



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Plain language re-drafting – *Hospitality Industry (General) Award 2010* (AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

SYDNEY, 3 AUGUST 2018

4 yearly review of modern awards – plain language re-drafting – Hospitality Industry (General) Award 2010.

[1] Conferences were held on 20 December 2017, and 12 and 23 February 2018 to discuss items raised by parties in relation to the plain language exposure draft of the *Hospitality Industry (General) Award 2010* (the Hospitality PLED). Reports were issued after the 12 and 23 February 2018 conferences, setting out the status of the outstanding items.

[2] A decision issued on 21 May 2018¹ (the May 2018 decision) determined a number of the outstanding issues in relation to the plain language redrafting of the *Hospitality Industry (General) Award 2010* and set out the next steps for resolving the remaining outstanding items. Interested parties were invited to make submissions on those outstanding issues.

[3] A revised Hospitality PLED was published on 22 May 2018 to incorporate changes arising from the 21 May 2018 decision.

[4] Submissions and reply submissions were received from:

- Australian Hotels Associations, Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn, Motel and Accommodation Association (collectively the Associations);
- Business SA; and
- United Voice.

¹ [\[2018 FWCFB 2710\]](#).

[5] The 13 February 2018 report indicated that items 46 and 69 would be determined on the basis of submissions already before the Commission.

[6] This decision deals with the remaining outstanding plain language re-drafting items.

Item 46 – payment of wages

[7] This issue concerns clause 23.5 of the Hospitality PLED. In the May 2018 decision we proposed to resolve the issue by amending clause 23.5 as follows:

‘**23.5** An employee paid by cash or cheque who has a rostered day off on a pay day is entitled **at the employee’s election** to be paid on their last day at work before their rostered day off.’²

[8] Interested parties were invited to make submissions.

[9] The Associations and Business SA do not object to the proposed amendment to clause 23.5.³ United Voice did not comment on the proposed amendment. We have decided to amend clause 23.5 as set out at above.

Item 69 – special leave without pay arrangements for certain catering employees

[10] This issue concerns clause 30.5 of the Hospitality PLED. In the May 2018 decision we proposed to resolve the issue by amending clause 30.5 as follows:

‘**30.5 Special leave without pay arrangements for certain catering employees**

(a) Clause 30.5 applies to an employee who is employed at or in connection with catering functions in primary or secondary boarding schools or residential colleges associated with tertiary educational institutions.

(b) The employer may require an employee to take a period of leave without pay during all or part of a term break, semester break or the Christmas/summer vacation.

(c) The employer must give the affected employees at least one week’s notice in writing of a requirement to take leave without pay and the period (~~unpaid leave period~~) for which that leave is to be taken.

(d) The ~~unpaid~~ **period of leave without pay period** may be varied by agreement between the employee and employer.

(e) An employee may take accrued annual leave or long service leave instead of leave without pay during ~~an unpaid leave~~ **a period of leave required to be taken under paragraph (b).**

(f) All ~~unpaid leave~~ **without pay taken under clause 30.5 periods** counts for the purposes of accruing annual leave, long service leave and personal/carer’s leave.

...’

² [2018] FWCFB 2710 at [14].

³ [The Associations submission](#), 30 May 2018, Paragraph 2; [Business SA submission](#), 30 May 2018, paragraph 3.

[11] The Associations and Business SA do not object to the proposed amendments at clause 30.5.⁴ United Voice did not comment on the proposed amendment. We have decided to amend clause 30.5 as set out above.

[12] The May 2018 decision also invited further submissions in relation to a number of outstanding items which were subject to review by the expert. We now turn to those items.

PTC-1 – Part-time employment

[13] Following the 23 February 2018 conference, clause 10 was referred to the plain language expert for review, particularly concerning the consistent use of the terms ‘employee’ and ‘part-time employee’. The reviewed clause was published as Attachment A to the May 2018 decision.⁵ Interested parties were invited to make submissions.

[14] Business SA did not identify any outstanding issues in relation to Attachment A.⁶ Submissions were received from United Voice and the Associations.

(i) Clause 10.4(a)

[15] United Voice raised an issue in relation to clause 10.4(a) of the Restaurant PLED and submitted the same issue arose in relation to the Hospitality PLED.⁷

[16] United Voice submits that the reference to an employer ensuring an employee is paid for their guaranteed hours has been removed. It argues the reference is important in ensuring that an employer is aware that the guaranteed hours are the minimum number of hours that the employee will be paid each week or roster cycle.⁸

[17] Clause 12.3(a) of the current award states:

‘(a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and’

[18] Clause 10.4(a) of the Hospitality PLED states:

‘(a) The number of hours of work guaranteed to the employee each week (or, if the employer operates a roster, over the roster cycle) (**the guaranteed hours**).’

[19] United Voice submits that clause 10.4(a) should be amended as follows:

⁴ [The Associations submission](#), 30 May 2018, Paragraph 3; [Business SA submission](#), 30 May 2018, paragraph 4.

⁵ [\[2018\] FWCFCB 2710](#) at Attachment A.

⁶ [Business SA submission](#), 30 May 2018, paragraph 5.

⁷ [United Voice submission](#), 30 May 2018, page 3.

⁸ [United Voice submission](#), 30 May 2018, page 1.

‘The number of hours of work guaranteed and to be paid to the employee each week (or, if the employer operates a roster, over the roster cycle) **(the guaranteed hours)**.’⁹

[20] Business SA submits that United Voice’s proposed change to clause 10.4(a) is unnecessary¹⁰. It submits that the clause relates to the employer and part-time employee agreeing on guaranteed hours and availability only – payment is required for all hours worked by the part-time employee per clause 10.13. Retaining reference to payment rates in clause 10.4 may cause readers to mistakenly believe that the employer and part-time employee may also agree on the number of hours work to be paid; introducing the possibility that this may differ from the number of guaranteed hours.¹¹

[21] We accept United Voice’s submission that the existing clause 12.3(a) combines two elements in the agreed guarantee: an entitlement to be provided with work for the agreed number of hours, and an entitlement to be paid for the agreed number of hours. The latter entitlement is intended to subsist independently of the former. The proposed clause 10.4(a) of the Restaurant PLED does not maintain the second entitlement, it would have the effect that, if the employer failed to provide the guaranteed hours of work, the employee would nonetheless only be entitled payment for those hours actually worked. We do not agree with Business SA’s submission. The current clause 12.3(a) does not admit of the possibility that there may be differing agreements on the hours of work to be provided and to be paid for. Accordingly clause 10.4(a) of the Restaurant PLED will be altered so that it is in the same terms as the existing clause 12.(3)(a).

(ii) Clause 10.7(a)

[22] The Associations submit that the wording of 10.7(a) as it appeared in the Hospitality PLED published on 22 January 2018 (as it was then numbered clause 10.6(a)) is consistent with the terminology used elsewhere in Clause 10. The Associations submit that the words “times at which they have agreed to be available” as appearing in Attachment 1 be replaced with the earlier wording ‘employee’s availability’.¹²

[23] Business SA agrees with the Associations and submits that the reference in clause 10.7(a) to ‘the employee’s availability’ is preferable.¹³

[24] We agree. For consistency of terminology within clause 10, we have decided to amend clause 10.7 as follows:

‘**10.7** However, a part-time employee:

(a) must not be rostered to work any hours outside the **employee’s availability** ~~times at which they have agreed to be available~~; and ...’

⁹ [United Voice submission](#), 30 May 2018, page 2.

¹⁰ [Business SA reply submission](#), 13 June 2018, paragraph 12.

¹¹ [Business SA reply submission](#), 13 June 2018, paragraph 113.

¹² [The Associations submission](#), 30 May 2018, Paragraph 4(a).

¹³ [Business SA reply submission](#), 13 June 2018, paragraph 2.

(iii) Clause 10.11

[25] The Associations note a change from the Hospitality PLED published on 22 January 2018 (as then numbered 10.10) where the word ‘employee’ where it appears between the words ‘then’ and ‘may alter’, has been replaced with the word ‘they’. The Associations submit that the change in word is unnecessary and detracts from the intention of the plain language re-redrafting of the award.¹⁴

[26] Business SA agrees with the Associations and submits that the word ‘they’ instead of ‘the employee’ is less clear than previous exposure drafts.¹⁵

[27] We disagree. The use of ‘they’ is consistent with the Plain Language Guidelines and avoids unnecessary repetition. We have decided to adopt clause 10.11 as it appears in the Hospitality PLED of 22 May 2018.

(iv) Clause 10.12

[28] The Associations submit that the words ‘the alteration to’ be deleted, or the words ‘as altered’ be deleted as both sets of words are not necessary.¹⁶ United Voice agrees that clause 10.12 could be clarified if the reference to either ‘the alteration to’ or ‘as altered’ were deleted.¹⁷

[29] We have decided to delete the words ‘as altered’ from the lead-in words at clause 10.12 as follows:

‘10.12 If the employer cannot reasonably accommodate the alteration to the part-time employee’s availability ~~as altered~~ under clause 10.11, then (regardless of clause 10.5): ...’

(v) Clause 10.13(b)

[30] We have decided to update the reference in clause 10.13(b) as follows to assist the reader to navigate the award and for consistency with the decision in the Restaurant award:¹⁸

‘(b) An employer must pay a part-time employee at the rates prescribed in ~~Table 5—Overtime rates in clause 28.4—Overtime rate~~ for all time worked in excess of.’

(vi) Clause 10.14

[31] The Associations submit that a comma should be inserted after the words “A part-time employee” as well as after the words “1 January 2018”.¹⁹

¹⁴ [The Associations submission](#), 30 May 2018, Paragraph 4(b).

¹⁵ [Business SA reply submission](#), 13 June 2018, paragraph 3.

¹⁶ [The Associations submission](#), 30 May 2018, Paragraph 4(c).

¹⁷ [United Voice reply submission](#), 13 June 2018, page 2.

¹⁸ [2018] FWCFB 4496.

¹⁹ [The Associations submission](#), 30 May 2018, Paragraph 4(d).

[32] We agree. The insertion of commas would assist the reader and will be inserted after the words ‘who’ and ‘2018’.

PTC-2 – Clause 11.4 – Casual employment

[33] United Voice also refer to their comments in relation to clause 11.4 of the Restaurant PLED and note that the same issue arises in relation to the Hospitality PLED.²⁰

[34] United Voice submits that the current clause 13.3 ensures that a casual employee will be paid for a minimum of 2 hours in a situation in which they are required to attend work for a 2 hour shift, but are then requested to leave work early at the initiative of the employer. It is contended that the proposed clause 11.4 states that the minimum daily engagement is 2 consecutive hours, but is ambiguous as how a casual employee would be paid if the employer required them to leave work early. United Voice submits that the current wording should be retained.²¹

[35] Clause 13.3 of the current award states:

‘13.3 On each occasion a casual employee is required to attend work they are entitled to a minimum payment for two hours’ work.’

[36] Clause 11.4 of the Hospitality PLED states:

‘11.4 The minimum daily engagement for a casual employee is 2 consecutive hours.’

[37] No other party made submissions in relation to clause 11.4.

[38] We agree with United Voice and will amend the Hospitality PLED so that it more closely follows the current award term, as follows:

‘11.4 A casual employee must be engaged and paid for at least 2 consecutive hours of work on each occasion they are required to attend work.’

Items 33 – 35 – Breaks

[39] Following the 23 February 2018 conference items 33 – 35 were referred to the plain language expert for amendment to ensure that the PLED more accurately reflects the current award provisions. The reviewed clause was published as Attachment B to the May 2018 decision.²² Interested parties were invited to make submissions.

(i) Clause 16.2 – Table 2—Entitlement to meal and rest breaks

[40] United Voice submits that under clauses 31.2(a), (b) and (c) of the current award, employees are entitled to an unpaid break of ‘no less than 30 minutes’ in the circumstances set out in that clause. It submits that clause 16.2 has reduced the employee entitlement to a

²⁰ [United Voice submission](#), 30 May 2018, page 3.

²¹ [United Voice submission](#), 30 May 2018, page 2.

²² [\[2018\] FWCFB 2710](#) at Attachment B.

meal break, by stating that employees who work more than 6 hours and up to 8 hours, more than 8 hours and up to 10 hours and more than 10 hours are entitled to a '30 minute unpaid meal break'. United Voice submits that some employees may prefer to take a longer break, and that the current award facilitates this by stating that the break will be 'no less than 30 minutes'.²³

[41] United Voice submit that the wording in clause 16.2 does not indicate that there is scope for a longer break to be arranged and propose that clause 16.2 be amended in rows 2 – 4 of Table 2 to state:

‘An unpaid meal break of no less than 30 minutes.’²⁴

[42] Business SA does not oppose United Voice’s submission regarding clause 16.2.²⁵ The Associations support United Voice’s position in relation to clause 16.2 and submit that the PLED should be amended in the terms United Voice propose.²⁶

[43] We have decided to amend rows 2 – 4 of Table 2 in accordance with United Voice’s submission.

[44] The Associations note in column 2 that in some rows the sentences end with a full stop, and not in other rows.²⁷ We will amend the table to ensure consistent use of punctuation.

[45] Business SA submits that the provisions setting out an employee’s election to take an unpaid meal break where the employee is required to work a shift of more than 5 hours and up to 6 hours could be expressed more clearly. The revised clause in Attachment B sets out the requirements within Table 2 – Entitlements to meal and rest break(s). The previous PLED and the current award set these requirements out in numbered clauses.²⁸

[46] Business SA submits that placing substantive content regarding how the employee elects to take an unpaid meal break in a single cell in Table 2 is less clear than providing the content in numbered clauses. This approach also differs from the other rows in Table 2, which simply set out what entitlements arise for a given number of hours worked.²⁹

[47] Business SA submits that clause 16 should be amended to ensure Table 2 simply provides information regarding what meal break and rest break entitlements arise in various circumstances and that any further detail, such as how to access entitlements, be provided in subsequent numbered clauses and referred to by cross-reference. Business SA also referred to discussions at the 23 February 2018 conference, and agrees with the Associations at [172] that clause 16.4 of the earlier PLED neatly summarises the entitlement/obligation.³⁰

²³ [United Voice submission](#), 30 May 2018, page 2.

²⁴ [United Voice submission](#), 30 May 2018, page 2.

²⁵ [Business SA reply submission](#), 13 June 2018, paragraph 7.

²⁶ [The Associations reply submission](#), 13 June 2018, paragraph 3.

²⁷ [The Associations submission](#), 30 May 2018, Paragraph 5(a).

²⁸ [Business SA submission](#), 30 May 2018, paragraphs 7 – 8.

²⁹ [Business SA submission](#), 30 May 2018, paragraph 9.

³⁰ [Business SA submission](#), 30 May 2018, paragraph 10.

[48] Business SA provided an example amendment to Table 2 and clauses 16.3 and 16.4 in their submission.³¹

‘Table 2—Entitlement to meal and rest breaks

Column 1 Hours worked per shift	Column 2 Breaks
More than 5 and up to 6	Elective up to 30 minute unpaid meal break in accordance with clause 16.4— Request for unpaid meal break.

16.3 When the employer rosters an employee’s breaks, they must make all reasonable efforts to ensure that the breaks are spread evenly across the employee’s shift.

16.4 Request for unpaid meal break

(a) An employee working a shift of more than 5 and up to 6 hours who elects to take an unpaid meal break must request the break in writing no later than the start of their shift. The employer must not unreasonably refuse the employee’s request.

(b) A request under clause 16.3 applies to all shifts of more than 5 hours worked by that employee unless otherwise agreed between the employee and the employer.

(c) The arrangement may be reviewed at any time.’

[49] The Associations expressed strong support for Business SA’s proposed change to the structure of Table 2 and clause 16.4.³²

[50] We have decided to update Table 2 to remove the provisions related to access of the meal break to a new clause 16.4 as proposed by Business SA. The wording in the table regarding the length of breaks will be updated in accordance with this decision.

(ii) Clause 16.3

[51] United Voice submits that the current award states that ‘breaks should be spread evenly across the shift’. However, clause 16.3 states:

‘When the employer rosters an employee’s breaks, they must make all reasonable efforts to ensure that the breaks are spread evenly across the employee’s shift.’

[52] United Voice submits that clause 16.3 alters the entitlement to evenly spread breaks and introduces a new concept of ‘reasonable effort’ on the part of the employer to the clause. The concept of an employer making ‘reasonable effort’ introduces a level of subjectivity and uncertainty that dilutes the employee’s entitlement to have breaks spread evenly across a shift. United Voice submits that having an even spread of breaks across a shift is important in ensuring employees have a proper opportunity to rest and recover.³³

[53] United Voice submits that clause 16.3 should be amended to state:

³¹ [Business SA submission](#), 30 May 2018, paragraph 10.

³² [The Associations reply submission](#), 13 June 2018, paragraph 4(a).

³³ [United Voice submission](#), 30 May 2018, pages 2 – 3.

‘When the employer rosters an employee’s breaks, they must ensure that the breaks are spread evenly across the employee’s shift.’³⁴

[54] Business SA opposes United Voice’s proposed amendment to clause 16.3 and submits that the proposed words ‘must ensure’ would alter the legal effect of the award.³⁵

[55] Business SA submits that clause 16.3 states that the employer ‘*must make all reasonable efforts*’ and the equivalent current award clauses, 31.2(b) and (c) both state that ‘breaks *should* be spread evenly...’ (emphasis in submission). Business SA submits that the obligation to spread breaks evenly across shifts does not exist because the current award uses the word ‘should’ not ‘must’ and submits that while the current award encourages employers to evenly spread breaks across a shift, they are not required to do so.³⁶ This is said to recognise that in some circumstances the employer may not be able to guarantee that breaks will be evenly spread.³⁷

[56] We agree with Business SA. There may be circumstances where an employer cannot guarantee that breaks are spread evenly across a shift. We will adopt clause 16.3 as it appeared in the Hospitality PLED of 22 May 2018.

(iii) *Clause 16.4*

[57] The Associations submit that the word ‘clause’ is missing before the number ‘16.5’.³⁸ We agree and will make the necessary change in the next version of the PLED.

(iv) *Clause 16.5*

[58] The plain language expert reviewed clause 16.5 and proposed the following revised clause 16.5:

‘**16.5** The rate the employer must pay the employee under clause 16.4 is:

(a) the rate the employer was paying the employee at the end of the 6th hour of work on that shift; and

(b) **50%** of the employee’s ordinary hourly rate.’³⁹

[59] The equivalent clause in the current award is clause 31.4, which states:

‘**31.4 Break not given**

For a shift of more than six hours, if the employer does not release an employee for an unpaid meal break the employee shall be paid at the rate of 50% of the ordinary hourly rate extra for

³⁴ [United Voice submission](#), 30 May 2018, page 3.

³⁵ [Business SA reply submission](#), 13 June 2018, paragraphs 8 & 11.

³⁶ [Business SA reply submission](#), 13 June 2018, paragraphs 9 – 10.

³⁷ [Business SA reply submission](#), 13 June 2018, paragraph 10.

³⁸ [The Associations submission](#), 30 May 2018, Paragraph 5(b).

³⁹ [\[2018\] FWCFB 2710](#) at Attachment B.

each hour or part of an hour from six hours after the employee started work until the employer gives the employee the unpaid meal break, or until the shift ends.’

[60] The Associations submit that the hourly rate payable to the employee is the rate of pay applicable at the time of working. The Associations submit the proposed wording is unnecessarily descriptive and could lead to an incorrect payment.⁴⁰ They provide the example where, at the end of employee’s 6th hour of work, it is 11.30 pm on a Friday, the employee is not provided with an unpaid meal break, and the employee works until 1.30 am on Saturday. The literal reading of the proposed clause would mean that for the work performed from midnight to 1.30 am, the employee continues to receive their Friday rate of pay (for the purposes of clause 16.5(a)), instead of receiving the Saturday rate of pay from midnight.⁴¹

[61] The Associations submit that the wording in current award clause 31.4, that the employee ‘shall be paid at the rate of 50% of the ordinary hourly rate extra for each hour or part of an hour’, satisfactorily explains the additional payment due to an employee who is not provided with an unpaid meal break.⁴²

[62] Business SA expressed concern over the wording of clause 16.5(a) regarding the applicable rate where a meal break has not been allowed and submits that the re-drafted clause has a different legal effect compared to the current award.⁴³ Its submits:

‘12. The current award, at clause 31.4 requires that where an employee is working a shift of more than six hours, and employer does not release an employee for an unpaid meal break, the employee will be paid an extra 50% of the ordinary hourly rate for each hour or part of an hour from six hours after the employee started work until the employer gives the employee the unpaid meal break or the shift ends.

13. Clause 16.5(a) by comparison, states the employer must pay the employee ‘the rate the employer was paying the employee at the end of the 6th hour of work on that shift, and 50% of the employee’s ordinary hourly rate.’ (emphasis added) Business SA submits the emphasised portion above differs from the current award in certain circumstances. For example, where an employee would become entitled to a penalty rate payment (such as working overnight Friday and into Saturday).

14. Business SA submits the wording of clause 16.6 in the PLED published on 22 February 2018, ‘...the employer must pay the employee at the rate of 150% of the employee’s ordinary hourly rate...’ appropriately reflects the current award’s operation.’

[63] The Associations do not support Business SA’s proposal to re-introduce wording for the payment of a break not taken that appeared in earlier versions of the PLED.⁴⁴ The Associations rely on their 5 September 2017 submission that the rephrasing of the payment

⁴⁰ [The Associations submission](#), 30 May 2018, Paragraph 5(c).

⁴¹ [The Associations submission](#), 30 May 2018, Paragraph 5(c).

⁴² [The Associations submission](#), 30 May 2018, Paragraph 5(c).

⁴³ [Business SA submission](#), 30 May 2018, paragraph 11.

⁴⁴ [The Associations reply submission](#), 13 June 2018, paragraph 4(b).

basis in the PLED from how it is currently is provided in clause 31 of the Award would result in additional costs to employers.⁴⁵

[64] The Associations continue to submit that the phrasing of the payment as it appears in the current Award appropriately describes the way in which the payment should be phrased in the Hospitality PLED.⁴⁶

[65] United Voice submits that clause 16.5 is unclear, and will create confusion about the rate that should be paid. United Voice submits that wording in clause 16.5(a) is inaccurate in that the rate the employer was paying the employee at the end of the 6th hour of work on the shift may not be the rate the employee is entitled to in later hours of work.⁴⁷

[66] United Voice submits that the earlier wording of the exposure draft should be retained.⁴⁸ The earlier wording is as follows:

‘If an employee is not allowed to take an unpaid meal break in accordance with clause 16.2 during a shift of more than 6 hours, the employer must pay the employee at the rate of 150% of the employee’s ordinary hourly rate from the end of 6 hours after starting work until either the employee is allowed to take it or the shift ends.’⁴⁹

[67] We agree that the revised clause 16.5 differs from the current award entitlement because it does not account for a situation where the employee would receive a higher rate of pay for their ordinary hours after their meal break was due (such as the example given by the Associations at [60]).

[68] We reject the submissions of Business SA and United Voice that the rate should be 150%. It is clear from the current award clause 31.4 that the employee is entitled to 50% of their ordinary rate extra (calculated including applicable all purpose allowances but not including penalties) plus the rate the employee is entitled to for their ordinary hours. Further, clause 32.4 of the current award states:

‘32.4 Penalty rates not cumulative

Except as provided in clause 31—Breaks, where time worked is required to be paid for at more than the ordinary rate such time will not be subject to more than one penalty, but will be subject to that penalty which is to the employee’s greatest advantage.’

[69] Clause 32.4 of the current award clearly provides an exception to the rule that penalty rates are not cumulative in relation to breaks. If the rate were expressed as 150% of the employee’s ordinary hourly rate, this would result in the employee receiving a lower net penalty for working through their meal break on a weekend than they would on a weekday.

[70] We propose the following amendment to clause 16.5 of the Hospitality PLED:

⁴⁵ [The Associations reply submission](#), 13 June 2018, paragraph 4(b).

⁴⁶ [The Associations reply submission](#), 13 June 2018, paragraph 4(b).

⁴⁷ [United Voice reply submission](#), 13 June 2018, page 2.

⁴⁸ [United Voice reply submission](#), 13 June 2018, page 2.

⁴⁹ [Hospitality Industry \(General\) Award plain language exposure draft](#), 22 January 2018, clause 16.6.

‘16.5 If an employee is not allowed to take an unpaid meal break in accordance with clause 16.2 during a shift of more than 6 hours, the employer must pay the employee **50%** of the employee’s ordinary hourly rate extra from the end of 6 hours after starting work until either the employee is allowed to take the break or the shift ends.

[71] Interested parties are invited to make final submissions in relation to the amendment to clause 16.5 proposed at [70] above by **4.00 pm, Wednesday 15 August 2018**.

Clause 16.5 example

[72] The plain language expert reviewed clause 16.5 and proposed the following example to clarify the operation of the clause:

‘EXAMPLE Mary is a full-time employee whose ordinary hourly rate is \$20.00 an hour. She is working an 8 hour shift. Under Table 2—Entitlements to meal and rest break(s), she is entitled to an “unpaid meal break (to be taken after the first 2 hours of work and within the first 6 hours of work)”. If she has been working for 6 hours and has not been allowed a break, then she becomes entitled to be paid the higher rate under 16.4 and 16.5.

If the shift is a normal mid-week shift on which Mary is paid her ordinary hourly rate of \$20.00, then from when she has worked 6 hours until she is allowed to take a break or her shift ends, the employer is to pay her:

- (a) her ordinary hourly rate of \$20.00;
- (b) plus 50% of her ordinary hourly rate, which is \$10.00.

So she is to be paid \$30.00 an hour after she has worked for 6 hours until she is allowed to take a break or the shift ends.

If the shift is a Sunday shift on which Mary is paid 150% of her ordinary hourly rate of \$20.00, then from when she has worked 6 hours until she is allowed to take a break or her shift ends, the employer is to pay her:

- (a) her Saturday shift rate of \$30.00 (being 150% of her ordinary hourly rate of \$20.00);
- (b) plus 50% of her ordinary hourly rate, which is \$10.00.

So she is to be paid \$40.00 an hour after she has worked for 6 hours until she is allowed to take a break or the shift ends.’

[73] The Associations submit in the first example the reference to Table 2 should reflect the wording in Column 2, that is, it should read from the third line in the example after the bolded word “break(s)” that she is entitled to a “30 minute unpaid break (to be taken...)”.⁵⁰ Business

⁵⁰ [The Associations submission](#), 30 May 2018, Paragraph 5(d).

SA agree.⁵¹ We will amend the example to ensure the wording accurately reflects Table 2 (including amendments to Table to arising from this decision).

[74] In relation to the example of a Sunday shift, the Associations submit that point (a) contains an error by referring to the ‘Saturday shift rate’. It should refer to the Sunday shift rate.⁵² We agree and this error will be amended in the next version of the Hospitality PLED. Business SA made a similar submission,⁵³ submitting that they may not accurately represent the award’s operation and will mislead readers.⁵⁴

[75] Business SA submits that the sentence ‘Under Table 2 – Entitlements to meal and rest break(s), she is entitled to an ‘unpaid meal break (to be taken after the first 2 hours of work and within the first 6 hours of work)’ is misleading. In circumstances where an employee is working an 8 hour shift, Table 2 states the employee is entitled to a 30 minute unpaid meal break. The example does not clearly state the unpaid meal break is for 30 minutes. Business SA submits that where an example is provided, it must fully reflect the award.⁵⁵

[76] The example will be updated to reflect the terminology adopted in Table 2 and for consistency with the updated clause 16.5.

Next steps

[77] A further revised PLED will be published on Wednesday, **8 August 2018**.

[78] Interested parties are invited to make final submissions in relation to clause 16.5 by **4.00 pm, Wednesday 15 August 2018**. Reply submissions are due by **4.00 pm, Wednesday 29 August 2018**.

[79] All material should be sent to amod@fwc.gov.au. We will decide the matter on the papers, absent any request for an oral hearing.

[80] We will publish a statement proposing any final amendments in order to maintain consistency between the Restaurant and Hospitality awards after we publish revised PLEDs in the two awards. Parties will have an opportunity to comment.

PRESIDENT

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⁵¹ [Business SA reply submission](#), 13 June 2018, paragraph 4.

⁵² [The Associations submission](#), 30 May 2018, Paragraph 5(e).

⁵³ [Business SA submission](#), 30 May 2018, paragraph 17.

⁵⁴ [Business SA submission](#), 30 May 2018, paragraph 15.

⁵⁵ [Business SA submission](#), 30 May 2018, paragraph 16.