IN THE FAIR WORK COMMISSION

Matter No: AM2017/59, AM2017/57

Four Yearly Review of Modern Awards –*Hospitality Industry (General) Award 2010 – Restaurant Industry Award 2010* –substantive issues

SUBMISSION OF UNITED VOICE

1. This submission is responsive to the Decision of the Full Bench of the Fair Work Commission dated 12 December 2018 ('Decision'). In the Decision the Commission stated that submissions in respect of several provisional views should be filed by 30 January 2019. United Voice makes the following submissions:

Restaurant Industry Award 2010

Clause 7 - Individual flexibility arrangements (IFAs)

2. In paragraph [202] of the Decision, the Commission expressed a provisional view that clause 7.1(a) of the *Restaurant Industry Award 2010* ('Restaurant Award') should be amended to expressly exclude meal breaks from the scope of IFAs.
3. The provisional view is appropriate given that:

   (a) In the Decision, the Commission stated that the view that meal breaks are currently not permitted to be the subject of IFAs may not be correct.[1]

   (b) IFAs are not monitored. Where meal breaks are the subject of IFAs there is a real risk that employees may be missing out on meal breaks or not receiving adequate meal breaks.

   (c)There are high levels of non-compliance with the Restaurant Award in the industry, a factor that the Commission acknowledged as relevant in the Decision.[2] It cannot be presumed that IFAs in relation to meal breaks result in employees genuinely being '*better off overall*'.
4. Amending clause 7 to exclude meal breaks from becoming the subject of IFAs will assist in ensuring that employees covered by the Restaurant Award receive proper and adequate meal breaks.

Clause 32- Meal breaks

5. The Commission expressed a provisional view that clause 32 should be amended in the manner outlined in paragraph [211] of the Decision.
6. United Voice opposes several elements of the proposed clause 32.

[1] Decision, paragraph [179].
[2] Decision, paragraph [201].

Timing of the additional 20 paid break

7. Table 2 of the proposed clause states that for an employee that works '*5 or more and up to 10*' hours per day, an unpaid meal break of at least 30 minutes is to be taken after the first hour of work and within the first 6 hours or work (or taken in accordance with clause 32.4). If the employee is rostered to take an unpaid meal break later than *6 hours* after starting work, the employee is entitled to a 20 minute paid meal break. Employees who work for more than 10 hours are also entitled to an unpaid meal break of at least 30 minutes; however they become entitled to the 20 minute paid meal break if they are rostered to take the unpaid break later than *5 hours* after starting work.
8. The current Restaurant Award clause 32.2 states '*If the unpaid meal break is rostered to be taken after five hours of starting work, the employee must be given an additional 20 minute paid meal break*.'
9. The provisions in the proposed clause in respect of employees working over 10 hours reflect the current Restaurant Award, whereas the provisions in respect of employees working 5 to 10 hours differ from the current Restaurant Award.
10. Our position is that there is no rational basis for a difference in when the additional paid meal break comes into effect.
11. Further, there is no cogent reason to delay the entitlement to the additional paid meal break until after 6 hours for employees who work 5 to 10 hours of work. The additional paid meal break provides a period of rest for employees who are required to wait a longer period of time for their full unpaid meal break of at least 30 minutes.
12. The timing of the additional meal break was not specifically the subject of evidence during the hearing on 26 November 2018 nor does it appear to have been given specific consideration in the Decision.
13. The current Restaurant Award clause 32.2 appropriately provides that if the unpaid meal break is rostered to be taken after 5 hours of starting work, then an employee must be given an additional 20 minute paid break. Table 2 of the proposed clause should be amended to reflect this for employees who work from 5 to 10 hours of work a day.

Introduction of the individual facilitative provision

14. The proposed clause 32.4 introduces scope for an employer and an employer to agree to an unpaid meal break to be taken within the first 6 and half hours of work (instead of the first 6 hours of work under the current Restaurant Award).
15. United Voice opposes this clause.
16. The current Restaurant Award clause provides sufficient flexibility for employers and meets the modern awards objective s 134(d) of the Fair Work Act 2009 ('the Act'). Employers are

permitted under clause 32.4 of the Restaurant Award to provide a meal break at a later time, provided they pay the employee 150% of the employee's ordinary base rate of pay from the end of the 6 hours until the meal break is given.

17. The proposed clause 32.4 also allows an employer to defer an employee's meal break, but without any penalty for the first 30 minutes. This would have the effect of reducing an employee's wages in this situation.
18. Whilst the proposed clause envisions a scenario in which an employee agrees to this freely, the reality is more complex. There will be circumstances in which an employee is not given a genuine choice.
19. The proposed clause 32.4 is unnecessary and should not be adopted.

Clause 32.7 and 32.8

20. The utility of having both clauses 32.7 and 32.8 within the proposed clause is unclear. Clause 32.8 of the proposed clause states that the penalty for not allowing an unpaid meal break is 150% but otherwise appears to replicate 32.7.

Break following overtime

21. Clause 32.7 of the current Restaurant Award does not appear in the proposed clause.
22. Clause 32.7 of the Restaurant Award provides that '*If an employee is required to work more than two hours' overtime after completion of the employee's rostered hours, the employee must be given an additional 20 minute paid break.*'
23. The proposed clause makes no provision for employees to receive an additional meal break after working overtime.
24. In paragraph [207] of the Decision, consideration is given to an example of a part time employee who works 3 ordinary hours and 3 hours of overtime. It appears that clause 32.7 may have been deleted on the basis that this situation results in unintended consequences in terms of breaks.
25. United Voice does not agree that this situation is an unintended consequence. It is not unreasonable for an employee working 6 hours to have an unpaid meal break of at least 30 minutes and a 20 minute paid rest break.
26. Further, the actual consequence of deleting this clause applies equally to part time and full time employees who work longer shifts. For example, a part time or full time employee who worked 14 hours (2.5 hours of overtime after an 11.5 hour shift) would no longer be entitled to an additional 20 minute meal break.
27. The proposed clause cannot be considered '*fair and relevant*' as it would remove a period of rest for employees working overtime.
28. Clause 32.7 of the current Restaurant Award should be retained.

Paid breaks for casual employees

29. We note that the proposed clause (unlike clause 32.6 of the current Restaurant Award) does not exclude casual employees who work more than 10 hours from the entitlement to 2 additional 20 minute paid meal breaks. We agree that this is an appropriate amendment given that casual employees may be engaged to work for a maximum of 12 ordinary hours per day. There is no difference in fatigue experienced by casual workers, especially given that it is not uncommon in this industry for casual workers to be working full time (or near to full time) hours.

Clause 39 - No deduction for breakages or cashiering underings

30. In paragraph [255] of the Decision, the Commission expressed the provisional view that clause 39 should be deleted.
31. Clause 39 as it currently stands exposes employees to a financial penalty for the benefit of the employer. It is ambiguous about what will constitute a finding of '*wilful misconduct*', who has the right to make a finding of '*wilful misconduct*' and how much may be deducted.
32. As such, clause 39 as currently worded may breach s 151(a) as it may permit unreasonable deductions for the benefit of an employer.
33. However, clause 39 also provides some measure of protection for employees, as it disallows deductions for breakages and cashiering underings in circumstances other than wilful misconduct. The wholescale removal of clause 39 may have the unintended consequence of employers deducting employee wages for accidental breakages or cashiering underings that occur as a result of mistakes.
34. The potential breach of s 151 (a) may be resolved by an amendment to clause 39 to ensure that the deduction is not unreasonable in the circumstances, is not disproportionate to the loss of the employer and can only be made for employees 18 and over if agreed to in writing and for employees under 18 if agreed to in writing by a parent or guardian of the employee.
35. United Voice proposes that clause 39 is amended as follows:

    An employer must not deduct any sum from the wages or income of an employee in respect of breakages or cashiering underings except in the case of wilful misconduct.

    a. In cases of wilful misconduct, the deduction must be reasonable in the circumstances and not disproportionate to the loss suffered by the employer and;

    b. Any deductions from the wages or income of an employee must be authorised in writing:

    (i) Where the employee is 18 years old and above the deduction must be authorised in writing by the employee.

    (ii) Where the employee is under 18 years old the deduction must be authorised in writing by a parent or guardian.

36. We note that the *Hospitality Industry (General) Award 2010* contains the same provision at clause 38 and should also be amended for the same reasons.

Competency based progression

37. United Voice does not oppose the introduction of competency based progression in the Restaurant Award.

Hospitality Industry (General) Award 2010

Draft determinations

38. Clause 29.1(a) and 29.1(c) (in paragraphs 11 and 12 of the draft determination) do not accurately reflect the Decision of the Commission in paragraph [39] to differentiate between unpaid rostered days off and accrued paid rostered days off.
39. Point 6 of clause 29.1(a) should state: '*160 hours each four week period with a minimum of eight days off each four week period plus an **accrued** day off.'*
40. Clause 29.1(c) should state:

    *'In addition to the conditions set out under clause 29.1(b), where the agreed hours of work arrangement provides for 160 hours per four week period with an **accrued** day off, the arrangement will be subject to the following'*
41. Clause 29.1(c)(ii) should state:

    '*(ii) Where practicable the **accrued** day off must be contiguous with an employee's rostered days off.*'

United Voice

30 January 2018