



Business SA Submission

4 yearly review of
modern awards – *Plain
language – Restaurant
Industry Award*

**(AM2016/15, and
AM2014/284)**

13 November 2017

1. Business SA provides this submission in response to the decision of the Fair Work Commission Full regarding the plain language re-draft of the *Restaurant Industry Award 2010*.¹ One matter not resolved in the October Decision was how the award should deal with the situation where an employee works overtime immediately before, and continuously with, their next rostered ordinary hours. The background and context of this issue was discussed in paragraphs [17] to [29] of the October Decision. As part of that Decision, the Full Bench invited Business SA to submit a draft variation to deal with this issue.² This submission provides that draft variation. All pinpoint references refer to the revised *Restaurant Industry Award 2017* plain language exposure draft (**PLED**) published on 24 October 2017³ unless otherwise specified.
2. The relevant *Restaurant Industry Award 2010* clause for our proposed variation appears as follows:
 - 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.
3. The above clause is reflected in the PLED as follows:
 - 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.
4. In our 22 September 2017 submission we put forward that neither the current award or the PLED spoke to the circumstance where an employee works overtime immediately before working ordinary hours.⁴ Our reading of clause 33.4 of the current award, and clause 26.2 of the PLED, suggested that where even 1 hour of overtime is

¹ [2017] FWCFB 5397 (**October Decision**).

² *Ibid* [31].

³ Available here: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-exposure-draft-restaurant-241017.pdf>.

⁴ Business SA, '4 yearly review of modern awards – Plain language – Restaurant Industry Award; Hospitality Industry (General) Award (AM2016/15, AM2014/284 and AM2014/272)', 22 September 2017, [1.6].

worked immediately before the employee's rostered ordinary hours the employee is entitled to at least an 8 hour break without loss of pay; an awkward and nonsensical application of the entitlement.

5. The Full Bench invited Business SA to submit a draft variation to deal with this issue.⁵ Below is our proposal, this proposal is intended as a starting point for discussions.
6. We propose an exclusion to paragraphs (b) and (c) of clause 26.2 where overtime is worked immediately prior to and continuously with the employee's rostered hours and the employee has had at least an 8 hour break beforehand. This exclusion of paragraphs (b) and (c) does not alter payment at overtime rates for the overtime so worked, dealt with in clause 26.1. Neither is the employee denied a break between periods of work, as the exclusion only applies where the employee had at least an 8 hour break before starting the overtime. The variation simply ensures that an 8 hour break entitlement does not arise where the employee works a period of overtime immediately before and continuously with their rostered hours. Our proposed variation seeks to protect the employee's award entitlement to a break between periods of work in balance with the employer's need for flexible modern work practices.
7. Our draft variation, with additions emphasised, appears below.

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.
- (d) *Paragraphs (b) and (c) will not apply if:*
 - (i) *the employee works overtime prior to, and continuously with, their next rostered shift; and*
 - (ii) *the employee had a minimum break of 8 hours before starting the overtime.*

Conclusion

Business SA thanks the Fair Work Commission for accepting this draft variation.

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⁵ [2017] FWCFB 5397, [31].