award provides a fair and relevant safety net of employment conditions that dairy operators receive no weekend penalty rates and no extra payments for working early in the morning or into the evening.

(e) the principle of equal remuneration for work of equal or comparable value

27. This appears to be a neutral factor.

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

28. The issue of productivity is dealt with above – productivity in the dairy industry has grown at an average rate of 1.6% per year from 1978-79 to 2013-14.

¹⁶ See paragraph [34] of the NFF submission dated 12 October 2015

¹⁷ Compare paragraph [34] of the NFF submission dated 12 October 2015 which refers to a sample size of 100 with the ABARES ‘Australian dairy – financial performance of dairy farms, 2011 - 12 to 2013-14’ – page 32, TAB 2 of Exhibit 186 which refers in the second last paragraph to a sample size of around 300

¹⁸ See asterisk below the table at paragraph [34] of the NFF submission dated 12 October 2015

29. The improvement was confirmed by Susan Wearden in cross-examination¹⁹

30. Whilst the claim may reduce employment costs slightly, this will arise at the expense of income for already low paid workers.²⁰

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

31. This appears to be a neutral factor.

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

32. The only economic effect from granting the NFF claim will be shifting a relatively small amount of money from low paid workers to dairy farmers.

33. Whilst the data does certainly indicate dairy farmers struggle in some years²¹, the evidence strongly suggests that the current minimum engagement period is not an operative factor in determining whether a dairy farmer in Australia has a good or bad year.

34. Leigh Shearman admitted in cross-examination that the main factors affecting the performance of dairy farms are seasons and the milk price.²²

35. On that basis, the minimal positive effect for employers in the dairy industry from the granting of this claim should not outweigh the significant detriment that would be caused to the guaranteed earnings of already low paid workers.

Summary

36. The conditions for employees in the dairy industry are already sub-standard compared to other industries in Australia and it is unsurprising that the industry faces a significant labour shortage as a consequence.

37. It is arguable that the granting of the NFF's claim may not actually be in the interests of employers in this industry, let alone employees. This arises because reducing conditions in an industry whereby it is already difficult to attract employees is only likely to exacerbate the current labour shortage.

¹⁹ See Transcript for 11 July 2016 at PN369

²⁰ See Transcript for 11 July 2016 at PN304

²¹ See ABARES 'Australian farm survey results 2013-14 to 2015-16' – page 39, TAB 1 of Exhibit 186

²² See Transcript for 11 July 2016 at PN229

38. That issue aside, granting the claim would reduce the conditions for employees to a level that cannot possibly constitute a fair and relevant safety net of employment conditions for the dairy industry in Australia.

A handwritten signature in black ink, appearing to read 'SCrawford', written in a cursive style.

Stephen Crawford

SENIOR NATIONAL LEGAL OFFICER

30 August 2016

"A"

Stephen Crawford

From: Phillips, Paul <Paul.Phillips@agriculture.gov.au>
Sent: Friday, 19 August 2016 10:28 AM
To: Stephen Crawford
Cc: Martin, Peter; Lubulwa, Milly; McKelvie, Lisa
Subject: RE: Clarification sought re Australian dairy report [SEC=UNCLASSIFIED]

Hi Stephen,

The report 'Australian dairy – Financial performance of dairy farms, 2011-2012 to 2013-14' is publically available so there is no issue with passing it on to the Commission.

Just to be quite clear, the estimates provided on milking time are average per milking not average per day.

Regards

Paul

From: Stephen Crawford [<mailto:stephen.crawford@nat.awu.net.au>]
Sent: Wednesday, 17 August 2016 1:15 PM
To: Phillips, Paul <Paul.Phillips@agriculture.gov.au>
Cc: Martin, Peter <Peter.Martin@agriculture.gov.au>; Lubulwa, Milly <Milly.Lubulwa@agriculture.gov.au>; McKelvie, Lisa <Lisa.McKelvie@agriculture.gov.au>
Subject: RE: Clarification sought re Australian dairy report [SEC=UNCLASSIFIED]

Hi Paul,

Thanks for your response.

We have previously tendered the 'Australian dairy – Financial performance of dairy farms, 2011-2012 to 2013-14' report in the Fair Work Commission during award review proceedings. A dispute then arose between the AWU and the National Farmers' Federation regarding whether the figures are on a per milking or per day basis. Is there any issue with us providing your clarification to the Commission so they are aware of how to interpret the figures?

Regards,

Stephen Crawford
Senior National Legal Officer
The Australian Workers' Union, National Office
Level 10, 377-383 Sussex Street
Sydney NSW 2000
Ph: (02) 8005 3333
Fax: (02) 8005 3300
Mob: 0425 303 265

From: Phillips, Paul [<mailto:Paul.Phillips@agriculture.gov.au>]
Sent: Tuesday, 16 August 2016 3:02 PM
To: Stephen Crawford
Cc: Martin, Peter; Lubulwa, Milly; McKelvie, Lisa
Subject: RE: Clarification sought re Australian dairy report [SEC=UNCLASSIFIED]

Hi Stephen

The times are average milking time, eg 2 milking's per day 2 times the average milking time.

Regards
Paul

Paul Phillips

Data Analyst | ABARES | Biosecurity and Farm Analysis | Farm Analysis Section

Phone +61 2 6272 2203

Email Paul.Phillips@agriculture.gov.au

Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES)
Department of Agriculture and Water Resources,
18 Marcus Clarke Street, Canberra ACT 2601 Australia
GPO Box 585 Canberra ACT 2601 Australia

From: Stephen Crawford [<mailto:stephen.crawford@nat.awu.net.au>]
Sent: Thursday, 11 August 2016 9:46 AM
To: ABARES - Info <Info.ABARES@agriculture.gov.au>
Subject: Clarification sought re Australian dairy report [SEC=UNCLASSIFIED]

Dear Sir/Madam,

We are seeking clarification about some figures cited in the 'Australian dairy – Financial performance of dairy farms, 2011-2012 to 2013-14' report found here:

http://data.daff.gov.au/data/warehouse/9aas/2014/adfpfd9aas20141216/AustDairyFinPerf_v.1.0.0.pdf

Can you please confirm whether the milking time figures cited on page 20 are on a per milking basis or alternatively on a per day basis?

Regards,

Stephen Crawford
Senior National Legal Officer
The Australian Workers' Union, National Office
Level 10, 377-383 Sussex Street
Sydney NSW 2000
Ph: (02) 8005 3333
Fax: (02) 8005 3300
Mob: 0425 303 265

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