



# DECISION

*Fair Work Act 2009*

s.160—Variation of modern award to remove ambiguity or uncertainty or correct error

## **Application by the Australian Hotels Association**

(AM2020/5)

DEPUTY PRESIDENT MASSON

DEPUTY PRESIDENT YOUNG

COMMISSIONER LEE

MELBOURNE, 20 MAY 2020

*Application to vary a modern award to remove ambiguity – breaks – Hospitality Industry (General) Award 2010.*

[1] This decision relates to an application by the Australian Hotels Association (AHA) to vary the exposure draft of the *Hospitality Industry (General) Award 2010* (the Hospitality Award).<sup>1</sup>

[2] The exposure draft was created as part of the 4 yearly review of modern awards (the Review). A separate Full Bench has been constituted to finalise the exposure drafts produced during the Review and the consequent variation of each modern award. In a decision dated 27 April 2020<sup>2</sup>, that Full Bench finalised the outstanding technical and drafting issues in the Hospitality Award exposure draft and issued a revised draft variation determination for comment. The final variation determination will come into operation on 29 May 2020 and at that point the award will become the *Hospitality Industry (General) Award 2020* (the Hospitality Award 2020).

[3] The application before us was made pursuant to s.160 of the *Fair Work Act* (the Act) to remove ambiguity and to ensure that the Hospitality Award 2020 is simple and easy to understand.

[4] Section 160 of the Act is set out below:

### **160 Variation of modern award to remove ambiguity or uncertainty or correct error**

(1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

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<sup>1</sup> [AHA application](#), 27 November 2019

<sup>2</sup> [\[2020\] FWCFB 1814](#)

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

[5] The grounds relied on by the AHA in support of the application are set out below:

‘Clause 16.2 of the Hospitality Exposure Draft provides for break entitlements on the basis of hours work, with the entitlement increasing for longer shift thresholds.

Clause 16.7 of the Hospitality Exposure Draft provides for additional break entitlements where more than 2 hours of overtime is worked after the completion of rostered hours.

It is unclear whether or not an employee is entitled to additional entitlements under both clauses in circumstances where more than 2 hours overtime lifts the employee’s overall hours worked above the next threshold.

The insertion of the word “ordinary” into the heading of column 1 in clause 16.2 will make it clear that those entitlements are triggered by the number of ordinary hours worked.’

[6] Clauses 16.2 and 16.7 are set out below:

**16.2 Frequency of breaks**

An employee who works the number of hours in any one shift specified in column 1 of **Table 2-Entitlements to meal and rest break(s)** is entitled to a break or breaks as specified in column 2.

**Table 2—Entitlements to meal and rest break(s)**

<b>Column 1 Hours worked per shift</b>	<b>Column 2 Breaks</b>
More than 5 hours and up to 6	Elective unpaid meal break of up to 30 minutes in accordance with clause 16.4—Request for unpaid meal break.
More than 6 hours and up to 8	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work).

<b>Column 1 Hours worked per shift</b>	<b>Column 2 Breaks</b>
More than 8 hours and up to 10	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work). One 20 minute paid rest break (may be taken as two 10 minute paid rest breaks).
More than 10 hours	An unpaid meal break of no less than 30 minutes (to be taken after the first 2 hours of work and within the first 6 hours of work). Two 20 minute paid rest breaks.

### **16.7 Additional rest break**

An employer must give an employee an additional paid rest break of 20 minutes if the employer requires the employee to work more than:

- (a) 5 continuous hours after an unpaid meal break; or
- (b) 2 hours' overtime after the employee finishes their rostered hours.

[7] A Mention was held before Deputy President Masson on 12 March 2020 and was attended by representatives of the AHA and the United Workers Union (the parties). The matter was then referred for conference before Commissioner Lee.

[8] At the conference before Commissioner Lee on 30 March 2020, the parties agreed that, instead of the original proposal, a note would be inserted following clause 16.7 (b) to clarify the entitlement to breaks. On 1 May 2020, Commissioner Lee [wrote](#) to the parties suggesting some amendments to the proposed note.

[9] On 7 May 2020, the AHA [confirmed](#) that both parties agreed to amendments that had been suggested save for one amendment, namely they sought that the word 'rostered' immediately before the words '7 hour shift' should be deleted. There was also agreement that any outcome from the conference in the Hospitality matter should also be applied to the Restaurant award. The Restaurant award is not before this Full Bench and so we have referred the parties' submissions to that Full Bench for consideration.

[10] The final version of the note is set out below:

NOTE: For the purposes of clause 16.7(b) the overtime worked does not compound on the break entitlements under clause 16.2.

EXAMPLE: An employee who works a 7 hour shift, followed by 3 hours of overtime will be entitled to breaks as follows:

- (a) for the 7 hour shift, an unpaid meal break of no less than 30 minutes under clause 16.2; and
- (b) for the 3 hours of overtime, an additional 20 minute paid rest break under clause 16.7(b).

[11] Having regard to the relevant provisions of the Act and the agreed position reached by the parties, we are satisfied that the variation to the Hospitality Award 2020 set out above removes any ambiguity relating to the entitlement to breaks.

[12] We will now issue a variation determination giving effect to our decision. The determination will come into operation from 29 May 2020. In accordance with s.165(3) of the Act the determination will not take effect until the start of the first full pay period that starts on or after 29 May 2020.



DEPUTY PRESIDENT

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