



DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

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

Agricultural industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT BEAUMONT
COMMISSIONER LEE

MELBOURNE, 29 JANUARY 2020

4 yearly review of modern awards – Pastoral Industry Award 2010 – outstanding issue – meal breaks and allowances for piggery attendants.

[1] In a previous decision the Commission determined that the operation and interaction of clauses 17.2 and 36.10 (which deal with overtime and meal breaks for piggery attendants) of the *Pastoral Industry Award 2010* (the Pastoral Award) ‘is ambiguous and they require review before the Commission can be satisfied that the relevant terms achieve the modern awards objective’.¹ This decision resolves the ambiguity in the operation and interaction of these provisions. Before turning to the submissions we propose to provide some context.

[2] Clause 17.2(c)(ii) of the current award states:

‘17.2 Expense-related allowances

(c) Meal allowance

(i) If an employee is required to work overtime after working ordinary hours (except where the period of overtime is fewer than one and a half hours), the employee will be paid \$12.93 for the first and any subsequent meals. Alternatively, the employer may supply the employee with a meal.

(ii) 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 \$12.93 for each meal not supplied.’

¹ [\[2017\] FWCFB 5536](#) at [292]

[3] Clause 36 of the current award is set out later (at [27]).

[4] The Commission identified the following potential conflict in respect of clauses 17.2(c)(ii) and 36.10:

‘If a pig breeding and raising employee works overtime that he/she was not notified of the previous day, and the overtime extends to a second meal break, is the employee entitled to a second meal in accordance with clause 17.2(ii) or limited to one in accordance with clause 36.10?’

[5] On 6 July 2017 (the *July 2017 Decision*)² a Full Bench made the following observations about these provisions:

‘The AWU submits that clause 36.10 is not limited to one allowance or meal. It submits that:

‘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.’³

The AWU’s submission appears to be a logical reconciliation of the two clauses and is consistent with the terms of such provisions in other modern awards (see Attachment D). However, it seems to us that the terms of clauses 17.2(c)(ii) and 36.10 are far from clear and in our view should be redrafted in plain language. It is necessary to first attempt to determine what entitlements the clauses are intended to provide.

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;
- 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’.

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).

But clause 17.2(c) is unclear in a number of respects. In particular, the meal allowance is payable where an employee works ‘*more* than two hours’ overtime, which simply begs the question, how much more? 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?

² [2017] FWCFB 3433

³ AWU, [submission in reply - exposure draft](#), 23 November 2016, at paras 71–72

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. But the 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'.

It seems to us that the meaning of the existing provisions needs to be clarified before we can attempt to reconcile any conflict between the provisions.⁴

[6] A conference was convened on 24 July 2017 in an effort to clarify the intended operation of clauses 17.2(c)(ii) and 36.10. At the conference there was general agreement that, in relation to clause 17.2(c)(ii), the initial meal allowance is payable after a period of 2 hours, however the time at which the second meal allowance would be payable was disputed.⁵ It was also noted that there is tension between the meal allowance provisions contained in clauses 36.5, 36.10 and 36.11. Following that conference interested parties were directed to file further submissions in relation to:

- the intended operation of clause 17.2(c)(ii) of the Pastoral Award, in particular when the second meal allowance is payable;
- the operation of the meal allowances provisions in clause 36, in particular the provisions contained at 36.5, 36.10 and 36.11; and
- the operation of clauses 10.2(d) and 32.7 of the exposure draft.⁶

[7] We note that clauses 10.2(d) and 32.7 of the Exposure Draft were subsequently renumbered as clauses 17.3(d) and 42.7.

[8] The relevant clauses of the Exposure Draft published on 14 October 2019 are 17.3(d) and 42.7 and are extracted below:

17.3 Expense-related allowances

...

(d) Overtime meal allowance

- (i) If an employee is required to work overtime after working ordinary hours (except where the period of overtime is less than one and a half hours):
- the employee will be paid \$13.76 for the first and any subsequent meals; or
 - the employer will supply the employee with a meal.

⁴ [2017] FWCFB 3433 at [141] – [147]

⁵ Statement [2017] FWC 3883 at [4]

⁶ Ibid

- (ii) An employee required to work overtime for more than ~~two~~ 2 hours after the employee's ordinary finishing time without having been notified before leaving work on the previous day that they will be required to work overtime:
- will be provided with a suitable meal free of cost; and
 - if the work extends into a second meal break, another meal; or
 - in the event of the meal not being supplied the employee is entitled to a payment of \$13.76 for each meal not supplied.

42.7 Overtime meal allowance

(a) Where overtime is unplanned and not notified the day or days beforehand, a payment will be made of \$13.76 after two 2 hours of overtime if work will continue beyond the meal break. Alternatively the employer may supply the employee with a meal.

(b) Where an employee is notified the day or days prior to an overtime day, the meal allowance is not payable unless the overtime is cancelled. Where cancellation occurs and notice of cancellation is not given at least the day before the planned overtime, the employee will be paid the meal allowance

[9] Written submissions were filed by the AWU and the NFF:

- [National Farmers Federation](#) (NFF) on 6 March 2018;
- [The Australian Workers' Union](#) (AWU) on 6 March 2018;
- [NFF](#) – in reply on 19 March 2018; and
- [AWU](#) – in reply on 19 March 2018.

[10] No consensus emerges from those submissions and the parties remain in dispute regarding the intended operation of these clauses. It is convenient to deal first with clause 17.2 of the current award.

[11] The NFF accepts and agrees with the Full Bench's observation in the *July 2017 Decision* that clause 17.2(c) of the current award 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;
- 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'.

[12] The NFF also accepts that 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).

[13] The NFF goes on to observe that two matters remain outstanding. As to the first, the NFF notes that the Full Bench queried the meaning of the expression ‘for more than two hours after the employees ordinary ceasing time’ in clause 17.2(c)(ii) of the current award. The NFF correctly observes that the parties have agreed that this expression requires an employer to provide the meal/allowance after an employee is required to work (and has worked) a period of at least 2 hours overtime. In our view the parties’ agreement resolves this issue.

[14] The second matter concerns the circumstances in which an employee is entitled to a second meal allowance. As to this matter, the NFF submits:

- Nothing in the award requires the provisions of the initial meal/allowance under clause 17.2(c)(ii)⁷ 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.⁸
- The award only contemplates meal breaks at clause 15.1(a).⁹ It follows that the ‘second meal break’ must be a meal break provided in accordance with clause 15.1(a).
- 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.

- 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).
- It follows that the first meal break would be that which is taken within the first 5 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.

[15] It is convenient to note here that clause 15.1 of the Pastoral Award provides as follows:

15.1 Meal break

- (a) 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.
- (b) All work performed on the instruction of the employer during a recognised meal break will be paid for at double time rates. Such payment will continue until the employee is released for a meal break of not less than 30 minutes.

⁷ i.e. which is paid where the “employee is required to work overtime for mot than 2 hours after ...ordinary ceasing time”

⁸ 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.

⁹ 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.

[16] In the alternative, the NFF argues that clause 17.1(c)(ii) is premised on the notion that an employee is entitled to a meal break once every five hours:

- Clause 15.1(a) provides for one meal break during the first 5 hours of work.
- Clause 17.2(c)(ii) grants an entitlement to the initial meal/allowance 2 hours after ‘ordinary ceasing time’.
- 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).
- 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.

[17] The AWU submits that clause 17.2(c)(ii) grants an employee an express entitlement to a second meal or meal allowance, but does not provide an associated length of time that must be worked in order for the entitlement to a second meal break to crystallise. The AWU submits that clause 15.1 is of no assistance in understanding the operation of clause 17.2(c)(ii) because ‘the scope of clause 15.1 [is] limited to determining when an employee’s *first* meal break must be taken during ordinary hours’. The AWU contends that although clause 17.2(c)(ii) does not explicitly state when the second meal break occurs ‘the words used in the provision make it relatively clear that the second overtime meal is to occur two hours after the first’.¹⁰ In short, the AWU contends:

‘On an ordinary reading of the clause, 17.2(c)(ii) sets the timing of the initial meal break at two hours after the overtime work begins – the clause explicitly states “two hours” and not any other period. This evinces a clear intention that the entitlement to the overtime meal allowance will crystallise only once an employee has worked two hours of overtime. We don’t believe that such a view is controversial.

It follows, therefore, that in the absence of a separate qualifying period such as in clause 8(ii) of the Poultry Award referenced above, in the present case the same period of overtime worked that qualifies an employee to an initial overtime meal allowance – two hours – would entitle an employee to a second overtime meal allowance.’¹¹

[18] The AWU contends that clause 10.2(d) of the Exposure Draft suffers the same ambiguity as clause 17.2(c) in the Pastoral Award, with the lack of a clear time period for the entitlement to a second overtime meal allowance to crystallise.

[19] In their reply submission dated 19 March 2018, the NFF submit that clause 15.1 is not limited in the manner contended by the AWU and submits that the clause cannot be read as ‘being limited to determining when an employee’s first meal break’ occurs, as the clause doesn’t reference a numbered meal break or sequence of meal breaks. It only states when a meal break should be provided. It further states that its operation should be read to prescribe each occasion on which a meal break must be provided, being within 5 hours of the ordinary commencing time or as agreed.

¹⁰ AWU [submission](#) 6 March 2018 at para 13

¹¹ Ibid at paras 14-15

[20] The NFF also disagree with the AWU's submission that an ordinary reading of the clause, 17.2(c)(ii) sets the timing of the initial meal break at 2 hours after the overtime begins. The NFF submits that the clause addresses the overtime meal allowance, not meal breaks, in which an allowance is to be provided if an employee works for more than 2 hours of overtime, but makes no mention as to whether a break should be provided. On behalf of the NFF, the clause states that the employer is required to bear the cost of a meal (when the employee has worked at least two hours overtime) which the employee will eat after finishing work or when another break is provided.

[21] The NFF submit that although clause 17.2(c)(ii) makes reference to a second meal break, this is purely the reference to the break provided under clause 15.1 in which is the only clause in the award that allows for a meal break.

[22] The NFF also submit that the AWU contention that the initial period that would qualify an employee for an initial overtime meal allowance, being two hours, would entitle them to a second overtime meal allowance. The NFF contend that in reality employees should and would not be provided with a complete meal every two hours, and that there is no reason that this would be necessary during overtime hours in comparison to ordinary hours.

[23] The NFF submits that the Commission should reject the AWU's proposed draft determination. It reaffirms its submissions that the effect of clause 17.2(c) is, to grant an employee with a meal allowance if he/she works 2 hours (or more) overtime after ceasing ordinary hours; and if the overtime extends into the subsequent day or, in the alternative, if the employee works for a further 5 hours.

[24] As we have mentioned, there is an ambiguity in clause 17.2(c)(ii) regarding the time at which an employee working overtime is entitled to a 'second meal break' (and consequently a further meal allowance). As submitted by the NFF, the terms of the current award are premised on the notion that an employee is entitled to a meal break for each 5 hour period of work. Further, as the NFF submits, clause 17.2(c)(ii) provides that a *meal allowance* is payable where an employee works more than two hours of overtime but the clause is silent as to whether a *meal break* should be provided at that time. However, consistent with the NFF's contention that the current award is premised on the provision of a meal break after each 5 hour period it would follow that a meal break is to be provided when the entitlement to the first meal allowance crystallises, that is after two hours overtime.¹²

[25] Similarly, and contrary to the AWU's submission, the entitlement to a second meal break (and the consequent meal allowance payment) arises 5 hours after the first meal break (that is after 7 hours of overtime). We will publish a draft variation determination giving effect to our decision in due course.

[26] We wish to make it clear that this decision simply deals with the ambiguity in the current award and is not a determination as to the merits of the existing meal break/allowance provisions. In the event that any party contends that, as a matter of merit, the relevant award terms should be varied, they should make such an application.

¹² Based on a standard 8 hour day such a meal break will occur about 5 hours after the employee's previous meal break (see clause 15.1(a)).

[27] We now turn to clause 36 of current award which relevantly¹³ provides:

36. Overtime and penalty rates

- 36.1** All time worked by Piggery attendants before the ordinary commencing time or after the ordinary ceasing time or in excess of ordinary hours of work in any one day or in any one week will be regarded as overtime and will be paid for at the rate of time and a half for the first two hours and double time after that.
- 36.2** All overtime worked on Saturday will be paid for at the rate of time and a half for the first two hours and double time after that.
- 36.3** In computing overtime each day's work will stand alone.
- 36.4** An employee recalled to work overtime after leaving the employer's business premises (whether notified before or after leaving the premises) must be paid for a minimum of four hours work at the appropriate rate for each time the employee is so recalled; provided that the employee must not be required to work the full four hours if the job they were recalled to perform is completed within a shorter period.
- 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 \$13.76 for the first and any subsequent meals. Alternatively the employer may supply the employee with a meal.
- 36.6** Before starting such overtime an employee will be allowed a meal break of 30 minutes which will be paid for at ordinary rates.
- 36.7** An employee working such overtime will be allowed a crib time of 20 minutes without deduction of pay after each four hours of work.
- 36.8** Employees will work reasonable overtime to meet the needs of the enterprise.
- 36.9** No employer or employee will be party to payment for overtime where such overtime is not actually worked. The assignment of overtime by an employer will be based on specific work requirements and the practice of 'one in all in' overtime must not apply.
- 36.10** Where overtime is unplanned and not notified the day or days beforehand, a payment will be made of \$13.76 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 We have omitted clause 36.12 – *Time off instead of payment for overtime* as it is not relevant to the matter before us.

[28] In the *July 2017 Decision* at [146] the Full Bench made the following observations in relation to 36.10 of the current award:

‘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. But the 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’.’

[29] In relation to the above extract the NFF submit that:

- Clause 36.11 is relatively clear and specifies what occurs when notice of overtime is given to an employee and when notice of overtime being cancelled.
- Clause 36.5 operates where the employee works overtime after working ordinary hours from Monday to Friday.
- Clause 36.10 will operate outside of ordinary hours Monday to Friday. For example, if the employee works overtime on a Saturday and the work will continue beyond the ‘meal break’.
- Clause 36.5 provides that the ‘first meal’ during overtime is the meal which may be taken during the meal break contemplated in clause 36.6. the ‘subsequent meals’ stated in clause 36.5 would be any further meals which is to be taken during the further meal break provided under clause 15.1 of the Pastoral Award.

[30] The AWU submits that confusion occurs when attempting to determine the entitlement to overtime meal allowances for Pig Breeding and Raising employees for unplanned overtime on Monday to Friday. The AWU also submit that clause 36.5 pertains to overtime after ordinary hours on Monday to Friday, clause 36.10 pertains to unplanned overtime on Monday to Friday and clause 36.11 revokes the entitlement to an overtime meal allowance for employees working planned overtime. The AWU submits that the conflict between clause 36.5 and 36.11 must be resolved in favour of 36.5, otherwise clause 36.5 is redundant.

[31] The AWU submits Clause 36 entitles employees working overtime to a paid 30-minute break before starting overtime. However, it uses the phrase “such overtime”. The AWU submits that reading this clause in ascending order may lead the reader to believe that the phrase “such overtime” refers to the overtime described in clause 36.5. It submits that such should be deleted on this clause as it limits the scope to that type of overtime.

[32] The AWU further submits, within the Exposure Draft clause 36.5 of the Pastoral Award has been removed. This has complications of restricting an overtime meal allowance to being payable only for unplanned overtime, or if overtime has been planned and then subsequently cancelled. Within clause 32.7 of the Exposure Draft there is no provision for subsequent meal allowance, despite its existing in the Pastoral Award.

[33] In regards to clauses 36.5, 36.10 and 36.11 of the Pastoral award, the NFF submit that the Commission should not accept the AWU's submissions because:

- although there is repetition, clause 36.11 does not render 36.5 redundant;
- the reference to 'such overtime' in clause 36.6 is a clear reference to clause 36.5; and
- clauses 36.5 and 36.10 grant different entitlements as they operate in different circumstances.

[34] In relation to the AWU's submission in respect of clause 32.7 of the Exposure Draft, the NFF submits that the draft is correct in failing to require a meal allowance when the employer gave adequate notice to the employee.

[35] In its reply submission the AWU agrees that clauses 36.5 and 36.10 are supposed to apply in two distinct circumstances, but submits that based on how they are currently drafted they are not currently distinct. The AWU further submit that clause 36.10 requires an amendment to clarify this, if it is to apply in circumstances where clause 36.5 does not.

[36] Finally, the NFF advances an 'alternative approach' which would exclude payment of an overtime meal allowance in circumstances where the employee could reasonably return home for a meal. In support of this proposal the NFF observes that 21 of the overtime meal allowance provisions in modern awards provides that a meal allowance is not payable where the employee could reasonably return home for a meal. The NFF submits that:

'... given the remoteness of the working locations where the Pastoral Award usually applies and the fact that frequently employers supply onsite accommodation in most case it would be more convenient for the employee to return home than to find a retail food outlet. The Award should accommodate this practice.'¹⁴

[37] At the outset we note that the parties agree that clauses 36.5 and 36.10 are intended to apply in two distinct circumstances; but differ as to whether they require amendment to make such a distinction clear. We think the position should be clarified by amending the comparable provision to clause 36.10 in the exposure draft (and draft variation determination) to make it clear that it does not apply to overtime worked after ordinary hours on Monday to Friday. We also intend to reinsert clause 36.5 into the exposure draft and draft variation determination.

[38] As to clause 36.6, we agree with the NFF that the reference to 'such overtime' is a reference to overtime worked after ordinary hours on Monday to Friday (ie the overtime referred to in clause 36.5).

[39] We do not propose to make any further amendments to the exposure draft or the draft variation determination as to do so would constitute a substantial change to the current award provisions.

¹⁴ NFF submission 6 March 2018 at para 18

[40] If the NFF wishes to pursue its 'alternative' approach, or if the AWU wishes to pursue a merits based variation of the existing provision, the appropriate course is to make an application to vary the award.

PRESIDENT

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<PR716158>