DECISION

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

4 yearly review of modern awards – Plain language re-drafting – Restaurant Industry Award 2010

(AM2016/15 & AM2014/284)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT MELBOURNE, 24 OCTOBER 2017

4 yearly review of modern awards – plain language project – Restaurant Industry Award 2010 – plain language re-drafting of award-specific clauses.

[1] Subject to one outstanding matter and any issues arising from the plain language review of the *Hospitality Industry (General) Award 2010*, this Decision largely finalises the plain language project in relation to re-drafting the *Restaurant Industry Award 2010.*[1]

[2] A plain language exposure draft of the *Restaurant Industry Award 2017* was published on 21 April 2017. Submissions and reply submissions were received in relation to the published draft.

[3] A revised plain language exposure draft[2] was published on 22 August 2017. A Statement[3] was issued on the same date inviting interested parties to file further information in respect of matters raised by the drafter in response to the initial submissions. A Summary of Submissions was published on 8 September 2017.

[4] A conference was convened by the President on 12 September 2017 and the following organisations attended:

- Australian Hotels Association (AHA);
- Accommodation Association of Australia;
- Motor Inn, Motel and Accommodation Association;
- United Voice;
- ABI and New South Wales Business Chamber (ABI And NSWBC);
- Business SA; and
- Clubs SA

[5] During the course of the conference the President dealt with each of the matters listed in the Summary of Submissions, in order to determine the current status of each item in light of the drafter's comments. A substantial number of issues were either withdrawn or resolved and a limited number of remaining matters require determination, as set out below.

(i) Withdrawn

[6] Items 1, 2, 8, 9, 12, 15, 16, 17, 20 and 21 have been withdrawn.

(ii) Resolved

[7] Items 4, 7, 10, 14, 23, 24, 25, 26, 27, 28, 29, 30 and 31 have been resolved either as a result of a party's submissions being accepted or by the adoption of a proposal advanced by the drafter. We agree with the manner in which these matters have been resolved.

(iii) Items for determination by the Full Bench

[8] Items 3, 5, 6, 11, 13 and 22 are to be determined by us based on the submissions previously lodged and the supplementary oral submissions made at the conference. We now turn to consider each of these matters.

[9] Items 3, 5 and 6 relate to Table 1 in clause 7 of the plain language exposure draft. Clause 7.1 notes that the award contains facilitative provisions which allow agreement between an employer and an individual employer, or the majority of employees, as to how specific award provisions are to apply at the workplace. The award clauses which have facilitative provisions are set out in Table 1, as follows:

Table 1—Facilitative provisions

Clause	**Provision**	**Agreement between an employer and:**
15.2(A)	Make-up time (introduction of system of make-up time)	the majority of employees
15.2(b)	Make-up time (agreement to take make-up time)	an individual employee
22.2	Payment of wages	the majority of employees
26.4	Time off instead of payment for overtime	an individual employee
27.4(c)	Alternative payment for work on public holiday	an individual employee
28.8	Annual leave in advance	an individual employee
28.9	Cashing out of annual leave	an individual employee
32.2	Substitution of public holidays by Agreement	the majority of employees

[10] The position advanced by Business SA in respect of items 3, 5 and 6 is, simply put, that as a matter of consistency each of the facilitative provisions in Table 1 should provide the 'pinpoint reference' to the facilitative provision within the relevant clause. The facilitative provision in respect of payment of wages illustrates the point made. Various matters relating

to the payment of wages are dealt with in clause 22. Clause 22.2 contains the relevant facilitative provision and provides:

> 'Except on termination of employment, wages may be paid on any day of the week other than a Friday, Saturday or Sunday. However, if the employer and the majority of employees at a workplace agree, wages may be paid on the Friday of a week during which there is a public holiday.'

[11] As the facilitative provision in respect of payment of wages is contained in clause 22.2, it is this subclause which is referenced in Table 1, not clause 22 in its entirety.

[12] It is contended that the same approach should be taken in respect of the facilitative provisions relating to time off instead of payment for overtime; taking leave in advance; and the cashing out of annual leave. In particular, Business SA contends that various aspects of Table 1 are 'not accurate', namely:

- the facilitative provision in relation to time off instead of payment for overtime should refer to clause 24.4(a) *not* clause 24.4 (Item 3);

- the facilitative provision relating to the taking of annual leave in advance should refer to clause 28.8(a) *not* clause 28.8 (Item 5); and

- the facilitative provision relating to the cashing out of annual leave should refer to clause 28.9(c) *not* clause 28.9 (Item 6).

[13] We need only refer to the last matter in any detail in order to illustrate the point made. The 'cashing out of annual leave' is dealt with in clause 28.9, as follows (emphasis added to clause 28.9(c)):

> 'Cashing out of annual leave
>
> **(a)** Paid annual leave must not be cashed out except in accordance with an agreement under paragraph (c).
>
> **(b)** Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under paragraph (c).
>
> **(c)** An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.
>
> **(d)** An agreement under paragraph (c) must state:
>
> **(i)** the amount of leave to be cashed out and the payment to be made to the employee for it; and
>
> **(ii)** the date on which the payment is to be made.
>
> **(e)** An agreement under paragraph (c) must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
>
> **(f)** The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under paragraph (c) as an employee record.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under paragraph (c).

NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 28.9.

NOTE 3: An example of the type of agreement required by paragraph (c) is set out at Schedule I – Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule I – Agreement to Cash Out Annual Leave.

[14] At present, Table 1 refers to clause 28.9 simpliciter in respect of facilitating the cashing out of annual leave. Business SA contends that the reference should be to clause 28.9(c), as this is the 'pinpoint reference' to the making of an agreement to provide the facilitation.

[15] No other party expressed a view in respect of the issue raised by Business SA and, as Mr Klepper advanced at the conference on 12 September 2017, the position put is not something Business SA 'is wedded to'.[4]

[16] We are not inclined to make the changes proposed by Business SA. It seems to us that in respect of each of the three matters set out above (at paragraph [12]) it is the entire subclause which is intended to be facilitative. This view is consistent with the decisions which determined some of the substantive provisions contained in these award terms.[5]

[17] Item 11 relates to clause 15.1(e) of the plain language exposure draft. Clause 15.1 of the plain language exposure draft deals with hours of work for full time employees. The comparable provision in the current award is clause 31.

[18] Clause 15.1 of the plain language exposure draft provides as follows (emphasis added to clause 15.1(e)):

An arrangement for working ordinary hours must satisfy all of the following conditions:

(a) the minimum number of ordinary hours that may be worked by a full-time employee on any day is 6 (excluding meal breaks); and

(b) the maximum number of ordinary hours that may be worked on any day is 11.5 (excluding meal breaks); and

(c) an employee who is rostered to work more than 10 ordinary hours on more than 3 consecutive days is entitled to a break of at least 48 hours after the last consecutive day on which the employee works more than 10 ordinary hours; and

(d) the maximum number of days on which an employee may work more than 10 ordinary hours in a 4 week cycle is 8; and

(e) an employee (other than a casual employee) must have a minimum break of 10 hours between when the employee finishes work on one day and starts work on the next and a minimum break of 8 hours for a changeover of rosters; and

(f) an employee must have a minimum of 8 full days off work in a 4 week period; and

(g) the maximum spread of hours for an employee who works split shifts is 12.

NOTE: An employee under the age of 18 years must not be required to work more than 10 hours in a shift. See clause 13.3 (Junior employees).

[19] Business SA contends that clause 15.1(e) should be replaced with clause 31.2(d) of the current award to ensure that there is no substantive legal change. Clause 31.2(d) of the current award is in the following terms:

'The arrangement of ordinary hours must meet the following conditions:

… (d) an employee must be given a minimum break of 10 hours between the finish of ordinary hours of work on one day and the commencement of ordinary hours of work on the next day. In the case of a changeover of rosters the minimum break must be eight hours'

[20] During the course of the conference it was generally agreed that the word 'work' (where twice occurring) in clause 15.1(e) should be replaced by the words 'ordinary hours', such that the clause 15.1(e) now reads:

'an employee (other than a casual employee) must have a minimum break of 10 hours between when the employee finishes ordinary hours on one day and starts ordinary hours on the next and a minimum break of 8 hours for a changeover of rosters'.

[21] Business SA accepted that the variation proposed satisfied its concern. However as a consequence of the amendment an additional issue arises, namely whether the minimum break provided by clause 15.1(e) is reduced by the amount of overtime worked.

[22] At the conference interested parties were invited to file further submissions in relation to this issue. Two submissions were subsequently received in relation to this issue, from Business SA and ABI.

[23] The relevant clauses in the exposure draft and the current award are set out below.

Clause 15.1(e) of the exposure draft is as follows:

15. Ordinary hours of work

15.1 An arrangement for working ordinary hours must satisfy all of the following conditions:

…(e) an employee (other than a casual employee) must have a minimum break of 10 hours between when the employee finishes ~~work~~ ordinary hours on one day and starts ~~work~~ ordinary hours on the next and a minimum break of 8 hours for a changeover of rosters; . . .

[24] Clause 26.2 of the exposure draft deals with breaks after working overtime and is in the following terms:

> **26.2 Break after working overtime**
>
> (a) Clause 26.2 applies to an employee who works overtime and is next rostered to start work less than 8 hours after the employee finishes working overtime.
>
> (b) The employee may delay the start of their next rostered shift until 8 hours after the employee finished working overtime without loss of pay for the rostered ordinary hours not worked.
>
> (c) If the employee does not have an 8 hour break, the employer must pay the employee at the overtime rate until the employee has a break of at least 8 hours.

[25] Clause 31.2(d) of the current award states:

> **31. Hours of work**
>
> 31.2 The arrangement of ordinary hours must meet the following conditions:
>
> …
> (d) an employee must be given a minimum break of 10 hours between the finish of ordinary hours of work on one day and the commencement of ordinary hours of work on the next day. In the case of a changeover of rosters the minimum break must be eight hours;

[26] Clause 33.4 of the current award states:

> **33.4 Breaks after working overtime**
>
> If starting work at the employee's next rostered starting time would mean that the employee did not receive a full eight hour break then:
>
> (a) the employee may, without loss of pay, start work at such a later time as is necessary to ensure that the employee receives a break of at least eight hours; or
>
> (b) the employer must pay the employee overtime rates for all work performed until the employee has received a break of at least eight hours.

[27] In their written submission dated 22 September 2017, ABI state that they 'agree there is some ambiguity as to the operation of the current award clause and would support further discussion between the parties and/or feedback from the drafter/Commission.'

[28] In their written submission dated 22 September 2017, Business SA state 'where an employee has worked overtime immediately after completing ordinary hours the effective minimum break will be reduced, though only by 2 hours at most.[6] This is due to clause 26.2(b) of the exposure draft. Business SA submit that the current award does not properly consider the circumstance where overtime is worked immediately *before* working ordinary hours, and therefore the exposure draft does not properly consider this circumstance.[7]

[29] Business SA also submit:

'Where there has not been mutual agreement to alter the full-time or part-time employee's rostered hours under current clause 31.6(b), and the employee works overtime immediately before starting rostered hours the employee appears have an entitlement to an 8 hour break without loss of pay before starting work. This is based on our reading of current provision 32.4 (clause 26.2 in the PLED). The current provision appears to operate even if the employee only had to work one hour of overtime before starting their rostered hours. While application of current clause 32.4 makes sense in the context of overtime after rostered hours, as indicated above it applies awkwardly in the context of overtime before rostered hours.'[8]

[30] We propose to invite Business SA to submit a draft variation to the exposure draft to address the issue they have raised. Interested parties will then have an opportunity to comment on their proposal.

[31] Business SA is to submit a draft variation by no later than **4.00 pm Monday, 13 November 2017.** Any comments on the draft variation are to be filed by **4.00pm Monday, 27 November 2017**. Submissions should be sent to amod@fwc.gov.au.

[32] Item 13 concerns clause 16.5 of the exposure draft:

> 'If an employee is not allowed to take an unpaid meal break at the rostered time, the employer must pay the employee at the rate of **150%** of the employee's minimum hourly rate from when the meal break was due to be taken until either the employee is allowed to take it or the shift ends. (emphasis added)

[33] The comparable provision in the current award is clause 32.3:

> 'If an employee is not given the unpaid meal break at the time the employer has told the employee it will be given, the employer must pay the employee 150% of the employee's ordinary base rate of pay from the time the meal break was to commence until either the meal break is given or the shift ends.' (emphasis added)

[34] United Voice contends that the words 'is not allowed' in clause 16.5 of the exposure draft should be deleted and replaced with 'is not given'. United Voice advances the following submission in support of this contention:

> 'The plain language draft has altered the breaks clause so that the onus is placed on the worker to ask for a break. This is a departure from the current award which places the onus on the employer to give the employee a break …
>
> An employee must be 'given' a break by their employer, regardless of whether they have asked for one or not. If they are not 'given' the break, they will be entitled to a penalty rate until they have been given the proper break or the shift ends. This is consistent with the rostering provisions of the Restaurant Award which place responsibility for rostering in the hands of the employer. The purpose of this provision is to ensure that employees are given the appropriate breaks by placing a deterrent cost on non-compliance. This is term ensures that the modern award meets the modern awards objective.
>
> The exposure draft variation implies that the employee must ask for the break before the penalty rate is paid. This is unfair given the difference in power between an employee and an employer in this industry. Restaurant Award employees are low-paid, younger and less-skilled than employees in other industries. Restaurant Award workplaces tend to be small and lack

> specialist HR teams: employees will need to negotiate with direct managers. There are significant barriers to self-help that may not be found in other industries. It is important that the breaks provision has sufficient deterrent power to ensure that the Award is followed.'[9]

[35] We are not persuaded to make the change proposed. Contrary to United Voice's submission the expression 'is not allowed' in clause 16.5 does not imply that an employee must ask for a meal break. Further, we note that the context makes it clear that an employee has an *entitlement* to a meal break. Clause 16.1 says:

> 'Clause 16 gives an employee an entitlement to meal breaks and rest breaks.' (emphasis added)

[36] Further, clause 16.2 says:

> 'An employee who is required to work for 5 hours or more in a day is entitled to an unpaid meal break of at least 30 minutes.' (emphasis added)

[37] Item 22 concerns clause 24.6 of the plain language exposure draft, which deals with the allowance for distance work, as follows:

Allowance for distance work

(a) An employer must pay an employee who works away from their employer's workplace at their ordinary rate of pay for time spent travelling both ways between the employee's residence and their place of work.

(b) Paragraph (c) applies to an employee to whom all of the following apply:

(i) the employee is engaged for work that requires the employee to travel 80 kilometres from their usual place of work or more to take up the engagement; and

(ii) the employee performs their work to the satisfaction of their employer for a period of up to 4 weeks; and

(iii) the employee is willing to complete the full period of the engagement.

(c) The employer must pay the employee for transport both ways between the employee's residence and their place of work.

[38] The comparable provision in the current award is at clause 24.4, which states:

Allowance for distant work

(a) The special rate to be paid to employees who work away from their employer's place of business for the time occupied in travelling between the employer's place of business and work or between the employee's residence and work will be at ordinary rates.

(b) Where an employee is engaged for country or seaside work and has to travel 80 kilometres or more to take up service the employee will be paid for transport, both ways, if:

(i) the employee has performed to the employer's satisfaction for up to a period of four weeks; and

(ii) the employee is willing to complete the full period of engagement.

[39] In the Summary of Submissions document parties were asked to clarify the meaning of 'ordinary rate of pay' in clause 24.6(a) and whether that expression included applicable penalties.

[40] At the 12 September conference, Item 22 was discussed[10] and parties were invited to file a short written submission about the meaning of the expression 'ordinary rate of pay' in clause 24.6(a). Following the conference, two written submissions were received in relation to this issue from Business SA and ABI. No submissions were received from any other party.

[41] Business SA submit:

> 'The current award equivalent of PLED clause 24.6(a) is clause 24.4(a). The current award clause does not provide a clear answer which supports either the inclusion or exclusion of applicable penalties. Business SA has not yet been able to locate the origin of this provision to ascertain the initial intention of this clause and as such is unable to provide a substantiated argument for either inclusion or exclusion of applicable penalties.'[11]

[42] ABI submit:

> 'The term 'ordinary rate of pay' is used elsewhere in the current RIA, in addition to the current clause 24.4 (which deals with distant work). See clauses 34.3 and Clause F.1 in Schedule F. The term 'ordinary base rate of pay' is also used – see, for example, clause 32.3. This would suggest that the 'ordinary rate of pay' is a different concept to 'ordinary base rate of pay'.'[12]

[43] United Voice made oral submissions relating to the issue at the 12 September conference, as follows:

> '… the intention of the clause is to compensate employees for distant work or the travel component of distant work. It's obviously not going to be particularly relevant at the commencement of the engagement but if someone is travelling home, I'd say ordinary rate of pay - it should be clear that it will mean overtime if overtime is applicable or an evening loading or that sort of thing.'

[44] It is our *provisional* view that the term 'ordinary rate of pay' in clause 24.6(a) includes applicable penalties and loadings. We agree with United Voice that the intention of the clause is to compensate employees for distance work, or travel time associated with distance work, and this compensation should include applicable penalties and loadings. We note that Clause 33 – Overtime rates – of the current award refers to an 'overtime rate' as a percentage of 'the employees' ordinary *base* rate of pay' (emphasis added). It seems to follow that in the current award the expression 'ordinary rate of pay' means something other than 'ordinary base rate of pay'.

[45] In terms of the setting of a fair and relevant safety net (in accordance with s.134(1)) it seems to us that time spent by an employee travelling for the purpose of undertaking distant work should be paid at the applicable hourly rate. Hence, for example, if the travel takes place

during the employees' ordinary hours on a Sunday they should be paid 150 percent of the relevant minimum wage.

[46] Due to the use of the phrase 'ordinary hourly rate' being defined in other exposure drafts (when dealing with all purpose allowances) we have decided to use the term 'applicable' rather than 'ordinary' in order to avoid any confusion. Accordingly we propose that clause 24.6(a) be amended as follows and a note be inserted at the end of the clause in the following terms:

> **(a)** An employer must pay an employee who works away from their employer's workplace at their applicable ~~ordinary~~ rate of pay for time spent travelling both ways between the employee's residence and their place of work.
>
> NOTE: ~~**ordinary**~~ **applicable** **rate of pay** includes any penalties or loadings that apply to the distance work.

[47] Any party who has an opposing view is to file a short written submission by no later than **4.00pm Monday, 20 November 2017.** Submissions should be sent to amod@fwc.gov.au.

(iv) Outstanding Items

[48] Items 18 and 19 remain outstanding. These items concern clause 23 of the plain language exposure draft. Clause 23 deals with annualised salary arrangements. The comparable provision in the *Restaurant Industry Award 2010* is at clause 28. United Voice and Restaurant and Catering Industrial have made separate applications to vary aspects of clause 28. These applications have been referred to the Annualised Salaries Full Bench for determination, in the context of a broader review of all annualised salary terms in modern awards.[13] At the 12 September 2017 conference it was generally agreed that the plain language redrafting of clause 28 of the current award should be deferred until the Annualised Salaries Full Bench has determined the matters before it.[14]

(v) Identical terms to the plain language exposure draft of the Hospitality Industry (General) Award 2010

[49] Some issues raised in the plain language exposure draft of the Hospitality Industry (General) Award 2010 have not resolved and will be dealt with at a later date. Some of the outstanding issues relate to provisions that are identical, either in wording or in concept, to provisions in the Restaurant plain language exposure draft. The solutions to the outstanding issues in the Hospitality plain language exposure draft could affect the drafting of the corresponding provisions in the Restaurant plain language exposure draft.

[50] The outstanding issues in the Hospitality plain language exposure draft are listed as items 12, 14, 15, 17, 19, 20, 22, 32, 46, 53, 67A, 91 and 93 of the Hospitality summary of submissions[15]. Once these items are decided, a decision will be also be made about the corresponding provisions in the Restaurant plain language exposure draft. Interested parties will be provided with an opportunity to comment.

(vi) Other matters

[51] We note that clause 22.1 is a facilitative provision and, therefore, should be listed at Table 1 in clause 7 of the plain language exposure draft. The next draft to be published will contain reference to clause 22.1 at Table 1, being an agreement between an employer and an individual employee.

[52] We note an issue relating to clause 27.3 of the plain language exposure draft was listed at item 26 of the Restaurant summary of submissions.[16] The issue was resolved by updating the clause in accordance with Business SA's proposed variation. However, the amended wording at clause 27.3(a) creates a duplication the obligation stated at clause 27.3(b). In order to eliminate the duplication we propose to delete proposed clause 27.3(b) and renumber clause 27.3(c).

Clause 20—National training wage

[53] In accordance with determination[17] issued on 21 June 2017 a new provision relating to the National training wage was inserted into the current award and Schedule D of the current award was deleted. The same provision has been inserted into the plain language exposure draft at clause 20 and Schedule F has been deleted.

Part-day public holidays

[54] Schedule G to the Award relates to 2017 Part-day Public Holidays; however, there is no reference to that subject matter in the body of the award. We propose that a new subclause 32.5 be inserted as follows:

> **Part-day public holidays**
>
> For provisions relating to part-day public holidays see Schedule G—2017 Part day Public Holidays.

Schedules F, G, H and I

[55] As mentioned in paragraph [51] above, in accordance with the determination[18] issued on 21 June 2017 Schedule D was deleted from the current award. The equivalent Schedule of the plain language exposure draft, Schedule F, was deleted. At the same time, we propose to re-order the Schedules to be in the order that the relevant clauses appear in the body of the award.

Next Steps

[56] A revised plain language exposure draft of the *Restaurant Industry Award 2017* has been published along with this decision. Parties are invited to review the draft to ensure that the resolved items have been accurately recorded.

[57] Interested parties are invited to file a short written submission in relation to the revised plain language draft and the *provisional* view expressed at paragraph [44] of this decision. Submissions are to be filed by no later than **4.00 pm Monday, 20 November 2017.**

[58] Any party wishing to file a submission in reply should do so by no later than **4.00 pm Monday, 27 November 2017.**

[59] Submissions should be sent to amod@fwc.gov.au. Any party has liberty to apply.

PRESIDENT

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[1] Restaurant Industry Award 2010

[2] Revised plain language exposure draft – Restaurant Industry Award 2017

[3] [2017] FWCFB 4118

[4] Transcript of proceedings 12 September 2017 PN19

[5] See [2015] FWCFB 3406 at [266] and [411].

[6] Business SA submission, 22 September 2017 at paragraph 1.2

[7] Business SA submission, 22 September 2017 at paragraphs 1.6

[8] Business SA submission, 22 September 2017 at paragraphs 1.7

[9] United Voice submission, 8 June 2017 at paragraphs 36-38

[10] Transcript, 12 September 2017 at PN 90-108.

[11] Business SA submission, 22 September 2017 at paragraph 2.2

[12] ABI submission, 22 September 2017 at page 1

[13] See generally the Statement issued on 31 May 2016, [2016] FWC 3520

[14] Transcript of conference of 12 September 2017 at paragraph 80-86

[15] Hospitality summary of submissions 8 September 2017

[16] Restaurant Summary of Submissions 8 September 2017

[17] PR593889

[18] PR593806