

NATIONAL OFFICE

Level 10, 377-383 Sussex Street Sydney NSW 2000

T: (02) 8005 3333 F: (02) 8005 3300

E: members@awu.net.au W: www.awu.net.au

Members Hotline: 1300 885 653

Scott McDine National Secretary

Fair Work Commission
Terrace Tower, 80 William Street
East Sydney NSW 2011
By email: amod@fwc.gov.au

17 April 2016

Re: AM2014/239 AWU submissions on the Exposure Draft for the *Pastoral Award 2016*

Background

1. On 23 March 2016 the President, Justice Ross published a Statement which requires submissions on drafting and technical issues for Group 3 exposure drafts to be filed by 14 April 2016.
2. The President subsequently agreed to The Australian Workers' Union's (AWU) request for an extension to 18 April 2016.
3. The AWU's submissions in relation to the Exposure Draft for the *Pastoral Award 2016* (Exposure Draft) as published on 15 January 2016 appear below.

Drafting and technical issues

General provisions

4. Clause 3.3: Subject to not disturbing existing coverage arrangements, consideration could be given to linking the exclusions specifically to the coverage of other relevant awards. For example:

Without limiting the generality of the exclusion in clause 3.1, this award does not cover employers covered by:

(a) the *Wine Industry Award 2016*;

(b) the *Silviculture Award 2016*, except where work is carried on as part of a broadacre mixed farming enterprise;

- (c) the *Sugar Industry Award 2016*;
- (d) the *Horticulture Award 2016*;
- (e) the *Aquaculture Award 2016*, except where the production of freshwater species is incidental to a broadacre mixed farming enterprise; and
- (f) the *Seafood Processing Award 2016*,

This approach would reflect that taken in clause 4.2 of the *Building and Construction General On-site Award 2010*.

5. Clause 5.2: The facilitative provision in clause 30.5 regarding the spread of ordinary hours requires majority agreement – the Exposure Draft incorrectly refers to individual agreement.
6. Clause 6.3 (a): This clause should be amended to read: “A full-time employee is an employee who is engaged to work 38 ordinary hours per week.” Otherwise, for example, overtime hours worked by a piggery attendant outside the span of ordinary hours in clause 30.3 could be included in the guaranteed 38 hours for the week.
7. Clause 6.4 (a) (i): This should be amended to read “is engaged to work less than 38 ordinary hours per week” for the reasons outlined above.
8. Clause 6.5 (a): This should be amended to read: “A casual employee is an employee engaged as such and paid by the hour”. The omission of the words “as such” means any employee engaged and paid by the hour can be treated as a casual.
9. Clause 6.5 (c) (i): Given there is scope for payment at time work rates, this should be amended to read: “Shearers, Crutchers and Woolpressers will be engaged as casual pieceworkers in accordance with the terms specified in Part 8 – Shearing Operations”.
10. Clause 7: This clause is problematic for piggery attendants who work as shiftworkers because there is a paid crib break entitlement. We propose the start of clause 7 be amended to read:

The following provisions will apply to all employees other than employees engaged in shearing operations who will be entitled to the breaks prescribed in Part 8 – Shearing Operations and piggery

attendants who work as shiftworkers who will receive the paid crib break as per Part 6 – Pig Breeding and Raising.

11. Clause 9.1: The words “actual ordinary” should be deleted as they indicate the payment obligation would not apply to overtime hours. The clause should state: “Wages must be paid weekly or fortnightly according to the hours worked each week or fortnight or according to the applicable piecework payment”.

12. Clause 10.1 (a) (iii) and (d): We accept the travelling allowance cannot sensibly be treated as an all-purpose allowance and that it is more appropriately described as an expense-related allowance. We note it is already adjusted as an expense-related allowance in Schedule C.2.2.

13. Clause 10.1 (c): We are concerned the wording conveys that the employee would have to actually carry out first aid duties to receive the allowance. We suggest the clause be amended to read:

An employee appointed by their employer to perform first aid duty as required in addition to their usual duties, and holding a current recognised first aid qualification such as one from St John Ambulance or a similar body, must be paid an allowance of \$2.49 per day.

14. Clause 10.2 (c): The current two sub-clauses overlap and conflict. We submit the overtime meal allowance clause should read:

An employee required to work overtime for more than one and a half hours after working ordinary hours:

- *will be paid \$12.65 for the first and any subsequent meals; or*
- *will be provided with a suitable meal free of cost for the first and any subsequent meals.*

This clause does not apply to piggery attendants who are entitled to a meal allowance in accordance with clause 32.8.

15. Clause 14: A number of clauses will likely be impacted upon by the finalisation of the annual leave common proceedings including: when leave is paid, excessive leave and leave in advance.

16. Clause 14.4 (a) (i): Given farm and livestock hands and poultry workers can be required to work ordinary hours on the weekend without any penalty rates the words “as performed between Monday and Friday” should be deleted.

17. Clause 14.8: This clause should be amended to read: “On termination of employment, an employee must be paid for leave accrued (including annual leave loadings or penalty rates as per clause 14.4) that has not been taken at the appropriate wage calculated in accordance with this award”. This is the rate required by s 90 (2) of the *Fair Work Act 2009*.
18. Clause 18.2 (b): The wording in clause 26.2 (b) of the *Pastoral Award 2010* (the Award) is clearer and should be retained.

Broadacre farming and livestock operations

19. Clause 23.2: We don't think a definition of “industry QA Programs” is required but references to “OH&S procedures” should be amended to “WH&S procedures”.
20. Clause 24.3: We support the amendment proposed in the Exposure Draft as it should eliminate the prospect of overtime and public holiday payments being calculated on a rate which has been reduced by the “with keep” amount. This would be unjust as it would effectively increase the deduction beyond the prescribed amount.
21. Clause 25.3 (a): This should be amended to read: “in or in connection with jetting or spraying of sheep, if they mix the poison or handle the nozzle”.
22. Clause 25.3: We submit the disability allowance in clause 25.3 should be moved to clause 10.1 of the Exposure Draft so that it can apply to any employee who is exposed to these tasks.
23. Clause 26.3: We don't think any amendment is required to these provisions.
24. Clause 27.3: This clause is affected by the common issue Award Flexibility proceedings. The AWU and the NFF are in ongoing discussions about the insertion of the model TOIL term.
25. Clause 27.4: This clause should be deleted as it is contrary to the requirement in s 323 of the *Fair Work Act 2009* for work to be paid for in full subject to permitted and reasonable deductions.
26. Clause 27.5: We submit this clause would be clearer if amended to read:

Overtime and public holiday rates are calculated on the full relevant minimum rate. That is, the rate before any deduction is made for “with keep” employees.

Pig Breeding and Raising

27. Clause 30.2: This should be amended to read: “If an employee works less than 38 ordinary hours in one week of a four week period then the employer will use its best endeavours to ensure that the employee is paid the full weekly rate for that week”.
28. Clause 31.1: The Exposure Draft has conflated the concepts of “Non-continuous work” and “non-successive shifts”. “Non-continuous work” is referring to the system of shifts that operates at the enterprise. In contrast, “non-successive shifts” is concerned with the shifts worked by an individual employee and is specifically directed at prescribing higher rates when they perform less than a full week of afternoon or night shift.
29. A seemingly unintended effect of the Exposure Draft would be to remove the entitlement to higher rates of pay for employees who perform less than a full week of shifts in a continuous work enterprise.
30. A further issue is the Exposure Draft confines the entitlement to a paid crib break to continuous workers when this does not appear to be the intent of the Award. This is demonstrated by the fact that clause 35.6 (a) of the Award refers to non-continuous workers performing an average of 38 hours per week “inclusive of crib time”.
31. We propose the following amendments to address these issues:
- Insert a definition of “Non-continuous work” into clause 31.1 which reads:

Non-continuous work means shift work which does not meet the definition of “continuous work”;
 - Amend clause 31.1 (c) to read: “***Non-successive shifts*** means work carried out by a shift worker on afternoon or night shift which does not continue...”;
 - Do not have a clause 31.2 (h) that applies different to “Continuous work” and “Other than continuous work”. Instead, clause 31.2 should be amended to read:

(h) *Shiftworkers will be allowed a 20 minute crib break each shift, which will be counted as time worked.*

(i) *Shiftworkers will work ordinary hours continuously except for crib breaks at the discretion of the employer,*

- Insert the following definition into the clause 14.1:

For the purpose of the additional week of annual leave provided by the NES, a shiftworker means a shiftworker on continuous work as defined in this award; and

- Amend the reference in the table in clause 31.5 from “Non-continuous afternoon or night” to “Non-successive afternoon or night”.

32. Clause 31.2 (e): This should be amended to read: “Subject to clause 31.2 (f) ordinary hours of work must not exceed 10 hours per shift inclusive of crib time”.

33. Clause 32.2: The words “all hours” should be deleted from the table given the clause is only concerned with overtime.

34. Clause 32.6: This clause is a relic of the past and is not *necessary* for inclusion in a modern award.

35. Clause 32.9: This should be amended to read: “For overtime which follows the working of ordinary hours, an employee will be allowed a meal break of 30 minutes paid at ordinary rates.”

36. Clause 33: The table for day workers should state: “Sunday – ordinary hours worked by agreement”.

37. Clause 33: Given shiftworkers on “non-continuous work” can seemingly perform ordinary hours on a Sunday, the words “continuous shifts” should be deleted. We note clause 35.10 refers generally to shiftworkers when excluding the shift loading for work on the weekend and public holidays.

38. The second footnote referring to a major portion of the shift being on a Sunday should be deleted as there is no corresponding provision for Saturday night shifts or shifts on a public holiday.

Poultry Farming

39. Clause 38.1 (a): This should read “all time worked by a poultry worker in excess...”

40. Clause 38.1 (c): The AWU is still in discussions with the NFF about the potential insertion of the model TOIL provision.

Shearing Operations

41. Clause 39.2 (c) (ii): The second dot point should read: “the employee is advised by the employer of a starting time with more than 24 hours’ notice”.

42. Clause 40.3 (b): There is no need to change this provision.

43. Clause 40.5 (g): As per our previous correspondence to the Commission dated 3 March 2016, the correct cross-reference at the end of this clause is 40.5 (a) – this is where the piecework rates are contained.

44. Clause 41.2: The wording in clause 46.2 of the Award is clearer and should be retained.

45. Clause 44.7 (b): The words “subject to the foregoing” should be retained because they clarify that stands allocated to a ‘learner shearer’ can be excluded from the drawing of lots.

46. Clause 46.1 (b): This clause should also refer to Woolpresser shed-hands.

47. Clause 46.1 (c): The reference to 1/38th of the appropriate minimum weekly rate in clause 51.1 (c) of the Award has been changed to 20% of the weekly rate per hour. This seems reasonable on a merit level but perhaps extends beyond the scope of the redrafting process.

Schedules

48. Schedule B.4.1: The Award is currently ambiguous in terms of whether a day worker can work ordinary hours on a Sunday. Clause 35.1 seemingly allows an agreement to this effect but clause 37.2 but does not refer to ordinary duty by day workers on a Sunday.

49. In the circumstances, we submit Schedule B.4.1 of the Exposure Draft should be amended to exclude shiftworkers (given their rates are comprehensively dealt with in Schedule B.4.2) and to insert a 200% Sunday column.

50. Schedule B.4.2: As per our submissions above, the columns headed “Non-continuous afternoon or night shift” should be changed to “non-successive afternoon or night shift”. The second footnote should also be amended and third footnote deleted for reasons explained above.

51. Schedule B.4.4: As per above, a 225% column should be added for ordinary hours worked by agreement on Sunday and shiftworkers should be excluded rather than included given their rates are in Schedule B.4.5.
52. Schedule B.4.5: As per above, the reference to “non-continuous” should be “non-successive”, footnote 2 amended and footnote 3 deleted.
53. Schedule B.5 and B.6: It would assist if casual overtime rates are included in the Exposure Draft given these are often contentious.
54. Schedule G: The definition of “continuous service” should not include a provision which indicates continuous service is broken if an employee is absent from work due to a sickness or accident for more than 4 weeks in a year.



Stephen Crawford

SENIOR NATIONAL LEGAL OFFICER