

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

23 March 2018

Re: AM2014/239 Pastoral Award 2010

BACKGROUND

1. The President, Justice Ross, issued a Statement on 15 March 2018 (**'Statement'**) that included an invitation for interested parties to file any comments on the re-drafted clause 31 of the Exposure Draft for the *Pastoral Award 2010* (**'Exposure Draft'**) attached to the Statement by 5 April 2018.
2. The Australian Workers' Union (**'AWU'**) makes the following comments in accordance with that invitation.

TECHNICAL AND DRAFTING

3. The AWU broadly supports the redrafting of clause 31 by the plain language expert, including most notably the shift in language from 'non-continuous shifts' back to 'non-successive shifts'.
4. However, the AWU has identified some technical and drafting issues in the re-draft more generally, which are discussed below. The clauses referenced in the sub-headings below are the clauses of the plain language re-draft.

Clause 31.2

5. The AWU notes that the words, "at least" before "6 days in a row" do not feature in the re-draft as they do in clause 35.3(b) of the *Pastoral Award 2010*.

Clause 31.4(b)

6. The AWU notes that the words, “and up to 12 ordinary hours” appearing at clause 31.4(b) are not required as clause 31.4(c) sets the maximum shift length.

Clause 31.6

7. The AWU submits that the words, “that time is counted as work” appearing in this clause should be replaced by the words, “which is counted as time worked” as the latter provides more clarity.

Clause 32.1

8. The AWU submits that the words, “24 hour a day 6 day week” in the heading of clause 32.1 is inaccurate for the same reasons clause 31.2 is inaccurate – it states a firm six days rather than *at least* six days. Additionally, neither the heading nor the content of the clause makes an explicit reference to shiftworkers, potentially creating confusion as to the application of the clause.

9. The AWU submits that the heading of clause 32.1 should read:

“32.1 Clause 32 applies to shiftworkers at workplaces that do not operate on a continuous work basis”

10. The AWU submits that the text of clause 32.1 should read:

“Clause 32 applies to shiftworkers at workplaces that operate on a basis other than continuous work. Continuous work is defined at clause 31.2.”

Clause 32.2(a)

11. The AWU notes that clause 32 as a whole does not make provision for crib time to be counted as time worked as is currently the case in clause 35.6(a) of the *Pastoral Award 2010*.

12. The AWU submits that clause 32.2(a) should read:

“(a) In any 28 day period, a shiftworker, inclusive of crib time:

(i) is not to work more than 152 ordinary hours; and

(ii) is to average 38 ordinary hours a week”

Clause 32.3(b)

1. As with clause 31.4(b) above, the AWU notes that the words, “and up to 12 ordinary hours” appearing at clause 32.3(b) are not required as clause 32.3(c) sets the maximum shift length.

Clause 34.1(d)

2. The AWU notes that the definition for successive afternoon or night shift at clause 34.1(d) has the potential to cause confusion by using the words, “on which the employee works *either afternoon shifts or night shifts*”. Specifically, the way this clause is drafted may portray that a shiftworker who works a combination of afternoon and night shifts is working successive shifts.
3. For a shiftworker to be considered as working successive shifts, that shiftworker must work the requisite number of a certain *type* of shift, whether it is afternoon shifts alone, or night shifts alone.
4. Accordingly, the AWU submits that clause 34.1(d) should read:

“(d) **Successive afternoon or night shift** means an afternoon or night shift (that is not a permanent night shift as defined in paragraph (c)) worked by an employee during a period where the employee works:

- (i) 5 successive afternoon shifts or 5 successive night shifts on a 5 day site; or
- (ii) 6 successive afternoon shifts or 6 successive night shifts on a 6 day site.”

Clause 34.1(e)

5. The AWU submits that the definition for non-successive afternoon or night shift at clause 34.1(e) does not accurately reflect the content of clause 35.9(b) of the *Pastoral Award 2010*.

6. The purpose of clause 34.1(e) is to entitle a shiftworker who does not work successive afternoon or night shifts to a higher loading for working such shifts. The drafting of clause 34.1(e), by using the words, “any mix of...shifts in any” does not necessarily achieve that purpose.
7. The AWU notes that clause 35.9(b) of the *Pastoral Award 2010* places focus on the shifts *not continuing* for at least the number of successive shifts required for the shiftworker to be considered an afternoon or night shift worker and thereby receive the relevant loading in clause 35.9(a). Clause 35.9(b) of the *Pastoral Award 2010* sets a clear threshold and if that threshold is not met, another loading will apply for the work performed by that shiftworker.
8. The AWU submits that for the re-drafted clause 34.1(e), such a threshold and the subsequent entitlements are not clear.
9. Accordingly, the AWU submits that clause 34.1(e) should read:

“(e) Non-successive afternoon or night shift means an afternoon or night shift (that is not a permanent night shift as defined in paragraph (c)) worked by an employee during a period where the employee does not work:

- (i) 5 successive afternoon shifts or 5 successive night shifts on a 5 day site; or
- (ii) 6 successive afternoon shifts or 6 successive night shifts on a 6 day site.”

Yours faithfully,



Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union