



# DECISION

*Fair Work Act 2009*

s.158 - Application to vary or revoke a modern award

## **Australian Federation of Employers and Industries**

(AM2010/223)

## **AMUSEMENT, EVENTS AND RECREATION AWARD 2010**

[MA000080]

Amusement, events and recreation industry

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 14 MARCH 2011

*Application to vary Clause 22 of the Amusement, Events and Recreation Award 2010; breaks.*

### **Introduction**

[1] On 27 September 2010 the Australian Federation of Employers & Industries (AFEI) made an application under s.158 of the *Fair Work Act 2009* (the Act) to vary Clause 22 of the *Amusement, Events and Recreation Award 2010* (MA000080)(the modern award).

[2] Subclauses 22.1 and 22.2 of the modern award currently provide:

#### **‘22. BREAKS**

##### **22.1 Meal breaks—other than casual employees**

(a) An employee other than a casual employee must be allowed a meal break of not less than 30 minutes and not more than 60 minutes, not later than five hours after commencing work.

(b) Special meal break provisions

Where an employee is instructed by their employer to remain on call during their meal period, that period will be paid for at the ordinary rate of pay.

##### **22.2 Rest breaks—casual employees**

(a) Casual employees engaged for a minimum of five hours must be allowed a rest break of 20 minutes without deduction of pay.

(b) Casual employees required to continue working for a further five hours must be allowed a further rest break of 20 minutes without deduction of pay.

(c) Both of the above rest breaks must be taken at a time convenient to the employer but not at the beginning or the end of the period of duty.’

[3] The AFEI’s application sought to delete subclauses 22.1 and 22.2 and insert in lieu thereof the following subclause:

**‘22.1 Meal breaks**

(a) All employees must be allowed a meal break of not less than 30 minutes and not more than 60 minutes, not later than five hours after commencing work.

(b) Such meal breaks shall be unpaid.

(c) Special meal break provisions

Where an employee is instructed by their employer to remain on call during their meal period, that period will be paid for at the ordinary rate of pay.’

[4] The effect of the proposed variation would be to delete the separate rest break provisions for casuals, bringing the break provisions for casual and non casual employees into line. For casual employees this would mean losing an entitlement to a paid rest break of 20 minutes for every five hours worked, while gaining an entitlement to an unpaid meal break of between 30 minutes and 60 minutes after five hours work.

[5] On 29 September 2010 directions were issued for parties supporting or opposing the application to file an outline of their submissions and any material in support. Submissions in support of the application were filed by the AFEI, the Australian Amusement, Leisure and Recreation Association Inc. (AALARA), Dreamworld, the Australian Bowling Proprietors Association (ABPA), Jamberoo Action Park (Jamberoo), and Luna Park Services Pty Ltd (Luna Park). Submissions opposed to the application were filed by the Australian Workers’ Union (AWU) and the Media, Entertainment & Arts Alliance (MEAA).

[6] An initial hearing was held on 18 November 2010. Following this hearing, the AFEI filed a revised application. This application sought to replace subclauses 22.1 and 22.2 of the modern award with the following:

**‘22.1 Meal breaks**

(a) All employees must be allowed a meal break of not less than 30 minutes and not more than 60 minutes, not later than five hours after commencing work.

(b) Such meal breaks shall be unpaid.

(c) Special meal break provisions

Where an employee is instructed by their employer to remain on call during their meal period, that period will be paid for at the ordinary rate of pay.

**22.2 Rest breaks**

Where practicable and where rest periods do not interfere, in the opinion of the employer, with the normal continuity of an employer's business, employees will be allowed a 10 minute paid rest break where a shift exceeds five hours in duration (excluding time taken as an unpaid meal break).'

[7] The difference between the original and the amended application is that the latter includes, in addition to the unpaid meal break, an entitlement - subject to certain qualifications - to a 10 minute paid rest break for all employees who work more than five hours.

[8] A further hearing was held on 21 February 2011. Oral submissions were made at that hearing by the AFEI, the ABPA and the AWU.

### **The legislation**

[9] Section 157 of the Act relevantly provides that

‘(1) FWA may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.’

[10] The modern awards objective is set out in s.134 of the Act. It provides as follows:

‘(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

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

(b) the need to encourage collective bargaining; and

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

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

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

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

(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; and

(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’.

[11] A Full Bench, in a case dealing with two appeals in relation to the minimum period of engagement for casuals in the retail industry, made the following observation with regard to the proper construction of s.157(1).

‘In our view synonyms such as exceptional, indispensable and requisite and the compound phrase “exceptional circumstances” are of limited value and their use is likely to lead to confusion. While synonyms might in some circumstances assist in the construction of statutes, they ought not to be substituted for the words that the legislature has used.’<sup>1</sup>

[12] The Full Bench also observed:

‘It is important to have regard to the context in which the terms of the modern retail award were formulated’<sup>2</sup>

[13] In having regard to that context, the Full Bench referred to the fact that the modern retail award replaced a large number of pre-existing state and federal awards. It noted that the relevant provisions in those awards were not uniform and, for the purpose of the appeals it was dealing with, only considered it necessary to refer to the provisions of general application in the industry concerned. Later in the decision the Full Bench found that the Vice President ‘*was entitled, perhaps even required, to give consideration to the circumstances*’ which had led to the inclusion in the modern award of the provisions that the applications sought to vary<sup>3</sup>.

## **Submissions**

[14] The AFEI submitted on 13 October 2010 in support of its original application that the proposed variations would ensure that the modern award took into account ss.134(1)(d) and (f) of the Act. It submitted that the modern award does not currently promote flexible modern work practices and the efficient performance of work, as the 20 minute break ‘*is not adequate time to allow employees to properly break from work to eat and meet other needs. Many employers operate very large venues in the industry and the meal break of 20 minutes does not allow employees to leave their work area and eat a meal.*’

[15] The AFEI also submitted that ‘*[t]he 20-minute paid rest break for casual employees creates a significant cost burden for employers, which is not consistent with the modern award objective at subsection 134(1)(f) of the FW Act. Prior to the commencement of modern awards, most casual employees now covered by the AER Award were previously entitled to a 30 - to a 60- minute unpaid meal break...The 20-minute paid meal break for casual employees was not a feature of this industry prior to award modernisation.*’

[16] The AFEI submitted that the cost implications of providing a 20-minute paid meal break were significant. *'On an annual basis, an employer of an average of 30 casual employees per day would be required to pay an additional \$73,137 per annum, based on a Grade 2 casual employee. Any benefit for employers derived from a shorter meal break would have no effect for employers who must persist with longer 30-minute breaks due to the constraints caused by the size of many venues in the industry.'*

[17] In a further submission made on 10 December 2010 The AFEI described its revised proposed variation as balancing the needs of both employers and employees in the industry and ensuring that the modern award achieves the modern awards objective. The proposed variation would significantly reduce the cost impact of the current 20 minute paid rest break for casual employees, while ensuring that employees receive an adequate break from their duties. It indicated that it had been in contact with other employer parties in, or with interests in, the industry. They had indicated their support for the proposed variation to the modern award.

[18] AALARA describes itself as the peak national body representing the amusement, leisure and recreation industry of Australia. According to its submission, AALARA has a total membership of 568 businesses and operators. It represents the majority of the amusement and recreation industry. These members are largely covered by the modern award. They employ in excess of 225,000 employees, over 70 per cent of whom are casual.

[19] The AALARA submitted that the most prevalent awards in the industry prior to award modernisation did not include paid 20-minute meal breaks for casual employees. It expressed concern at the cost impact of the new provision and submitted that it would have a negative effect on the viability and employment opportunities of the industry.

[20] The ABPA represents private bowling centres throughout Australia. Prior to the creation of the modern award the *AWU Tenpin Bowling Industry Award 2003* applied to 86 named respondents. This did not provide for paid breaks, except in certain very specific circumstances.

[21] Luna Park's submission criticised the modern award provision on three grounds. Luna Park is currently covered by an enterprise agreement. However, if the modern award provision was applied to Luna Park's own operations it would have a substantial cost impact. Secondly, there would be administrative difficulties involved in accommodating break arrangements in a different fashion for casuals than those applied to weekly engaged staff. Thirdly, the shortness of the break was inconsistent with good occupational and health and safety standards.

[22] According to its submission, Jamberoo is the largest employer in the tourism and recreation industry in New South Wales. It is covered by an enterprise agreement which expires in 2013. It calculated that if it had to pay meal breaks when its agreement expires the impact would be \$364,056 per year. *'This could be catastrophic to the viability of the business.'* It would be forced to respond by introducing split shifts for casual employees so that they did not become entitled to the paid break. However, this would make it difficult to secure good staff and lead to *'an administrative nightmare for all involved.'*

[23] Dreamworld described itself as one of the largest theme parks in Australia, employing up to a 1,000 employees at certain times (most of whom are casuals). It submitted that the

overwhelming majority of pre-reform awards and NAPSAs contained no paid meal breaks for casuals, and that those that did so had application primarily to recreation grounds. It submitted that the current provisions in the modern award are inconsistent with the vast majority of both previously applicable instruments and most other modern awards. According to its submission:

‘Due to the proximity of rest and recreation facilities to work locations, it would not be feasible to expect the majority of casual employees to be able to enjoy the benefit of a break for a meal and attend to personal matters within a 20 minute timeframe.’

[24] Dreamworld is currently covered by an enterprise agreement with a 10 minute paid rest break. It made a conservative estimate that if it had to apply the meal break provisions in the modern award this would cost over \$200,000 per annum. It submitted:

‘Clearly the retention of the current meal and rest break provisions, which are based on a very small number of pre-reform Awards and NAPSAs which predominantly covered employees who are now covered by the racing industry Modern Awards, has the potential to add significantly to operating costs for our business. We submit that this is contrary to the modern award objectives prescribed in s134 of the Act, particularly s134(1)(f) - *‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’*.

[25] The AWU in a submission filed on 27 October 2010 contended that the application sought to revisit the award modernisation review conducted by the Australian Industrial Relations Commission (AIRC). There had been a lengthy process of consultation. The applicant had made a submission on the issue of rest breaks in response to the exposure draft award and *‘Section 157 applications to vary should not be used as an opportunity for disaffected parties to re-visit matters that have previously been determined. ... Instead in our submission, should the applicant’s concern remain, any variation is more appropriately dealt with as part of the four year review.’*

[26] The AWU submitted that:

‘the variation is neither essential, indispensable nor a requisite to achieving the modern award modernisation objectives of s.134 because:

Removing paid breaks is not essential to productivity or to the promotion of flexible working arrangements (s. 134(1) (d)).

The applicant seeks *inter alia* to extend the duration of casual breaks. In our submission the existing provisions act as a fair minimum safety net. Extended breaks can properly be the subject of enterprise bargaining. This approach is consistent with the modern award objective s.134 (1) (b).

The award has been in place for nearly 12 months prior to the lodging of this application.

The applicant has failed to demonstrate that the provisions have a detrimental impact across the entire industry in terms of *“productivity, employment costs*

*and regulatory burden*” (s.134 (1) (f)). Assuming problems are encountered by some businesses, this is not justification for the variation of an industry award.’

[27] At the hearing on 21 February 2011, the AWU emphasised two further arguments in opposition to the application. First it submitted that any variation in the award needs to take account of the award as a whole. The proposed variation would upset the existing balance between the interests of employers and employees. The award as it stands is in a number of respects not beneficial to employees when compared to other awards. Secondly, it submitted that there were in fact a number of pre-modern awards that provided for paid breaks for casual employees. The AWU also expressed concern that the revised application did not provide a guarantee of a paid break because the provision of a break was dependent on the employer being satisfied that it would not interfere with the continuity of work.

[28] The MEAA pointed out that the breaks clause in the modern award is modelled on that contained in a draft award it submitted to the AIRC on 22 May 2009. It argued that the submission of the AFEI failed to demonstrate how the provision would have a detrimental effect across the entire industry in terms of *‘productivity, employment costs and regulatory burden.’*

### **The Proceedings Leading to the Establishment of the Modern Award**

The ‘entertainment and broadcasting industry’ was dealt with by the Australian Industrial Relations Commission (AIRC) as part of Stage 3 of the award modernisation process. On 22 May 2009, following a preliminary round of consultations, the AIRC published an exposure draft of a separate Amusement, Events and Recreation Award.

[29] The Full Bench statement accompanying the release of the exposure draft included the following:

‘The exposure draft of the Amusement, Events and Recreation Award 2010 is based to a large extent on the terms of the *AWU Theme Park and Amusement Award 2001* but also incorporates many proposals advanced by the Media Entertainment and Arts Alliance (MEAA). Live Performance Australia (LPA) filed a very late draft exhibition industry award for which there has been inadequate time to properly consider.’<sup>4</sup>

[30] The exposure draft contained the meal break provisions now to be found in the modern award (apart from the special provisions dealing with exhibition employees, which were introduced later). It was clearly based in part on the terms of the draft award submitted by the MEAA on 6 March 2009.

[31] Quite a large number of submissions were made to the AIRC in response to the exposure draft. Many issues were canvassed in these submissions. Some, though not all, dealt with the issue of paid breaks. The MEAA made a submission criticising the failure to include paid breaks for non casual employees, as their draft had. Some employers (for example, Luna Park) made submissions which, *inter alia*, opposed the inclusion of paid breaks for casuals. Other employers supported the inclusion of paid breaks for casuals, though not necessarily in the form contained in the exposure draft. For example, the Chamber of Commerce & Industry (WA) Inc made a submission on behalf of the Royal Agricultural Society of WA proposing the award contain two ten minute paid breaks in the first four hours of work, and a further ten minute paid break in the next four hours. Similarly the AEG Ogden Group (operators of the

Brisbane Convention and Exhibition Centre) proposed the inclusion of two ten minute paid rest breaks. Interestingly, AALARA supported the inclusion of two ten minute paid breaks for casuals, which it suggested could be rolled together into one 20 minute paid break. This would be in addition to an unpaid meal break of 30 minutes.

### **Break provisions in pre-reform awards and NAPSAs**

[32] The *AWU Theme Park and Amusement Award 2001* referred to in the Full Bench statement provided the following:

#### **‘Meal break**

Each employee shall be entitled to an unpaid lunch break of a minimum 30 minutes and up to a maximum of one hour where shifts of 7.6 hours or more are worked. Such meal break shall be taken between the fourth and sixth hour of work or at a time convenient to and as agreed to between the employer and the particular employee involved.

Casual and part time employees working for more than five hours on any one day shall be entitled to an unpaid meal break of 30 minutes to be taken between the 4th and 6th hour or as agreed to between the employer and the particular employee involved.

#### **Rest breaks**

Every employee covered by this award shall be entitled to a rest pause of ten minutes duration in the employer’s time in the first four hours of work, and a further rest pause of ten minutes in the second four hours of work. Provided that by agreement between the employer and the employee both breaks can be combined into one twenty minute break to be taken at a time agreed between the parties. However, the taking of rest pauses shall not interfere with the continuity of work where continuity of in the opinion of the employer is necessary.’

[33] Another federal award, the *Theatrical Employees (Recreation Complex and Theme Park) Award 2002* provided the following for casual employees;

‘Employees shall be allowed a crib break period of twenty minutes.

Crib breaks shall be taken at a time convenient to the employer but not at the beginning or end of the period of duty.

In lieu of crib breaks employees engaged from 8:00 am and required to work after 6:00 pm or for longer than ten consecutive hours shall be allowed a paid meal break of one hour, where practicable, between 4:00 pm and 7:00 pm.’

[34] The *AWU Tenpin Bowling Industry Award 2003* provided employees with an unpaid meal break of between 30 and 60 minutes. There was no provision for paid rest breaks.

[35] In New South Wales the two main awards that applied to the industry and occupations covered by the modern award were the *Caterers Employees (State) Award* and the *Theatrical Employees Recreation and Leisure Industry (State) Award 2000*. Both awards gave



employees who worked more than five hours an unpaid meal break of between 30 and 60 minutes. Neither provided paid breaks to casual employees (though they did to full time and part time employees).

[36] In Queensland the main common rule award with application to employees now covered by the modern award was the *Hospitality Industry - Restaurant, Catering, & Allied Establishments Award - South East Division 2002*. This provided for an unpaid meal break of between 30 and 60 minutes. It also provided for two paid 10 minutes rest pauses for employees who worked at least eight hours, and one paid 10 minute rest break for employees who worked less than eight but more than four hours.

[37] The industry in Western Australia appears to have largely been award free prior to the making of the modern award. There was however a federal award which, *inter alia* covered the Royal Agricultural Society of WA, the *Entertainment and Broadcasting Industry - Recreation Grounds - Western Australia 2000*. This award provided employees with a paid meal break of twenty minutes.

[38] In South Australia, the most relevant common rule award was the *Theatrical Entertainment etc (South Australia) Award 2000*. This provided for a meal break of at least 30 minutes for casual employees, but no paid rest break.

[39] In Tasmania, the dominant common rule award, the *Entertainment Award*, did not provide for paid rest breaks.

### **Break provisions in other modern awards**

[40] Three other modern awards cover work that is broadly comparable to that covered by the modern award currently under examination: the *General Retail Industry Award 2010*; the *Restaurant Industry Award 2010*; and the *Hospitality Industry (General) Award 2010*.

[41] The first of these awards provides that employees who work five hours or more but less than seven hours must be given an unpaid meal break of between 30 and 60 minutes, and one paid 10 minute rest break. Employees who work seven hours or more but less than 10 hours must be given an unpaid meal break of between 30 and 60 minutes and two paid 10 minute rest breaks. If they work more than 10 hours they must be given an additional meal break.

[42] Both the restaurant and the hospitality awards provide that employees who work more than five hours must be given an unpaid meal break of at least 30 minutes. An additional 20 minute paid meal break is applicable if the unpaid meal break is rostered to be taken after five hours of starting work.

### **Consideration**

[43] The issue I need to determine is not whether the award clause proposed by the AFEI would be more appropriate than the existing clause - it is whether the proposed variation is 'necessary to achieve the modern awards objective'. The Shorter Oxford English Dictionary relevantly defines the adjective 'necessary' as:

'That cannot be dispensed with or done without.'

[44] While paying due regard to the Full Bench's stricture against the use of synonyms, it is clear that this is a demanding standard.

[45] It is clear from the previous summary that there was a considerable diversity of provisions in pre-modern awards governing rest breaks for casual employees in the industry in question. At least two significant federal awards provided for paid rest breaks, while one did not. Most - but not all - state common rule awards did not provide for paid breaks.

[46] The current provision was inserted in the original exposure draft published by the AIRC, and was subject to a wide range of comments by a number of different parties. A number of submissions (including some from employers) supported the inclusion of paid rest breaks, including for casuals, while others were opposed.

[47] The award modernisation process inevitably involved a balancing process, between the interests of employers and employees, between the diverse provisions in pre-reform awards, between the views of the parties making submissions and between the differing elements of the modern awards objective. It is consistent with the Act for FWA to be reluctant to make changes to modern awards outside the four yearly review process. Bearing in mind the circumstances leading to the establishment of the modern award, and having regard to all the submissions made, I am not satisfied that the proposed variation is necessary to achieve the modern awards objective. The application is therefore refused.

#### SENIOR DEPUTY PRESIDENT

##### *Appearances:*

*D Story* for the Australian Federation of Employers and Industries.

*Z Angus* for the Australian Workers Union

*G Muir* for the Australian Bowling Proprietors Association

##### *Hearing details:*

2010  
Sydney.  
18 November.

2011  
Sydney and Brisbane (by video link).  
21 February

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<sup>1</sup> [2010] FWAFB 7838 at [23]

<sup>2</sup> *ibid* at [7]

<sup>3</sup> *Ibid* at [27]

<sup>4</sup> [2009] AIRCB 450 at [75]